

LEGAL WILDERNESS: ITS PAST AND SOME SPECULATIONS ON ITS FUTURE

BY

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This Article considers the past and possible future of the effort to provide legal protection for tracts of federal lands under the umbrella of the Wilderness Act of 1964. Because legal protection comes through the political process, the task requires examining the politics of wilderness. Therefore, the Article spends considerable time looking at the political forces that led up to enactment of the Wilderness Act of 1964, and have shaped its implementation in the half-century that has followed. It explores the political compromises contained in the Wilderness Act, and how these have worked out in practice. It discusses how the legal meaning of wilderness has been shaped since enactment, and how successful the idea of legally protecting wild values has been. It also puts the Wilderness Act in the broader context of changes in federal land management policy since 1964. For example, whereas in 1964 wilderness designation was just about the only reasonably secure way to protect land from road building and other forms of intensive development, today many legal tools are available to accomplish it. Finally, the Article discusses current and likely future challenges to wilderness protection, some but not all of which stem from a destabilizing climate. The cumulative effect of these and other factors identified in the paper has already slowed down expansion of the National Wilderness Preservation System, and will likely continue

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to do so. Nevertheless, the System stands as a monumental achievement, expressing some of the more high-minded objectives of American political culture.

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I. INTRODUCTION

The common concept of wilderness as landscapes without much human presence or impact is mostly a creation of human culture.¹ Since 1964, federal law has defined and embedded that understanding.² The fiftieth

¹ In this respect the concept of wilderness resembles that of race. Both have some grounding in the physical world; race, for example, has some faint tracings in genes. But the idea of race is—and especially was, when race legally mattered a lot more than it does today—in large part a classification invented by and imposed on humans, often through the legal system. See JACQUELINE JONES, *A DREADFUL DECEIT: THE MYTH OF RACE FROM THE COLONIAL ERA TO OBAMA'S AMERICA* (2013).

² The very label “wilderness” had to be negotiated among the originators of the idea of legal protection for wild places, the founders of the Wilderness Society. After considering and rejecting the idea of “primitive,” they finally settled on, in Paul Sutter’s words, “reconditioning a term with common currency to reflect the developments of a new age.” PAUL S. SUTTER, *DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT* 241

anniversary of the Wilderness Act is an opportune moment to think about its future. It requires a close examination of its meaning in law, which is what I propose to do in what follows. This turns out not to be a simple task, because the legal meaning has evolved and become considerably more complex over the last half-century. In the course of my examination, I will touch on a number of topics explored in other papers in this symposium, but I will keep my focus on the politics of wilderness. This is for one simple reason: Labeling a tract of land as legal wilderness is a political act, and therefore politics has shaped the system of legal protection of wild areas.

Law is intimately related to culture, of course, and the culture has gradually embraced the idea of preserving wilderness—a process that, in William Cronon’s words, loaded the idea with “some of the deepest core values of the culture that created and idealized it. . . .”³ The cultural understanding of wilderness obviously has influenced, and continues to influence, the legal meaning of wilderness. While my focus here is the legal framework for protecting and managing wilderness areas, it is necessary to keep the cultural context in view.

The Wilderness Act’s uncommonly poetic language, inspirational to generations of wilderness lovers, reflects the cultural understanding of “wilderness”:

In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possession, leaving no lands designated for preservation and protection in their *natural condition*, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.⁴

. . . .

A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as *an area where the earth and its community of life are untrammeled by man*, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter *an area of undeveloped Federal land retaining its primeval character and influence*, without permanent improvements or human habitation, which is protected and managed so as to preserve its *natural conditions* and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3)

(2002). Other leading histories of the wilderness movement are CRAIG W. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* (1982) and RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND*, (5th ed. 2013). James Morton Turner ably explores the wilderness movement, focusing mostly on developments since 1964, in *THE PROMISE OF WILDERNESS: AMERICAN ENVIRONMENTAL POLITICS SINCE 1964* (2012).

³ William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in *UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE* 69, 73 (William Cronon ed., 1996).

⁴ 16 U.S.C. § 1131(a) (2006) (emphasis added).

has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an *unimpaired condition*; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.⁵

Eloquent, to be sure, but also, considered as a legal text, a bit contradictory. Although the italicized phrases seem straightforward enough, the remainder of the definition is replete with qualifying phrases (“primarily,” “generally,” “substantially”) that depart from the ideal. Also, the language that such areas must “generally appear[] to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable,” is more concerned with surface presentation than with what can be revealed by detailed examination, informed by scientific understanding.

The more that is learned about humans and nature, the more this contradiction becomes apparent. It is now generally appreciated, much more than in 1964, that human impact is found everywhere on earth.⁶ Despite their relatively recent appearance in the earth’s history, humans have contributed to and are continuing to cause the appearance and disappearance of species all over the planet.⁷ Detritus from civilization is ubiquitous, in microscopic forms like traces of heavy metals and persistent organic pollutants.⁸ Few if any areas of the globe are free from aircraft noise and contrails.⁹ Most ominously, global climate is being altered by human-caused buildup in greenhouse gases.¹⁰ No place, including wilderness areas preserved by law, is free from such influences today.

Following the statute’s concern with appearances, advocates for legal protection of wilderness have maintained that wilderness areas cannot contain the more obvious imprints of human endeavor. These include things like road building and mechanical transport and their close relatives, commercial enterprises. The latter include, besides conventional industrial activity, recreational developments associated with what Edward Abbey, a fierce wilderness advocate, called “industrial tourism.”¹¹

⁵ *Id.* § 1131(c) (emphasis added).

⁶ See generally WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND 3–33 (2003); BILL MCKIBBEN, THE END OF NATURE (1996). TURNER, *supra* note 2, at 35–36 (citation omitted) (noting that the principal drafter of the Wilderness Act’s definition, Howard Zahniser, understood “how little of the nation’s wild lands were truly pristine[,]” and that wilderness was a concept “defined as much by society’s values as [by] the state of the land itself.”).

⁷ ELIZABETH KOLBERT, THE SIXTH EXTINCTION; AN UNNATURAL HISTORY (2014).

⁸ See OSPAR COMMISSION, ATMOSPHERIC DEPOSITION OF SELECTED HEAVY METALS AND PERSISTENT ORGANIC POLLUTANTS TO THE OSPAR MARITIME AREA (1990–2005) 15, 25 (2008), available at http://qsr2010.ospar.org/media/assessments/p00375_Atmospheric_deposition_HM_and_POps.pdf (discussing heavy metal and persistent organic pollutants).

⁹ See OpenFlights, *Airport and Airline Data*, <http://openflights.org/data.html> (last visited Apr. 18, 2014) (showing global map of routes of 531 airlines).

¹⁰ See, e.g., AMERICAN ASSOCIATION FOR THE ADVANCE OF SCIENCE CLIMATE SCIENCE PANEL, WHAT WE KNOW: THE REALITY, RISKS AND RESPONSE TO CLIMATE CHANGE (2014).

¹¹ EDWARD ABBEY, DESERT SOLITAIRE: A SEASON IN THE WILDERNESS 52 (1968).

"[W]here to draw the line," Justice Holmes famously said, "is the question in pretty much everything worth arguing in the law."¹² Like all major products of the political process, the Wilderness Act reflects many compromises among disparate interests and, inevitably, some ambiguity. It also partially, and imperfectly, charted a course for future expansion of the system of wilderness areas it created. How those compromises, ambiguities and imperfections have played out on the ground can tell us a good deal about what the future of wilderness might be.

II. MAJOR FORCES LEADING TO THE WILDERNESS ACT OF 1964.

The campaign to enshrine protection for "wilderness" in law is a kind of American epic, a landmark in the evolution of American culture. Although the idea was mentioned earlier,¹³ its beginning is usually traced back to around 1920, to the actions of career civil servants in the executive branch of the national government.¹⁴ Their efforts built upon what was then a rather recent development in American life—wide public embrace of the notion that the United States should permanently retain large tracts of land in federal ownership, and manage them in the overall national interest.

Most of this land was in the eleven western states and in what was then the territory of Alaska. Within the prior decade, the national government had also launched a program to acquire significant chunks of land east of the Mississippi, mostly for watershed and wildlife protection.¹⁵ The movement to retain federal lands in the west, and to acquire lands into federal ownership elsewhere, flowered in the so-called "progressive" era, when the idea that the government had the capability to improve the human condition was widely embraced.¹⁶

The progressive era was winding to a close when the notion that the national government should preserve some of its land in a wild condition was put forward.¹⁷ At the time, the generally accepted characterization of the settlement of the "New World" by Europeans was a process by which civilization occupied areas that heretofore were largely subject to natural forces, and only thinly populated by Native Americans.¹⁸ "Wilderness" was,

¹² *Irwin v. Gavit*, 268 U.S. 161, 168 (1925).

¹³ See G. Frederick Schwarz, *A Suggestion Regarding National Forest Reserves*, 11 *FORESTRY & IRRIGATION* 288–89 (1905) (including what was perhaps the earliest mention of the idea of preserving tracts of federal land as wilderness); see also ALLIN, *supra* note 2, at 68. In 1864, George Perkins Marsh, in his pioneering work on landscape conservation, spoke of the desirability of "some large and reasonably accessible region of American soil . . . remain[ing], as far as possible, in its primitive condition." *Id.* at 26 (quoting *MAN AND NATURE: OR, PHYSICAL GEOGRAPHY AS MODIFIED BY HUMAN ACTION* 235 (1864)).

¹⁴ See NASH, *supra* note 2, at 183–87.

¹⁵ See WILLIAM E. SHANDS & ROBERT G. HEALY, *THE LANDS NOBODY WANTED* 19, 24 (1977).

¹⁶ Of the several standard histories of the Progressive Era, the most prominent one focusing on natural resources is SAMUEL P. HAYS, *CONSERVATION AND GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT* (1959).

¹⁷ See generally RICHARD HOFSTADTER, *THE AGE OF REFORM* (1955).

¹⁸ See CHARLES C. MANN, 1491: *NEW REVELATIONS OF THE AMERICAS BEFORE COLUMBUS* 104–05 (2006) (discussing various population estimates of humans in the Americas in 1492).

during the European settlement period, understood to mean “wasteland,” a condition to be overcome, and so the subjugation of the wilderness and of Native American populations was widely celebrated as a majestic American achievement.¹⁹ Given this cultural history, the idea that Americans should protect and preserve some of the remaining “wilderness” would not find easy acceptance. One of the movement’s major architects, Aldo Leopold, acknowledged in his first essay on the subject that serious discussion of this idea “will seem . . . rank heresy to some minds.”²⁰ He was right. Nearly a half-century went by before that heretical notion gained majority support in the U.S. Congress.

Beginning around 1920, a remarkable cadre of U.S. Forest Service employees, led by Leopold and Arthur Carhart and some others, invented a designation called “primitive area,”²¹ and gradually, over the next dozen years or so, persuaded the agency’s leaders to approve affixing it to a few million acres of national forest land. These areas were not selected for biodiversity values, but because they had abundant natural scenery, few obvious signs of human presence, ample opportunities for more “primitive” forms of recreation, and little if any commercial value.²² Congress was not involved; the matter was worked out exclusively within the executive branch.²³ In the decades that followed, across large changes in society, this “heretical” campaign to preserve something of what Americans had been laboring long and hard to overcome found increasing acceptance.

From the beginning, the movement’s primary impetus was a reaction to the growth and spread of the automobile and road building.²⁴ The automobile age was well underway; Americans owned one million autos in 1913, ten

¹⁹ It was reflected in the Supreme Court’s celebration, in a run-of-the-mill case involving disputed title, of the fact that “property, which within a few years was but of little value, in a wilderness, is now the site of large and flourishing cities.” *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 473 (1836). A turn-of-the-twentieth-century book dealing with the slums of Boston called them a “wilderness.” ROBERT A. WOODS, *THE CITY WILDERNESS* (1898); see ALLIN, *supra* note 2, at 57. While the progressives did much of lasting value to conserve natural resources, their overall record was not free from the stain of racism and social Darwinism. See, e.g., ERIC GOLDMAN, *RENDEZVOUS WITH DESTINY* 63 (1977); RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 143-200 (1955).

²⁰ Aldo Leopold, *The Wilderness and Its Place in Forest Recreational Policy*, 19 J. FORESTRY 718, 719 (1921), *quoted in* SUTTER, *supra* note 2, at 70.

²¹ DOUG SCOTT, *THE ENDURING WILDERNESS* 29 (2004). The label was changed to “wilderness” or “wild” area, depending upon size, as a result of new regulations (the so-called “U Regulations”) adopted in 1939 by the Secretary of Agriculture. The new labels were applied only after each of the previous “primitive areas” were reexamined and reclassified under the new regulations. In fact, however, local Forest Service officials were in no hurry to reclassify the areas and strengthen their protection. By the time Congress came to adopt the Wilderness Act in 1964, a quarter of a century after the U Regulations were adopted, more than 5.5 million acres remained in the old “primitive” classification, and their fate became a somewhat disputed issue as the Act moved through the legislative process. See ALLIN, *supra* note 2, at 82-84. How the Act dealt with them is discussed further below.

²² See SUTTER, *supra* note 2 at 85, 240, 243 (discussing early wilderness preservation advocates’ views on the subject).

²³ *Id.* at 84-89; see also ALLIN, *supra* note 2, at 60-66.

²⁴ SUTTER, *supra* note 2, at 98-99.

million by 1922, and twenty-three million by 1929.²⁵ Henry Ford's assembly line made its appearance in 1916, the same year Congress enacted the first federal aid highway act.²⁶ Federal lands were deeply involved in servicing the automobile. In 1915, Congress authorized the young Forest Service to permit recreational cabins and other tourist facilities in the national forests, and the next year, allotted the agency nearly 15% of the federal dollars made available under the first federal highway act.²⁷

Around the same time Leopold and his allies were seeking to advance the idea of wilderness preservation in the U.S. Forest Service (housed since 1905 in the Agriculture Department²⁸), something different was happening in the Interior Department. In 1913, after a bruising battle, Congress had approved San Francisco's project to dam the Hetch Hetchy Valley in Yosemite National Park.²⁹ Legendary champion of wild nature John Muir led the fight against Hetch Hetchy; some say the loss hastened his death.³⁰ It was, Roderick Nash said, the first time in American history that "the competing claims of wilderness and civilization to a specific area received a thorough hearing before a national audience."³¹ Seeking to salvage something from their defeat, conservationists worked to persuade Congress to create the National Park Service to manage the handful of national parks that Congress had set aside, piecemeal, in earlier decades.³² In 1916, Congress agreed, and installed the new agency in the Interior Department.³³

The Park Service's founding director, Stephen Mather, set to work building a constituency for his new agency. Mather's primary strategy was to develop access roads and tourist facilities to bring people to the parks.³⁴ Even though the statutes establishing a number of these early parks had generally called for their protection in their natural condition,³⁵ the

²⁵ *Id.* at 24.

²⁶ *Id.* at 16.

²⁷ *Id.* at 60, 62.

²⁸ 16 U.S.C. § 472 (2006).

²⁹ SUTTER, *supra* note 2, at 57–58.

³⁰ Underscoring that Muir and Leopold were of different generations, Muir did not oppose admitting automobiles to Yosemite. NASH, *supra* note 2, at 326.

³¹ *Id.* at 162.

³² See JOHN ISE, OUR NATIONAL PARK POLICY: A CRITICAL HISTORY 185–93 (1961).

³³ *Id.* at 190.

³⁴ See SUTTER, *supra* note 2, at 120–21.

³⁵ The 1890 statute creating Sequoia National Park was typical, calling on the Secretary of the Interior to "provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition." 16 U.S.C. § 43 (2006); see also 16 U.S.C. § 92 (2006) (Mt. Rainier in 1899, using almost identical language). New York can claim credit for the earliest designation of publicly owned land as "wild." Its state legislature created an Adirondack Reserve in 1885, expanded it fourfold to 2.8 million acres in 1892 (including much privately owned land) and, in response to continued timber cutting, amended the state constitution in 1894 to provide that the parklands "be forever kept as wild forest lands." N.Y. Const. art. XIV, § 1; see generally DAVID TERRIE, CONTESTED TERRAIN: A NEW HISTORY OF NATURE AND PEOPLE IN THE ADIRONDACKS (1997). Bob Marshall, a major champion of wilderness in the 1920s and 1930s, recalled watching, as a fourteen-year-old, his father work to preserve this language when developers sought to change it in a New York state constitutional convention in 1915. See NASH, *supra* note 2, at 201.

penetration of roads and cars into some of the most scenic natural areas in the country was not only well-organized and well-funded, but widely hailed. By 1922, superintendents in national parks were calling for more roads and other visitor facilities, arguing that without them “a national park would be merely a wilderness”³⁶ The Park Service’s campaign to attract and accommodate visitors by automobile continued apace and, in the 1920s, expanded to include construction of scenic “parkways” winding along the spines of the Appalachian mountains,³⁷ and of engineering wonders like the “Going to the Sun Highway” in Glacier National Park.³⁸

Several years before Leopold and his allies pushed the idea of legally protecting wild areas, Congress had, in the Antiquities Act of 1906, given the President authority to designate areas of federal lands as “national monuments” to protect “objects of historic or scientific interest” found thereon.³⁹ While this language harbored the possibility of protecting wild qualities on some federal lands, that potential had not been realized. It was true that several presidents of both political parties, beginning with Theodore Roosevelt, had vigorously used the Antiquities Act to create national monuments on millions of acres of federal land. But these designations were used to provide a level of protection roughly akin to national parks—restricting mining and logging, but not roads or dams or other developments.⁴⁰ Indeed, monuments were generally regarded as second-class parks.⁴¹

Road-building and related actions spurred a movement to advocate preserving some wild areas, by putting some limits on American society’s accommodation to the automobile.⁴² Eventually, in 1935, the movement coalesced in the founding of the Wilderness Society by Leopold, Bob Marshall, and others.⁴³ Its focus was on protecting areas that offered abundant wild scenery and rustic outdoor recreational opportunities. Science and particularly biological values were not major factors motivating its founders—their efforts were more aimed at preserving areas *from* significant conventional “development” than it was preserving them *for* specifically articulated values or purposes.⁴⁴

The challenges the movement faced were formidable. The engineers were not simply building roads. Elaborating on the Hetch Hetchy model, they demonstrated, at Hoover Dam in the early 1930s, how federal money and their skill could tame mighty rivers that flowed through remote wild

³⁶ ROBERT B. KEITER, *TO CONSERVE UNIMPAIRED: THE EVOLUTION OF THE NATIONAL PARK IDEA* 16 (2013); *see also* JOHN C. MILES, *WILDERNESS IN NATIONAL PARKS: PLAYGROUND OR PRESERVE* 47–48 (2009).

³⁷ SUTTER, *supra* note 2, at 137.

³⁸ *Ibid.*

³⁹ 16 U.S.C. § 431 (2006).

⁴⁰ *See* Hal Rothman, *Second-Class Sites: National Monuments and the Growth of the National Park System*, 10 ENVTL. REV. 45, 45, 47 (1986).

⁴¹ *Id.* at 46.

⁴² SUTTER, *supra* note 2, at 4

⁴³ *Id.* at 4–5.

⁴⁴ *Id.* at 67–89.

canyons, and attract visitors in large numbers to the artificial lakes that were created.⁴⁵ The National Park Service that was given the task of administering “national recreation areas” designated on federal lands surrounding many such reservoirs.⁴⁶ But the Park Service’s record on dams was mixed. Shortly after the Park Service was created in 1916, it successfully resisted proposals to erect dams in Yellowstone, the world’s first National Park.⁴⁷ In a portent of battles to come, a central argument put forward against the dams was the need to protect the integrity and purpose of the park designation.⁴⁸

Roads, dams, and other major developments continued their penetration of wild areas as the economy surged after World War II, but at the midpoint of the twentieth century the federal government still controlled large tracts of relatively remote, unroaded and otherwise undeveloped land.⁴⁹ Partly this was simply because the federal lands were so vast—occupying nearly one billion acres or 1.5 million square miles, more than one of every three acres in the country, a high percentage of which were in the eleven western states and Alaska.⁵⁰

By this time, the number of federal land management agencies had doubled, as the Forest Service and the Park Service were joined by the U.S.

⁴⁵ See, e.g., MARC REISNER, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 127–31 (1993).

⁴⁶ Lake Mead was the first national recreation area, but several others quickly followed. See ISE, *supra* note 32 at 369, 467–69. The water projects were built and operated by the Bureau of Reclamation or the Army Corps of Engineers, but these engineering agencies were not well equipped to handle visitor facilities and services. Most of the reservoirs occupied federal land, however, so it was logical to engage the Park Service for this task, as it was conveniently housed in the Interior Department alongside the Bureau of Reclamation, and had considerable experience in such matters. The Forest Service, the other agency with substantial visitor management expertise, was in the Agriculture Department across town. Gradually, over time, this marriage of the Park Service to dam-building proved uncomfortable, as these developments penetrated deeper into wild areas. MARK W.T. HARVEY, *A SYMBOL OF WILDERNESS: ECHO PARK AND THE AMERICAN CONSERVATION MOVEMENT* 65 (1994). The “national recreation area” label was eventually applied to areas of federal land other than surrounding reservoirs, beginning with the Sawtooth National Recreation Area in Idaho. See Sawtooth National Recreation Area Act, Pub. L. No. 92-400, 86 Stat. 612 (1972) (codified at 16 USC § 460aa–460aa–14 (2006)). This was part of trend of proliferating special labels for areas of federal land, discussed further below.

⁴⁷ Michael J. Yochim, *Conservationists and the Battles to Keep Dams Out of Yellowstone: Hetch Hetchy Overturned*, in 6th Biennial Scientific Conference on the Greater Yellowstone Ecosystem: Yellowstone Lake: Hotbed of Chaos or Reservoir of Resilience? 283, 292, 294, 299 (2002).

⁴⁸ An influential magazine article in the campaign was titled “Pawning the Heirlooms.” Emerson Hough, *Pawning the Heirlooms*, SATURDAY EVENING POST, Sept. 25, 1920, at 12. The Harding Administration killed the project by announcing the “established policy” that the “national parks must and shall forever be maintained in absolute, unimpaired form, not only for the present, but for all time to come.” Yochim, *supra* note 47, at 294. President Harding himself visited the Park shortly before his death in 1923. *Id.* at 295.

⁴⁹ A Forest Service historian estimated that as late as World War II “perhaps as much as two-thirds of the National Forest System was essentially undeveloped.” DENNIS M. ROTH, *THE WILDERNESS MOVEMENT AND THE NATIONAL FORESTS: 1964–1980* at 24 (1984).

⁵⁰ Large-scale dispositions of federal lands had ended by the mid-1930s everywhere except Alaska. In that state, more than 150 million federal acres were yet to be distributed under the terms of section 6 of the Alaska Statehood Act of 1959, Pub. L. No. 85-508, 72 Stat. 339 (1958), and the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601–1629.

Fish & Wildlife Service and the Bureau of Land Management, both of which were housed alongside the Park Service in the Interior Department.⁵¹ While each agency had a distinct culture and legal mission, practically all of the lands managed by each of these agencies were open to road building and other developmental activities that could destroy their “wilderness” values.⁵² This is worth emphasizing: very few of the federal acres were, at this point in time, legally protected from development, for each agency possessed practically unfettered authority to allow prominent human imprints on practically every acre under its supervision.

There were, to be sure, some shades of difference of management authorities and attitudes among the agencies. The Forest Service, since 1905 part of the Department of Agriculture, tolerated just about all kinds of uses—logging, mining, livestock grazing, and recreation—on just about all of its lands, except those few million acres Leopold and his allies had managed to put into some sort of wilderness-protective status.⁵³

The National Park Service, formed in 1916, managed the nation’s scenic “crown jewels” for recreational enjoyment.⁵⁴ Its statutory charter contained the germ of a wilderness preservation idea, speaking of the need “to conserve the scenery and the natural and historic objects and the wild life therein, and to provide for the enjoyment of the same in such manner and by such means as will *leave them unimpaired for the enjoyment of future generations*.”⁵⁵ While a strict construction of those last nine words might have limited or at least discouraged intensive development, they plainly had not been applied to constrain road building and construction of tourist facilities in heretofore undeveloped areas. Moreover, while most units of the National Park System were off limits to mineral development, some—like some national recreation areas—were not.⁵⁶ Some park units even remained open to limited timber harvesting and hydropower development.⁵⁷

⁵¹ See ROBERT L. FISCHMAN, *THE NATIONAL WILDLIFE REFUGES* (2003); JAMES R. SKILLEN, *THE NATION’S LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT AND THE AMERICAN WEST* (2009).

⁵² See SUTTER, *supra* note 2, at 62.

⁵³ *Id.* at 87.

⁵⁴ See ISE, *supra* note 32.

⁵⁵ 16 U.S.C. § 1 (2006) (emphasis added).

⁵⁶ See ISE, *supra* note 32, at 369.

⁵⁷ *Id.* at 307–17. The Federal Power Act of 1920 created a federal commission authorized to license non-federal hydropower projects, and did not forbid such projects in the national park system. NPS director Stephen Mather persuaded Congress to ban such licenses in the park system the next year, but the fix left two gaping holes. 16 U.S.C. § 79(a) (2006). First, Congress protected only national parks and monuments then existing, leaving newer parks and monuments open to such projects. Second, and even more significant, the 1921 amendment prevented only the licensing of *private* dams in the national parks and monuments, leaving open the possibility that dams could be built within such units by the federal Bureau of Reclamation or the Army Corps of Engineers. Despite these loopholes, dam proponents often lobbied against new park and monument designation, calculating, correctly, that such designations would make it more difficult to build dams. They sometimes succeeded; for example, when Congress expanded Sequoia National Park in 1926, it excluded what is now Kings Canyon National Park. See T.H. WATKINS, *RIGHTEOUS PILGRIM: THE LIFE AND TIMES OF HAROLD L. ICKES, 1874–1952*, 569 (1990).

The U.S. Fish & Wildlife Service (FWS) was established in 1940 through the merger of the Bureau of Fisheries and the Bureau of Biological Survey, agencies which had themselves been transferred the year before to the Interior Department from the Departments of Commerce and Agriculture, respectively.⁵⁸ The Bureau of Land Management (BLM) was created in 1946 through the merger of the old General Land Office—the agency that did a “land office business” by presiding over the disposition of more than a billion acres of federal land—and the Grazing Service.⁵⁹ The FWS managed a system of National Wildlife Refuges, and was principally concerned with protecting migratory bird habitat. It was, however, free to permit road building, mining, logging or other such activities on its lands under some circumstances.⁶⁰ The BLM managed the “public lands” that had not been parceled out to the other three agencies, or transferred out of federal ownership altogether.⁶¹ BLM was known as the “bureau of livestock and mining,” because those were its primary concerns.⁶² While it was far more obscure, in 1950 it managed more land than all the other agencies combined.⁶³

Almost nowhere—not even in the national park system—did federal law restrain the building of roads and tourist and supporting facilities in wild country. On the national forests and BLM lands, and to a lesser extent on USFWS lands, mining, logging, livestock grazing, and other non-recreational commercial activities were not only legally possible, but widespread. Indeed, on Forest Service and BLM lands, the general practice was that, where there was commercial interest in developing resources like minerals, trees and forage, it was given the green light.⁶⁴ In short, by far the most important reason that large tracts of federal land remained relatively undeveloped at the midpoint of the twentieth century was not because of law, but because development had not yet proved feasible.⁶⁵

But that was changing. The post-World War II housing boom increased demand for wood, which brought strong new pressure to harvest timber from the national forests.⁶⁶ A powerful coalition of interests, building upon the example of Hoover Dam on the Colorado and its counterparts on the Columbia River, was promoting water development on rivers everywhere.⁶⁷ The best dam sites were often on federal lands in remote, scenic canyons.

⁵⁸ JOHN V. LOOMIS, INTEGRATED PUBLIC LANDS MANAGEMENT 70–71 (2d ed. 2002).

⁵⁹ *Id.* at 57–59.

⁶⁰ *Id.* at 71–73.

⁶¹ See T.H. WATKINS & CHARLES S. WATSON, JR., THE LANDS NO ONE KNOWS 138–39 (1975); see also SKILLEN, *supra* note 51, at 1.

⁶² This moniker is generally attributed to Edward Abbey. See, e.g., DAVID A. DALTON, THE NATURAL WORLD OF LEWIS AND CLARK 198 (2008).

⁶³ *Id.*

⁶⁴ See Roger Flynn, *Daybreak on the Land: The Coming of Age of the Federal Policy and Management Act of 1976*, 29 VT. L. REV. 815, 818 (2005).

⁶⁵ See *id.*

⁶⁶ Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 341 (1985).

⁶⁷ See generally Reisner, *supra* note 45, chapters 5–7.

Mining was also a threat, especially for energy fuels like oil and gas and uranium.⁶⁸ The latter was sought for the atomic weapons program and to carry out President Eisenhower's Atoms for Peace initiative, announced in late 1953.⁶⁹ Uranium was thought to be scarce, and practically all federal lands except those in national parks were open to prospecting.⁷⁰ Responding to the call, prospectors built primitive roads through many remote areas, especially in the Colorado Plateau's wild canyonlands.⁷¹ Other kinds of mines were also threats to wild areas, as the same geologic conditions that produced scenery could produce valuable deposits of gold, copper and other metals, justifying the cost of developing access roads and other infrastructure to develop them.⁷² On top of all this, the interstate highway system Congress authorized in 1956 called for a vast network of highways spanning the lower forty-eight states, some of which were going to penetrate relatively unspoiled terrain, and make wild country ever more accessible to urban populations.⁷³

As these pressures grew, the federal land management toolbox was thought to lack the legal means to durably protect "wilderness" values.⁷⁴ Not even the few million acres of national forest "primitive" areas established by Leopold and his allies were off limits. The Forest Service's original (so-called "L-20") regulations adopted in the late 1920s allowed forest rangers considerable latitude to authorize roads, logging and water projects in them.⁷⁵ Even more important, the limited protections afforded by these regulations remained subject to change or even abolition by the agency itself, as well as by Congress.⁷⁶

Still, the Forest Service persisted in protecting their relatively small system of "primitive" areas. Partly this was a strategic response by the Forest Service leadership, led by Chief William B. Greeley, to the Park Service's success in building a public constituency around its control of many of America's scenic "crown jewels."⁷⁷ Greeley and some of his colleagues calculated that support for wilderness preservation in the Forest Service might, in Craig Allin's words, "rescue the Agriculture Department's

⁶⁸ Doug Brugge & Rob Goble, *The History of Uranium Mining and the Navajo People*, 92 AM. J. OF PUB. HEALTH 9, 1410, 1410-1411 (2002); R. MCGREGGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION AND WESTERN POLITICS* 53 (1993).

⁶⁹ Michael A. Amundson, *Mining the Grand Canyon to Save It: The Orphan Lode Uranium Mine and National Security*, 32 W. HIST. Q. 320, 324 (2001).

⁷⁰ See JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 298 (1987).

⁷¹ RAYE C. RINGHOLZ, *URANIUM FRENZY: BOOM AND BUST ON THE COLORADO PLATEAU* (1989); U.S. DEP'T OF THE INTERIOR, W. L. DARE ET AL., *URANIUM MINING ON THE COLORADO PLATEAU* 5 (1955), available at http://mines.az.gov/DigitalLibrary/usbm_ic/USBMIC7726UraniumMiningColoradoPlateau.pdf.

⁷² See LESHY, *supra* note 70, at 229-42.

⁷³ SUTTER, *supra* note 2, at 256.

⁷⁴ Christopher Wehrli & Robin Clegg, *The Evolution of the Wilderness Concept, in* CONTESTED LANDSCAPE: THE POLITICS OF WILDERNESS IN UTAH AND THE WEST 3, 8 (Doug Goodman & Daniel McCool eds., 1999).

⁷⁵ SUTTER, *supra* note 2, at 252.

⁷⁶ *Id.* at 253.

⁷⁷ KEITER, *supra* note 36, at 244.

image with preservationists and prevent further transfer of Forest Service lands to the national parks.”⁷⁸ Thus the idealistic push for wilderness from lower ranks in the agency came to serve the desire of the agency’s leaders to fend off land raids by the Park Service. One might speculate whether Leopold and his allies in the bureaucracy could have succeeded as much as they did without the support of leadership, who saw wilderness not so much as a cause as a bargaining chip in the struggle with their fellow bureaucracy.

In any event, the Forest Service leadership’s embrace of wilderness preservation proved successful enough to provoke a counter-thrust. Upon assuming office in 1933, Interior Secretary Ickes initiated what became a long-running, relentless, but ultimately unsuccessful campaign to transfer the Forest Service to his domain.⁷⁹ One of his tactics was to encourage the Park Service to do more to protect wildlands. Under Ickes’ leadership, a few national parks were created on a kind of wilderness model—the Everglades in Florida, Olympic in Washington, and Kings Canyon in California.⁸⁰ But only at Everglades was that expectation plainly written into the governing legislation.⁸¹ The 1934 Act establishing the Everglades National Park called for its lands to be “permanently reserved as a wilderness, and no development of the project or plan for the entertainment of visitors shall be undertaken which will interfere with the preservation intact of the unique flora and fauna and the essential primitive natural conditions now prevailing in this area.”⁸² The Forest Service responded to the Park Service’s counter-thrust by making its regulations governing its “primitive” areas more preservation-oriented. These so-called “U-Regulations,” issued at the instigation of Bob Marshall in 1939, allowed “primitive” areas to be reclassified administratively as “wilderness,” but still allowed water projects and some other incursions.⁸³

All these cross-currents created the context for a mid-twentieth century controversy that was instrumental in propelling, onto the national stage, the idea of legislating the creation of a national system of wilderness preservation. In 1950, Interior Secretary Oscar Chapman decided to support

⁷⁸ See ALLIN, *supra* note 2, at 71–74, 144.

⁷⁹ See WATKINS, *supra* note 57, at 464–67, 484–88, 490–93, 569–78.

⁸⁰ See ALLIN, *supra* note 2, at 75–76 and 85–87; SUTTER, *supra* note 2, at 234; SCOTT, *supra* note 21, at 33–34. During this era, the principal nonprofit park advocacy group, the National Parks Association (now the National Parks Conservation Association) promoted what it called “primeval” parks. HARVEY, *supra* note 46, at 59; ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 106–38 (1979).

⁸¹ KEITER, *supra* note 36, at 18.

⁸² 16 U.S.C. § 410c (2006). This may have been the first use of the term “wilderness” in any federal statute. The Act establishing Kings Canyon National Park did not include such strictures. *Id.* § 80. On the other hand, four years before Everglades National Park was established, Congress enacted the Shipstead-Newton-Nolan Act, which was the first step toward protecting the naturalness of what became one of the flagship areas of legal wilderness, the Boundary Waters Canoe Area in northern Minnesota. This legislation protected nearly 1.3 million acres of national forest land, larger than any primitive area heretofore established by the Forest Service, and required its “natural features” to be “preserve[d] . . . in an unmodified state of nature.” 16 U.S.C. § 577b (2006). ALLIN, *supra* note 2, at 77–79.

⁸³ NASH, *supra* note 2, at 206; SUTTER, *supra* note 2, at 87–88, 252–54.

construction of Echo Park Dam in Dinosaur National Monument, at the confluence of the Green and Yampa Rivers along the Colorado-Utah border.⁸⁴ The original small monument (eighty acres) established by President Wilson in 1915⁸⁵ had been greatly expanded (to more than 200,000 acres) by President Franklin Roosevelt in 1938.⁸⁶ Both Presidents used the authority Congress had provided in the Antiquities Act of 1906.⁸⁷

The fight that ensued over whether to build Echo Park Dam became the biggest national debate over development versus preservation of natural scenery since San Francisco's successful campaign to build Hetch Hetchy Dam in Yosemite National Park some four decades earlier.⁸⁸ In both cases, the Interior Department might have had the authority to approve the projects without action by Congress.⁸⁹ The proponents of these projects nevertheless decided that Congress ought to authorize them.⁹⁰ In both cases, then, wilderness advocates were trying to stop Congress from acting.

Congress approved Hetch Hetchy in 1913;⁹¹ it rejected Echo Park in 1956.⁹² The conservationists defeated the latter by a well-organized campaign. It succeeded even though Dinosaur was merely a national monument instead of a national park, even though it lacked the magic of Yosemite in the public's imagination, and even though the Echo Park Dam opponents lacked a highly visible champion like John Muir was for Hetch Hetchy. Of course many things had changed over the intervening years, but

⁸⁴ HARVEY, *supra* note 46, at 6, 89–91. The terminology here is admittedly confusing. The dam site was called Echo Park because a “park” is an open high western valley. The Echo Park area was within the Dinosaur National Monument, which was not a national “park,” but was a unit of the national park *system*.

⁸⁵ *Id.* at 6–7.

⁸⁶ *Id.* at 7, 14.

⁸⁷ *Id.* at 254.

⁸⁸ There were other disputed dam proposals in scenic areas, but they did not trigger national debate. See Elmo Richardson, *Olympic Park: 20 Years of Controversy*, FOREST HISTORY, Apr. 1968, at 14–15.

⁸⁹ HARVEY, *supra* note 46, at 272; JOHN WARFIELD SIMPSON, DAM! WATER, POWER, POLITICS, AND PRESERVATION IN HETCH HETCHY AND YOSEMITE NATIONAL PARK 316 (2005).

⁹⁰ At Hetch Hetchy, existing statutes authorizing rights of way over federal land might have been sufficient to accommodate the city's desires; indeed, Interior Secretary James Garfield (son of the former President), initially approved San Francisco's application in 1908. NASH, *supra* note 2, at 165. Eventually Garfield's successor, former San Francisco City Attorney Franklin Lane, appointed by President Wilson, decided that Congress must make the decision. *Id.*; see also ALLIN, *supra* note 2, at 45. At Echo Park, the federal government itself was going to build and operate the project, and the National Park Service arguably had authority to permit it, based on some obscure language in the proclamations establishing and then enlarging Dinosaur National Monument. See HARVEY, *supra* note 46, at 19–20. But congressional authorization was, as a practical matter, a political necessity because the dam was part of an interconnected series of water projects designed to give the states in the so-called Upper Basin of the Colorado River a share of federal dam-building largess, as a form of compensation for the federal government's earlier construction of Hoover Dam and the All-American Canal for the benefit of the lower Basin State of California. Mark W.T. Harvey, *Echo Park, Glen Canyon, and the Postwar Wilderness Movement*, 60 PAC. HIST. REV. 43, 53–54 (1991); see generally REISNER, *supra* note 45, at 197, 284–85.

⁹¹ SIMPSON, *supra* note 89, at 318.

⁹² HARVEY, *supra* note 90.

one important difference was that the proposal to build the dam at Echo Park was not just an assault on Dinosaur National Monument, it was an attack on an entire system of protected areas—the national park system, established in the wake of the losing battle to keep Hetch Hetchy Dam out of Yosemite National Park.⁹³ The Echo Park dam was, opponents emphasized, the “first invasion of the national park system by an engineering project since the National Park Service was established,” and one that “would open the door to similar invasion in other national parks.”⁹⁴ From a wilderness perspective, there was thus some irony in the fact that, after the dam was defeated, the Park Service constructed new roads into the area.⁹⁵

The opponents’ argument, by focusing on legal labels—national parks and the national park system—did have a downside. The bill that contained the authorization for Echo Park Dam, the Colorado River Storage Project Act (CRSP), would authorize several other dams as well.⁹⁶ One of these was downstream, on BLM land on the Utah-Arizona border, at an obscure location conveniently outside the National Park System or any other “dedicated area.”⁹⁷ No politically powerful label attached to this piece of real estate called Glen Canyon, though not for lack of trying. Secretary Ickes’ proposal in the 1930s to create a giant Escalante National Monument, which included the dam site, had been stymied by local opposition.⁹⁸

Being so focused on protecting Dinosaur National Monument from the Echo Park Dam, and with that victory in their grasp, in the end conservationists did not strenuously object to the dam in Glen Canyon.⁹⁹ Contrary to conventional wisdom, conservationists did not support the dam, but almost certainly they lacked the political strength to defeat it, had they mounted a vigorous campaign against it.¹⁰⁰ To modern day conservationists

⁹³ HARVEY, *supra* note 46, at 238–39.

⁹⁴ *Id.* at 190, quoting congressional testimony of Fred Packard of the National Parks Association. The conservationists, in other words, did not distinguish between monuments and parks. A prime mover of the Wilderness Act, Howard Zahniser, spoke during this controversy of the “sanctity of dedicated areas.” *Id.* at 174.

⁹⁵ KEITER, *supra* note 36, at 19.

⁹⁶ Harvey, *supra* note 90, at 43.

⁹⁷ *See id.* at 44.

⁹⁸ *See generally* Elmo R. Richardson, *Federal Park Policy in Utah: The Escalante National Monument Controversy of 1935–1940*, 33 UTAH HIST. Q. 109 (1965).

⁹⁹ *See* HARVEY, *supra* note 46, at 280.

¹⁰⁰ Harvey, *supra* note 90, at 46–47. Mark W. T. Harvey, who has plumbed the historical record more deeply than anyone, wrote that “the relationship between the two dams has not been well understood, and historians have poorly explained [it].” *Id.* at 46. These are the essential facts: Glen Canyon was not traded for Echo Park. The original CRSP legislation proposed a somewhat lower dam at Glen Canyon, for two reasons. The first was to lower the evaporation costs—at a lower elevation, Glen Canyon was hotter, so its reservoir surface evaporated more water than Echo Park. The second was to avoid backing water up underneath Rainbow Bridge, a natural arch that, like Dinosaur, had been given legal protection as a National Monument under the Antiquities Act, by President Taft in 1910. *ISE*, *supra* note 32, at 158. Sierra Club President David Brower gained much publicity at congressional hearings on the CRSP Act by calling attention to the fact that the Bureau of Reclamation made a simple mathematical error in its calculation of evaporation rates of the two reservoirs. The Bureau’s error understated the evaporation loss at the Echo Park reservoir. *Id.* at 56–57. In hindsight, an

with the advantage of twenty-twenty hindsight, the cost of defeating the Echo Park Dam was steep, as the Hoover-sized dam at Glen Canyon inundated a much larger and even more scenic series of canyons.¹⁰¹

The Echo Park battle kicked off the movement that led to the Wilderness Act of 1964.¹⁰² Indeed, on the very day in 1956 that President Eisenhower signed the legislation ensuring that the Echo Park dam would not be built, Howard Zahniser sent a letter to key members of Congress asking for support of legislation to create a system of federal land areas that would be generally protected as wilderness.¹⁰³

Congress's decision to build Hetch Hetchy led to the creation of the National Park Service and the National Park System. Congress's decision not to build Echo Park was the launching pad for creating a system of protected wild federal land areas. Echo Park's primary lesson involved the power of national campaign, built on an attractive designation, and a system of protected lands. The President gave the lands at Echo Park the label of Dinosaur National Monument, and it was installed in the national park system created by Congress. In the end, these were key ingredients in the successful political campaign against the dam. This message was not lost on the politically savvy architects of the Wilderness Act, who were willing to

ironic effect of Brower's criticism, which was designed to expose shortcomings in the Bureau's case for building Echo Park, was to strengthen the case for a higher dam and larger reservoir at Glen Canyon. *Id.* at 59. In the end, the decision on which dam or dams to build was eventually fought out in the context of, and its resolution controlled by, Upper Basin/Lower Basin politics that had almost nothing to do with scenery or preservation. Given this hard reality, in late 1955, the conservation community decided it lacked the strength to oppose both dams, and reiterated that its primary objective was to defeat Echo Park. Brower, having gradually been made aware of the magnificence of Glen Canyon, continued to argue for opposing both dams. He maintained long afterward that had he been heeded, the conservationists could have beaten Glen Canyon as well, but few involved at the time agreed with him. *Id.* at 62–66; *see also* NASH, *supra* note 2, at 212–14. This was, after all, the heyday of dam-building, when the federal Bureau of Reclamation and the Army Corps of Engineers were part of a bipartisan “iron triangle” with state and local water interests and congressional committees, and used to getting what they wanted. The idea that conservationists could defeat this powerful coalition twice in one battle seemed farfetched.

¹⁰¹ Harvey, *supra* note 90, at 44–45. When Congress rejected the Echo Park Dam and approved a high dam at Glen Canyon, it expressed the “intention of Congress that no dam or reservoir constructed under [this Act] shall be *within* any national park or monument.” Colorado River Storage Project Act, 43 U.S.C. § 620b (2006) (emphasis added). The protection this language seemingly afforded to the Rainbow Bridge National Monument, upstream from the reservoir behind Glen Canyon Dam, was, the courts later ruled, essentially nullified by language Congress attached to subsequent legislation providing funds to build Glen Canyon. *See* Friends of the Earth v. Armstrong, 485 F.2d 1, 7 (10th Cir. 1973). When full, the reservoir, Lake Powell, backs up into the national monument. *Id.* Today, however, it no longer does because a lengthy drought has lowered the reservoir dramatically, and a number of climate scientists think that human-induced climate change may prevent the reservoir from ever filling again. Joe Baird, *Lake Powell May Never Be Full Again*, SALT LAKE TRIBUNE, Apr. 2, 2006, http://www.sltrib.com/ci_3665008 (last visited Apr. 18, 2014).

¹⁰² HARVEY, *supra* note 46, at 287.

¹⁰³ *Id.* at 291; *see also* DOUGLAS W. SCOTT, CAMPAIGN FOR AMERICA'S WILDERNESS, A WILDERNESS-FOREVER FUTURE: A SHORT HISTORY OF THE NATIONAL WILDERNESS PRESERVATION SYSTEM 11–13 (2001), *available at* http://wilderness.net/toolboxes/documents/awareness/Doug%20Scott-A_Wilderness-Forever_Future-history.pdf.

take some considerable risk, expressed in concessions found in the fine print of the Wilderness Act, to cement the bold vision of a national system of legally protected wild areas into federal law.

III. THE WILDERNESS ACT.

The Wilderness Act became law in 1964 only after decades of organizing, and eight years of slogging through the congressional process. Its original champions like Leopold, keenly aware that their vision cut against the grain of American history and culture, had from the beginning recognized the need to build public support. They erected a big tent that housed a broad coalition of interests embracing scenery, wildlife, primitive recreation, inspiration, preservation, history, science, and other values. For this reason, from its founding days, the Wilderness Society was concerned not to appear to exclude people from the wilderness.¹⁰⁴

Wilderness advocates were as pragmatic as they were visionary. They appreciated the need to compromise if they were to successfully navigate the political process. More than most major pieces of legislation, the Act was carefully, indeed meticulously, crafted over a long period of time. Congress, wrote Roderick Nash, “lavished more time and effort” on it than any other measure in American conservation history.¹⁰⁵ Nine congressional hearings resulted in more than 6,000 pages of testimony. Howard Zahniser, it was said, went through sixty-six drafts over the nearly decade-long journey from the defeat of the Echo Park Dam to President Johnson’s signature on the law.¹⁰⁶ The Wilderness Act is shot through with political concessions—on water projects and associated facilities, on mineral development, on livestock grazing, on fire-fighting, and on other matters. In hindsight, from the standpoint of actually protecting the lands from major intrusions, most of these concessions worked out rather well.

The explanation is not hard to find. The promoters of the Wilderness Act were seasoned operatives, in the world of human affairs as well as in nature. They understood the political process and the arc of cultural change. They had a sense of what was needed, and what was possible, to advance their agenda. They went to school on the experiences of Leopold and his Forest Service allies, who learned how to overcome opposition from engineers and industrial foresters inside their own agency, and who did not hesitate to exploit the bureaucratic rivalry between the Forest Service and its cross-town rival, the National Park Service.¹⁰⁷

¹⁰⁴ See SUTTER, *supra* note 2, at 243. The Wilderness Society had about 35,000 members around the time the Act emerged from Congress; the Sierra Club, about 30,000. Michael McCloskey, *Wilderness Movement at the Crossroads, 1945–1970*, 41 PAC. HIST. REV. 346, 351 n.10 (1972). The U.S. population in 1964 was about 192 million. U.S. Census Bureau, *Historical National Population Estimates: July 1, 1900 to July 1, 1999*, <http://www.census.gov/population/estimates/nation/popclockest.txt> (last visited Apr. 18, 2014).

¹⁰⁵ NASH, *supra* note 2, at 222.

¹⁰⁶ See *id.*; see also ALLIN, *supra* note 2, at 102–42 (tracing the Act’s journey through the congressional process).

¹⁰⁷ See *supra* text accompanying notes 77–78.

Getting the Wilderness Act through Congress was helped immeasurably by the zeitgeist of the late 1950s and early 1960s. In hindsight, the timing could not have been better. Coming off a war successfully waged against forces of darkness, with an expanding middle class enjoying unprecedented economic prosperity and leisure time, Americans had confidence in their governmental institutions, and were optimistic about the future.¹⁰⁸ Vietnam had not emerged as a divisive force in American politics, creating a counterculture and undermining that confident, optimistic consensus. The Act was signed into law just six weeks after Barry Goldwater accepted the Republican Party's nomination for the presidency in a speech brimming with hostility toward government,¹⁰⁹ but within three months of that speech, Goldwater would lose the national election in a landslide.¹¹⁰

The Wilderness Act was hailed, rightfully, as a landmark achievement. It created and gave structure to what it called the "National Wilderness Preservation System," or NWPS. Within the system, road-building and most forms of intensive development, including mechanized transport and commercial enterprise, were forbidden. The breadth and scope of its protections were unprecedented. Moreover, the Act's definition was framed to be consistent with the focus of the wilderness protection movement on protecting lands *from* development, rather than *for* particular, articulated objectives. Thus, nearly all the definitional language focused on preservation of natural conditions, real and apparent, and only then mentioned that such lands "*may* . . . contain ecological, geological, or other features of scientific, educational, scenic, or historical value."¹¹¹ This approach was shrewd because it expanded the proposal's appeal by allowing potential supporters to read into the measure their own preferences of reasons to support wilderness protection.

At the same time, the Act itself protected very little land. The charter members of the NWPS altogether included only about nine million acres of national forest lands, or only about 1% of total federal landholdings at the time.¹¹² The Act's champions appreciated that this was a very small fraction of the federal lands that could probably meet the Act's definition of

¹⁰⁸ HARVEY, *supra* note 46, at 74 (citing SAMUEL P. HAYS, BEAUTY, HEALTH, AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955–1985, 3 (1987)).

¹⁰⁹ Editorial, *Goldwater's 1964 Acceptance Speech*, WASH. POST, 1998, <http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm> (last visited Apr. 18, 2014).

¹¹⁰ Goldwater carried only his home state and five Deep South states that were smarting from enactment, a few months earlier, of the Civil Rights Act of 1964. See The American Presidency Project, *Election of 1964*, <http://www.presidency.ucsb.edu/showelection.php?year=1964> (last visited Apr. 18, 2014).

¹¹¹ See 16 U.S.C. § 1131(c) (2006) (emphasis added), *quoted in supra* text accompanying note 5.

¹¹² WILDERNESS AND PROTECTED AREAS MANAGEMENT 2, *available at* <http://campus.greenmtn.edu/faculty/gregbrown/NRM3061/combinedslides.pdf>. Univ. of Mont., *Creation and Growth of the National Wilderness Preservation System*, <http://www.wilderness.net/NWPS/fastfacts> (last visited Apr. 18, 2014) (explaining how Alaska skews these figures substantially because it contains just over half of America's wilderness lands, only about 2.7% of the contiguous United States is protected as wilderness).

wilderness, but they settled for this to get the System launched.¹¹³ Indeed, proponents generally emphasized that their goal for the system was relatively modest, perhaps 35–55 million acres of federal land, or less than 2% of the acreage in the country.¹¹⁴

Moreover, the Act was shot through with other accommodations and compromises. This was because, even though it protected relatively few acres, the Act did not lack for opponents. Some were found inside the federal land management agencies, who resisted having their management discretion cabined, and who also feared the loss of control of lands should a new agency be created to manage wilderness areas.¹¹⁵ Outside the federal family, those interested in extracting and developing resources from federal lands were powerful and accustomed to mostly getting their way. They feared that a new system of land management could thwart their ambitions, and they did not go quietly.

To sidestep the possibility of igniting turf wars among the federal agencies (particularly the Park Service and the Forest Service) that could derail the entire effort, the Act neither created a new agency to manage the NWPS, nor swept aside all the management authority that already applied to lands involved.¹¹⁶ Instead, the Act's legal protection for wilderness would simply overlay each existing land management agency's authority, making "each agency administering any area designated as wilderness . . . responsible for preserving the wilderness character of the area," as well as for administering the area "for such other purposes for which it may have been established as also to preserve its wilderness character."¹¹⁷

Second, the Act dealt only with federal land, and not tribal, state, or private land, even though some of those lands surely could also have been considered "untrammeled by man,"¹¹⁸ fitting the Act's definition.

¹¹³ Bob Marshall had estimated in 1936 that the nation had more than 300 million acres of wilderness. See ALLIN, *supra* note 2, at 81–82. At 1958 hearings on an earlier version of the Act, 50 million acres were mentioned as an upper limit on a national wilderness system. NASH, *supra* note 2, at 223. Around the time of enactment, 60 million acres was the figure some supporters mentioned. *Id.* at 226.

¹¹⁴ TURNER, *supra* note 2, at 37.

¹¹⁵ That the Act contemplated inclusion of national park system lands in the NWPS underlined that the park system itself did not prevent wilderness-impairing development. In fact, the National Park Service initially opposed the Act. KEITER, *supra* note 36, at 21–22; MILES, *supra* note 36, at 147–49.

¹¹⁶ See 16 U.S.C. § 1133(b) (2006).

¹¹⁷ *Id.* Although the idea that NWPS areas would be managed by the agency previously responsible for their management was part of the Act from the beginning, this did not deter either the National Park Service or the U.S. Forest Service from opposing the Act in congressional testimony in 1957. See ALLIN, *supra* note 2, at 160. NPS Director Conrad Wirth testified that to include NPS lands in the Act would put the parks "on a less firm foundation than has already been provided by federal law." *Id.* at 110. Richard A. McArdle, Chief of the Forest Service, was even more emphatically opposed. *Id.* at 111. By the next year, however, both agencies came around to express cautious support for the Act. *Id.* at 118.

¹¹⁸ See 16 U.S.C. § 1131(c) (2006). Almost 30 years earlier, Bob Marshall had persuaded his Interior Department colleague, the Commissioner of Indian Affairs, John Collier, to create more than a dozen wilderness areas on Indian reservations. ALLIN, *supra* note 2, at 82. Indian lands were in fact included in early wilderness bills introduced into the Congress; the original 1956

Third, while the Act created a system of protected federal wildlands, Congress firmly installed itself as the system's gatekeeper. Not one acre could be added to the NWPS except through enactment of a law concurred in by both Houses of Congress and the president—or his veto overridden by two-thirds vote in each House.¹¹⁹ Designation of any new legal wilderness anywhere in the nation would, in other words, require a political decision rendered by elected officials representing the entire nation. In settling for this, wilderness advocates were, in effect, wagering that their movement would continue to gain adherents and political strength.

The way this came about is instructive. Colorado's curmudgeonly Representative Wayne Aspinall, a power in the House of Representatives, wanted to preserve Congress's ability to control whether areas were protected as wilderness. This was part of a broader campaign of his to reclaim for Congress authority over federal lands that had been broadly delegated to the executive over the years.¹²⁰ He was joined by other influential westerners. Senator Frank Church of Idaho, pressed into service to manage the bill on the Senate floor when Senator Clinton Anderson of New Mexico became ill,¹²¹ agreed that all decisions about whether to include tracts of federal land in the NWPS would be made by Congress, not the managing federal agency.¹²² Some doubtless thought at the time that Congress would be less liberal than the federal agencies would be in manning the entrance to the NWPS; as it turned out, the opposite was true, at least for several decades.

The Wilderness Society reluctantly acquiesced; its reluctance was based on an expectation that Congress would be a tougher gatekeeper to the NWPS than the federal agencies.¹²³ In effect, the compromise challenged wilderness advocates to organize politically, especially at the grassroots, if they wanted the NWPS expanded. This is because the congressional process, then and now, almost always requires that bills dealing with the

proposal authorized wilderness areas on Indian reservations with the consent of the appropriate tribal councils. The idea was dropped from versions from 1960 on. *Id.* at 107, 123. Some states and some Indian tribes have protected lands under their jurisdiction as "wilderness" or something very much like it. See Wilderness.net, *Tribal Wilderness Designation, Versus Federal Designation* (2010), available at <http://www.wilderness.net/toolboxes/documents/IFST/Tribal%20vs.%20Federal%20Wilderness%20Designation.pdf>; see also *supra* note 35 (discussing Adirondack State Park's "forever wild" classification by state constitutional amendment).

¹¹⁹ 16 U.S.C. § 1132(b) (2006).

¹²⁰ ALLIN, *supra* note 2, at 127–28.

¹²¹ Sara Dant, *Making Wilderness Work: Frank Church and the American Wilderness Movement*, 77 PAC. HIST. REV. 237, 242–43 (2008).

¹²² *Id.* at 242–43. Earlier drafts had given the agencies and the Congress this authority, in varying degrees. ALLIN, *supra* note 2, at 107, 117, 123. The issue remained under discussion nearly until final passage, but Church's 1961 proposal survived. *Id.* at 129–31; see also TURNER, *supra* note 2, at 32–33.

¹²³ ALLIN, *supra* note 2, at 130–31 ("[R]equiring congressional approval for each addition to the system seemed to guarantee little or no growth beyond the original eight million acres. The wilderness bill had already proven to be a long, hard struggle for preservationists. It seemed unlikely that many additions could surmount the succession of obstacles that had to date prevented passage of any wilderness bill.").

management of particular tracts of federal land in one state or locale have the support, or at least not the active opposition, of the directly affected members of Congress, whether the objective was wilderness, or something else.¹²⁴

And organize they did. Church's compromise proved, as Stewart Brandborg, then Executive Director of the Wilderness Society, said in 1968, "to be a great liberating force in the conservation movement . . . [for it] opened the way to a far more effective conservation movement," being built from the grassroots up.¹²⁵ Efforts of wilderness advocates to organize grassroots political support were so successful, as discussed below, that for several decades Congress was rather more receptive to NWPS designation than the federal land management agencies were. And this was so even though some powerful, well-placed members of Congress, like Aspinall, never became fans of wilderness.¹²⁶

The timing of the Wilderness Act was opportune in another way. It was, as the late professor Joe Sax noted, transitional. On the one hand, it embodied what he called the "enclave" concept of federal land management—the idea that certain areas of federal lands with special qualities should be set aside for protection from the "disposal and settlement and exploitation" policy that applied to most public lands throughout much of the nineteenth and first half of the twentieth centuries.¹²⁷ The decisions to protect these enclaves were usually (although not always) congressional. On the other hand, Sax noted, the Wilderness Act looked forward, because it could be applied to any federal lands that had specified natural qualities, regardless of which agency managed them. Sax went on to suggest that the Endangered Species Act of 1973¹²⁸ completed the transformation in the nation's land policy, for it moved beyond aesthetics to biology, extended its reach to private as well as public lands, and replaced congressional decisions with executive branch agency decisions based largely on science.¹²⁹

From an even broader perspective, the struggle to enact the Wilderness Act was a kind of spear point for the modern environmental movement. The Act's simple message that important parts of the nation's natural heritage ought to be preserved resonated across the land. The grassroots organizing and lobbying that pushed the Act across the finish line helped forge similar

¹²⁴ Longtime wilderness advocate Brock Evans called this a principle of "comity." See Brock Evans, *The Wilderness Idea As a Moving Force in American Cultural and Political History*, 16 Idaho L. Rev. 389, 401–02 (1980).

¹²⁵ ROTH, *supra* note 49, at 2.

¹²⁶ ALLIN, *supra* note 2, at 203. Some have argued that this emphasis on grassroots organizing favored wilderness advocates because every undeveloped area of federal land has local friends who favor the status quo, and who can be mobilized to persuade others of similar minds across the country, while development interests find it harder to mobilize such a national network of public support. See ROTH, *supra* note 49, at 4–5.

¹²⁷ See Joseph L. Sax, *Perspectives Lecture: Public Land Law in the 21st Century*, 45 ROCKY MT. MIN. L. INST. § 1.02 (1999).

¹²⁸ Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2006 & Supp. VI 2011).

¹²⁹ Sax, *supra* note 127, § 1.03.

efforts to protect not only landscapes, but the nation's air and water quality and its biological resources. Thus, in the space of less than a decade after the Wilderness Act became law, many landmark environmental laws were put on the books, including the Wild & Scenic Rivers Act,¹³⁰ the Clean Air¹³¹ and Clean Water¹³² Acts, the National Environmental Policy Act,¹³³ as well as the already-mentioned Endangered Species Act (which is discussed further below). It was an outpouring of environmental lawmaking never matched before or since, even in the heyday of the conservation movement in the early part of the twentieth century. This is not to say the Wilderness Act made this other legislation inevitable, but it surely plowed the ground so that the seeds of these statutes could germinate.

Moreover, a kind of feedback loop operated. Wilderness advocates, seasoned in politics, worked to capitalize on this broader environmental sentiment as they took up the gritty task of implementing the Wilderness Act. They began to emphasize, for the first time, the scientific and biodiversity values of preserving natural areas.¹³⁴ Although the original Act mentioned science, the idea of preserving wilderness for scientific purposes had little political traction, and was not emphasized at the time.¹³⁵ The idea of wilderness as a tool to protect ecosystems did not come to the forefront until the early 1970s. It reached full flower in the battle over Alaskan wilderness in the latter part of that decade.¹³⁶

A. The Act's Creation of Study Areas for Possible NWPS Expansion

The Wilderness Act did not leave entirely to chance which tracts of land would be proposed for congressional consideration. It directed that, over the next decade, the National Park Service, U.S. Fish & Wildlife Service, and U.S. Forest Service should each study some of the lands they managed for possible inclusion in the NWPS, and forward their recommendations up the chain of command, culminating ultimately in presidential recommendations to the Congress.¹³⁷

¹³⁰ 16 U.S.C. §§ 1271–1287 (2006).

¹³¹ 42 U.S.C. §§ 7401–7671q (2006).

¹³² 33 U.S.C. §§ 1251–1387 (2006).

¹³³ 42 U.S.C. §§ 4321–4347 (2006).

¹³⁴ See, e.g., TURNER, *supra* note 2, at 34–35. There were disagreements among wilderness advocates on how much to embrace the new, broader environmental movement. *Id.* at 95–106. For a post-Act compendium of arguments for wilderness preservation that give science some prominence, see Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288 (1966).

¹³⁵ Aldo Leopold, for example, gave little play to ecological arguments for wilderness preservation. SUTTER, *supra* note 2, at 73–74.

¹³⁶ See TURNER, *supra* note 2, at 146–47. It was not until several years after the Alaska legislation that emerging notions of island biogeography and conservation biology began to be used in wilderness debates, and even then their political influence was small. See, e.g., Walter Kuhlmann, *Making the Law More Ecocentric: Responding to Leopold and Conservation Biology*, 7 DUKE ENVTL. L. & POL'Y F. 133 (1996).

¹³⁷ 16 U.S.C. § 1132(b)–(c) (2006).

But the recommendations from the executive were just that, and entitled to no special weight. The Act rather emphatically stated that any presidential recommendation “shall become effective only if so provided by an Act of Congress.”¹³⁸ It was inevitable that this would lead to the joke that prior to 1964, only God could make wilderness, while after 1964 only Congress could.¹³⁹

The congressional direction to study some federal lands for possible inclusion in the NWPS contained two noteworthy omissions. First, the pool of lands Congress directed to be studied comprised but a small fraction of the federal lands that likely met the Wilderness Act’s definition. True, the National Park Service and the U.S. Fish & Wildlife Service were to review *all* “roadless areas” of 5,000 acres or more, and roadless islands of any size, under their jurisdiction.¹⁴⁰ At the time, these included an estimated seventy areas comprising perhaps twenty-seven million acres in the National Park System,¹⁴¹ and twenty-one million acres in the National Wildlife Refuge System.¹⁴²

But the broad mandate to study all “roadless” areas under their control did not apply to the Forest Service. It, by contrast, was directed to review only those areas it had previously classified as “primitive,” and which were not included as charter members of the NWPS by the Act itself.¹⁴³ These covered only about five million acres, or about 3% of the national forest system.¹⁴⁴ Entirely omitted were tens of millions of acres of roadless national forest lands outside of formally designated “primitive areas.” It seems likely that Congress did not require study of these lands primarily because the Forest Service, cheered on by the timber industry, was emphasizing industrial forestry and interested in building a road network to serve it, and wilderness advocates chose not to fight a battle over this ground, figuring it could greatly delay enactment.¹⁴⁵

¹³⁸ *Id.*

¹³⁹ Marvin Henberg, *Wilderness, Myth, and American Character*, in *THE GREAT NEW WILDERNESS DEBATE* 500 (J. Baird Callicott & Michael P. Nelson eds., 1998).

¹⁴⁰ 16 U.S.C. § 1132(c) (2006).

¹⁴¹ See KEITER, *supra* note 36, at 21-29. For another discussion of the Park Service’s less than enthusiastic support of the NWPS, see RICHARD WEST SELLARS, *PRESERVING NATURE IN THE NATIONAL PARKS* 187-94, 280 (1997).

¹⁴² Nationalatlas.gov, *National Wildlife Refuge System—A Visitor’s Guide*, http://nationalatlas.gov/articles/boundaries/a_nwrs.html (last visited Apr. 18, 2014). From a legal standpoint, the criterion of being “roadless” had a curious aspect. Although the Wilderness Act uses this criterion, and generally bans “permanent roads,” and provides very limited authorization for “temporary” roads, 16 U.S.C. §1133(c), it fails to define “road.” The Act’s definition of wilderness does not specifically mention roadlessness as a criterion. Many relatively undeveloped federal lands are traversed by jeep tracks or other “ways” created substantially or solely by vehicular use. If these are “roads,” the areas they traverse may not fall within the Wilderness Act’s direction to study certain “roadless” areas. This issue is explored more fully below.

¹⁴³ 16 U.S.C. § 1132(b) (2006).

¹⁴⁴ SCOTT, *supra* note 21, at 57.

¹⁴⁵ SUTTER, *supra* note 2, at 259; see generally PAUL W. HIRT, *A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR II* (1994).

Also, the Wilderness Act did not even mention lands managed by the Bureau of Land Management, even though BLM controlled more acreage than all the other agencies combined—including vast and remote tracts in Alaska, on the Colorado Plateau, in the California desert, the desert southwest, and the Great Basin.¹⁴⁶

The second feature of note in the Wilderness Act's direction to study certain federal lands for possible inclusion in the NWPS was that Congress did not require the agencies to protect the wilderness qualities of these lands until Congress had an opportunity to act on their recommendations.¹⁴⁷ As it turned out, this has not proved to be a significant omission. The 1964 Act did preserve agencies' existing authorities to protect wild qualities,¹⁴⁸ and in practice, on those particular lands they were instructed by the Wilderness Act to study, the agencies generally refrained from actions during the study phase that threatened the lands' wilderness qualities.¹⁴⁹

¹⁴⁶ U.S. Dep't of the Interior, Bureau of Land Mgmt., *The Bureau of Land Management: Who We Are, What We Do*, http://www.blm.gov/wo/st/en/info/About_BLM.html (last visited Apr. 18, 2014); Wilderness Soc'y, *BLM Lands FAQs*, <http://wilderness.org/article/blm-lands-faqs> (last visited Apr. 18, 2014).

¹⁴⁷ 16 U.S.C. § 1132(b) (2006).

¹⁴⁸ Indeed, as far as the Park Service was concerned, the Act cautioned that nothing in it should, "by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the Interior with respect to the maintenance of roadless areas within units of the national park system." *Id.* § 1132(c).

¹⁴⁹ The Forest Service study provision gave rise to the first significant piece of litigation involving the Wilderness Act. *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971). The message sent by the Parker decision was that the courts would hold federal agencies to a high standard when they wanted to take actions that impaired the suitability of an area for inclusion in the NWPS. The court enjoined a proposed Forest Service timber sale in an area *not* under study for possible inclusion in the NWPS, but merely adjacent to one such study area. *Id.* at 793. The broader question of so-called "interim management"—how to manage lands being studied for possible inclusion in the NWPS—has emerged as an important issue in recent decades, and is discussed further below. The fate of the particular tract involved in the Parker litigation is instructive of the politics of NWPS expansion. The site of the enjoined timber sale ultimately became part of the Eagles Nest Wilderness. Jim Johnson, the Congressman who represented the area, initially supported the timber sale, but at the same time opposed a proposal by water developers to build a tunnel in the area to transfer water from the west slope to the Front Range. MaryAnn Gaug, *Eagles Nest Wilderness Turns 30*, SUMMIT DAILY, Jul. 12, 2006, <http://www.summitdaily.com/article/20060711/NEWS/60711008> (last visited Apr. 18, 2014). Ultimately he decided that interposing an obstacle to the Front Range's water grab was more important than logging the area, so he eventually supported putting it in the NWPS. While the President still had authority under the Wilderness Act to authorize the water project, the Congressman was banking, correctly, that it was too heavy a political lift. *See* H.R. 3863, 94th Cong. (Co. 1975) (indicating Johnson's support of designating approximately 136,760 acres as the Eagles Nest Wilderness); ALLIN, *supra* note 2, at 154–55; *see infra* text accompanying note 153 (discussing the Wilderness Act's exception for presidentially-authorized water developments).

B. The Wilderness Act's Compromises on Mining, Water Development, Grazing, and Inholdings

The Act's largest compromises between wilderness champions and opponents came on mineral development and water projects. The Act opened a window for twenty years—until the end of 1983—in which claims for so-called “hardrock” minerals like gold, silver, copper, and uranium could continue to be located and developed on lands that were open to such claim-staking when they were included in the NWPS.¹⁵⁰ The same window also allowed the government to issue new mineral leases for fossil fuels—oil, gas, oil shale, and coal—and fertilizer minerals, such as potash, on any NWPS lands open to such leasing when included in the NWPS.¹⁵¹ Moreover, the Act provided open ended protection to “valid existing rights” in minerals perfected prior to the window being closed.¹⁵²

On water projects, the Wilderness Act gave the president specific authority to build and maintain dams, power projects, transmission lines, and “other facilities needed in the public interest,” including associated roads, upon “his determination that such use or uses in the specific area will better serve the interests of the United States and the people thereof than will its denial.”¹⁵³ This extraordinary power was reserved to the president alone; it could not be delegated to cabinet secretaries or other underlings.

Livestock grazing was permitted to continue on lands where it had been established prior to their inclusion in the NWPS, subject to “such reasonable regulations as are deemed necessary.”¹⁵⁴ The federal agency managing a NWPS area was permitted to take “such measures . . . as may be necessary in the control of fire, insects, and diseases,” and could permit the use of aircraft or motorboats where such uses “have already become established.”¹⁵⁵

Contrary to the impression one might have from looking at a map displaying NWPS areas, some of the land within their boundaries is owned by states or private interests, not the federal government.¹⁵⁶ The Act contained some ambiguous instructions regarding these inholdings; for

¹⁵⁰ 16 U.S.C. § 1133(d)(3) (2006); see LESHY, *supra* note 70, at 229–42.

¹⁵¹ 16 U.S.C. § 1133(d)(3) (2006).

¹⁵² *Id.*

¹⁵³ *Id.* § 1133(d)(4). The effect of wilderness protection on water projects was a concern from the earliest congressional hearings in 1957. See ALLIN, *supra* note 2, at 108–09.

¹⁵⁴ 16 U.S.C. § 1133(d)(4) (2006). While Aldo Leopold had written about the adverse ecological impacts of livestock grazing in the arid Southwest as early as 1923, the case he made for wilderness preservation “drew very little from these ecological observations.” SUTTER, *supra* note 2, at 67–68. Thus, it is not surprising that his early wilderness writings contemplated livestock grazing and even limited logging in wilderness. *Id.* at 81, 86.

¹⁵⁵ 16 U.S.C. § 1133(d)(1) (2006). Commercial timber harvesting is not explicitly prohibited in NWPS areas, but the Act's general prohibitions on “commercial activities” and “mechanized transport” are an effective bar, and no one has seriously argued otherwise.

¹⁵⁶ See Wilderness.net, *U.S. National Wilderness Preservation System Map*, <http://www.wilderness.net/map.cfm> (last visited Apr. 18, 2014); see also Randy Tanner, *Inholdings within Wilderness: Legal Foundations, Problems, and Solutions*, 8 INT'L J. WILDERNESS 9, 10 tbl.1 (2002) (listing state and privately-owned acres of wilderness).

example, it authorized the Forest Service to provide access or to exchange the inholdings for lands of equal value outside the wilderness, and otherwise provided that title to these lands could be acquired only with the consent of the owner, or of the Congress.¹⁵⁷ Federal land agencies could not, in other words, acquire such lands by using their eminent domain or condemnation authority unless Congress agreed. Moreover, the managing agencies were ambiguously instructed to permit ingress and egress to such in-holdings “by reasonable regulations consistent with the preservation of the area as wilderness . . . by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.”¹⁵⁸

Where these numerous exceptions applied, they overrode the Act’s wilderness-protection provisions, because the Act applied such protections “except” where it “otherwise provided.”¹⁵⁹ Cumulatively, these compromises could be characterized as showing that wilderness champions paid a high price to secure the Act. No doubt there was tension between those who might be called “purists” and “pragmatists”—the former motivated more by a zeal to protect wild places in as pristine a form as possible, and the latter more keenly aware of the compromises necessary to get the Act through the sausage grinder of the political process. The challenge of persuading Congress to create the system kept these tensions among protection advocates submerged, and they did not come close to derailing enactment. Once the Act was on the books, and wilderness champions began working to expand the system, these tensions would break the surface, and create complications that persist to this day.

The exceptions and compromises in the Wilderness Act had another important effect. Politically, they made it somewhat easier for wilderness proponents to gain the support, or at least mute the opposition, of some members of Congress who were not inclined to favor preservation for its own sake, and did not want to outlaw all possibility of mining and water development. Preserving, at least on paper, the opportunity for continued mining and water projects made it easier for these members to justify voting for the original Act and subsequent additions to the NWPS. This was especially true for those members whose districts or states were far from, and unlikely to be affected by, how candidate areas for NWPS were managed.

¹⁵⁷ 16 U.S.C. § 1134 (a) and (c) (2006). These provisions are explored in John D. Leshy, *Wilderness and its Discontents: Wilderness Review Comes to the Public Lands*, 1981 ARIZ. ST. L.J. 361, 437-39.

¹⁵⁸ *Id.* § 1134(b). To their credit, many wilderness advocates and federal agencies managing wilderness have placed a high priority on acquiring inholdings, often using funds made available through the Land & Water Conservation Fund, 16 U.S.C. 4601-4 through 4601-10(c). Andy Wiessner, personal communication with author, April 8, 2014.

¹⁵⁹ *Id.* § 1133(b).

IV. IMPLEMENTING THE ACT: KEY EMERGING ISSUES

A half-century is a long time, and dramatic changes have taken place since the Wilderness Act became law. The U.S. population was 192 million in 1964;¹⁶⁰ it approaches 320 million today.¹⁶¹ The population of the eleven Western states where most wilderness acreage is found (Alaska excluded), has nearly tripled, to more than seventy million.¹⁶² The gross domestic economic product has grown dramatically.¹⁶³ More people have more wealth and leisure time to enjoy wild areas. Human settlements have encroached on some such places, a development captured in modern fire management policy-speak: the “wildland-urban interface.”¹⁶⁴

It is sometimes said that all systems tend to evolve toward complexity.¹⁶⁵ That is certainly true in spades for the national program to provide legal protection for wildlands. This section examines some key issues of implementation that have been raised, and to some extent resolved, since the Wilderness Act became law.

A. Tailoring the Idea of Wilderness to Conditions Across the Nation: Of “Purity” and “Sights and Sounds”

A remarkable thing about the Wilderness Act is that Congress has not formally amended it in any significant way—its basic structure, definitions and exceptions have all remained unchanged since 1964.¹⁶⁶ In this respect, it

¹⁶⁰ U.S. CENSUS BUREAU, HISTORICAL NATIONAL POPULATION ESTIMATES: JULY 1, 1900 TO JULY 1, 1999 (2000), <http://www.census.gov/popest/data/national/totals/pre-1980/tables/popclockest.txt> (last visited Apr. 18, 2014).

¹⁶¹ U.S. CENSUS BUREAU, MONTHLY POPULATION ESTIMATES FOR THE UNITED STATES: APRIL 1, 2010 TO NOVEMBER 1, 2013 (2013), <http://www.census.gov/popest/data/state/totals/2012/tables/NA-EST2012-01.csv> (last visited Apr. 18, 2014).

¹⁶² See *infra* notes 186–87 and accompanying text.

¹⁶³ Multpl.com, *US Real GDP*, <http://www.multpl.com/us-gdp-inflation-adjusted/> (last visited Apr. 18, 2014).

¹⁶⁴ Sara Elizabeth Jensen, *Policy Tools for Wildland Fire Management: Principles, Incentives, and Conflicts*, 46 NAT. RESOURCES J. 959, 959–60 (2006).

¹⁶⁵ The idea has been much discussed by, for example, evolutionists. See, e.g., Daniel W. McShea, *Complexity and Evolution: What Everybody Knows*, 6 BIOLOGY & PHILOSOPHY 303, 303 (1991) (explaining the consensus among evolutionists that the “complexity of organisms increases in evolution”).

¹⁶⁶ A part of the original Act that dealt with one specific area—the Boundary Waters Canoe Area in northern Minnesota—did not settle the question of how it should be managed. After continuing controversy and litigation, in 1978 Congress repealed those special provisions and substituted new ones. See Pub. L. No. 95-495, 92 Stat. 1649. The Colorado Wilderness Act of 1980 contained a provision that required the Wilderness Act’s provisions on livestock grazing to be “interpreted and administered in accordance with the guidelines contained in” the House Report accompanying that Act. Pub. L. No. 96-560, 94 Stat. 3271, §108. This language has been routinely incorporated into all subsequent statutes designating BLM and Forest Service areas as part of the NWPS. See Mark Squillace, *Grazing in Wilderness Areas*, 44 ENVTL. L. 415, 433 (2014). This came about because congressional committees had twice admonished the Forest Service in the 1970s that it was being too strict on grazing in NWPS areas. When the agency indicated it would likely ban rangeland improvements and use of motorized equipment to tend and transport livestock if an area went into the NWPS, it threatened to stall expansion of the NWPS.

is unlike most of the major conservation and environmental laws enacted in the last half-century, which Congress has revisited from time to time for fine-tuning or, sometimes, for major overhauling.¹⁶⁷

This durability is, in part, a credit to the skill and foresight of the Act's framers. They understood the inevitability of change. Indeed, they noted in the Act itself that it was designed to "assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States."¹⁶⁸ They built into the Act a mechanism for providing some flexibility. As the gatekeeper for adding areas to the NWPS, Congress has an ongoing opportunity, when it crafts statutes that add particular areas, to define how they will be managed.

Congressional tailoring of the management of particular areas has, however, not been as significant as one might have expected. True, some statutes adding specific areas to the NWPS make minor accommodations or exceptions for particular uses or intrusions.¹⁶⁹ Significant changes are, however, rare. The most notable example of such accommodation is, not surprisingly, found in the mammoth additions to the NWPS made by the Alaska National Interest Land Conservation Act (ANILCA)¹⁷⁰ in 1980. That single statute not only more than doubled the size of the NWPS, but also made several management adjustments, compared to lands in the lower forty-eight states, to address such things as subsistence hunting and fishing by rural Alaska residents, mostly Alaska Natives.¹⁷¹

In short, so far at least, the Act's framework has been remarkably durable. Congress has very rarely tinkered in any significant way with the protection given to NWPS areas. Moreover, it has never removed an entire area from the system.

Even though the Wilderness Act has not formally changed, many of its features have been modified in practice. To begin with, the legal definition of wilderness has undergone some refinement. As noted earlier, its eloquent

The root of the problem was a conflict between the Act's general ban on motorized equipment in NWPS areas, and its provision that established livestock grazing should be "permitted to continue subject to . . . reasonable regulations." Eventually a compromise arrangement, allowing upkeep of improvements and use of motorized equipment where it had been customary, was brokered by long-time House wilderness staff member Andy Wiessner. There was some delicacy in how this arrangement was to become binding; statutes adding lands to the NWPS generally incorporated the guidelines, but did so expressly "without amending the Wilderness Act." See ROTH, *supra* note 49, at 67–69.

¹⁶⁷ See, e.g., Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, 104 Stat. 2399.

¹⁶⁸ 16 U.S.C. § 1131(a) (2006).

¹⁶⁹ For example, the designation of a number of NWPS areas near military lands included special language permitting certain kinds of military activities, such as low-level overflights and the establishment of flight training routes over the areas. See, e.g., Arizona Desert Wilderness Act of 1990, Pub. L. No. 101-628 § 101(i), 104 Stat. 4469, 4474 (codified as amended at 16 U.S.C. § 1132(e) (2006)).

¹⁷⁰ 16 U.S.C. §§ 3101–3233 (2006).

¹⁷¹ See, e.g., *id.* § 3121(b) (directing the federal agencies to permit, "[n]otwithstanding any other provision of . . . law, . . . appropriate use for subsistence purposes of snowmobiles, motorboats, and other means of surface transportation traditionally employed for such purposes by local residents.").

phrasing was not without ambiguity, through its use of such qualifying phrases as “generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable.”¹⁷² This language left unresolved whether “wilderness” can be restored—whether lands once logged or traversed by a road or otherwise bearing some significant imprint of man’s actions can become eligible for the NWPS as the imprint fades.

This question, sidestepped in the deliberations over the original Wilderness Act by Senator Church’s proposal,¹⁷³ came up fairly quickly after the Wilderness Act was signed into law. The context was a debate over whether to put into the NWPS relatively wild lands in the east that had been logged many decades earlier.¹⁷⁴ The exemplar was a mostly open area in the forests of the Allegheny Mountains in northeastern West Virginia called Dolly Sods.¹⁷⁵ It had been heavily logged around the turn of the twentieth century, before the United States purchased it and put it in the Monongahela National Forest.¹⁷⁶ Then the Army used it for maneuvers, including artillery and mortar practice, in World War II.¹⁷⁷ In the 1950s, after unexploded munitions that could be located were removed, the area became a popular backpacking destination, with many of the hiking trails on old logging roads or railroad grades.¹⁷⁸

Wilderness champions inside and outside the government were divided on the issue.¹⁷⁹ Wilderness opponents favored a narrow view, because they wanted to limit the size of the system.¹⁸⁰ The U.S. Forest Service initially resisted the idea of “wilderness by restoration.” In 1971 it promoted a new legislative designation to protect some of the wild qualities of such areas, called “wild areas east.”¹⁸¹ The designation would have allowed some timber harvesting to “improve” wildlife habitat and recreation.¹⁸² The Senate endorsed the Forest Service idea in 1972, but opposition from wilderness advocates killed it.¹⁸³ Finally, in 1975, Congress settled the debate by adding

¹⁷² 16 U.S.C. § 1131(c) (2006).

¹⁷³ See Dant, *supra* note 121.

¹⁷⁴ See TURNER, *supra* note 2, at 84–90. Purity is defended in William A. Worf, *Two Faces of Wilderness—A Time for Choice*, 16 IDAHO L. REV. 423, 423–30 (1980); and criticized in Jeffrey P. Foote, *Wilderness—A Question of Purity*, 3 ENVTL. L. 255 (1973).

¹⁷⁵ See TURNER, *supra* note 2, at 85–86. The unusual name derives from the combination of an 18th century homesteading family from Germany (Dahle) and a local term for high mountain meadows (sods). Ernest F. Imhoff, *Land of Spruce and Mortar Shells Wilderness: Dolly Sods in West Virginia is a Harsh, Windy Area that Boasts Rare Plants—and Unexploded Munitions*, BALTIMORE SUN, Mar. 17, 1998, http://articles.baltimoresun.com/1998-03-17/news/1998076018_1_sods-wilderness-dolly-sods-trees (last visited Apr. 18, 2014).

¹⁷⁶ TURNER, *supra* note 2, at 85.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 85–86.

¹⁷⁹ *Id.* at 86–88.

¹⁸⁰ SCOTT, *supra* note 21, at 67–68.

¹⁸¹ *Id.* at 68.

¹⁸² *Id.*

¹⁸³ *Id.* at 68, 71.

fifteen areas in Eastern National Forests to the NWPS.¹⁸⁴ By making it clear that “wilderness” as defined in the original Wilderness Act was broad enough to encompass previously logged areas, Congress effectively enlarged the pool of federal lands eligible for the NWPS.¹⁸⁵ Time, perhaps aided by human intervention—such as by “putting roads to bed”—can erase visible human impacts on the landscape. And that means, in turn, that a standard argument for wilderness protection—that the pool of candidate areas can only shrink, and not grow—is not exactly true.

A related development came three years later, in the so-called Endangered American Wilderness Act. It put in the NWPS several national forest areas the Forest Service had not recommended because they were within the viewshed and soundshed of major urban centers like Albuquerque, Salt Lake City, and Tucson. The key congressional committee report on these bills explicitly rejected the agency’s “sights and sounds” doctrine, and took the position that the accessibility of such areas to large urban populations actually enhanced their value as wilderness.¹⁸⁶

In hindsight, the significance of these congressional actions in 1975 and 1978 cannot be overstated. Had the Congress accepted the purist view, the NWPS would likely be considerably smaller than it is today, with considerably fewer supporters.

The malleable application of wilderness Congress adopted in 1975 and 1978 could, of course, have been taken to extremes. So long as the decision to put an area in the NWPS is a political judgment for the Congress, one might suppose that any area—no matter how developed or impacted by outside sights and sounds—might end up in the NWPS. But the Act’s definition of wilderness and tradition have, so far, combined to restrain Congress from following what former House Interior Committee Chair Morris Udall once puckishly described as then Interior Secretary James Watt’s definition of wilderness—“a parking lot with no yellow lines.”¹⁸⁷

B. The Emergence of Categories of Protection for Land’s Wild Qualities

While including eastern lands in the NWPS was a victory for a single wilderness system, that simplicity has not survived. Over time, the Act’s legal protection for wild qualities has evolved into at least four formal categories, plus a fifth more informal one. This means that the 110 million

¹⁸⁴ *Id.* at 71. The statute also mandated the study for possible inclusion of seventeen other areas. Because of a clerical error, the title “Eastern Wilderness Areas Act” was omitted from the bill, which has no section one where the title should have been. *See id.*

¹⁸⁵ *Id.*

¹⁸⁶ H. Rep. No. 95-540, 95th Cong. 1st Sess. at 5 (1977). *See* ROTH, *supra* note 49, at 52–55. The bill was Pub. L. No. 95-200 (1978). *See* Wilderness Soc’y, THE WILDERNESS ACT HANDBOOK 25–26 (40th Anniversary ed. 2004).

¹⁸⁷ *See* Op.-Ed., *Partisan in the Parks*, N.Y. TIMES, Apr. 22, 1983, available at <http://www.nytimes.com/1983/04/22/opinion/partisan-in-the-parks.html?pagewanted=print> (noting that Watt, no fan of the Wilderness Act, was President Reagan’s first Secretary of the Interior).

acres in the NWPS are only a fraction of the lands being managed, under the influence of the Wilderness Act, primarily to protect their wild qualities.

The first category is the original one: lands in the NWPS, designated by Congress.¹⁸⁸ This category also includes areas that Congress has labeled “potential wilderness,” which are included in the NWPS without further action by Congress once the managing agency declares that certain non-conforming uses within their boundaries have ceased to exist.¹⁸⁹

The second category includes those lands that the Wilderness Act itself specifically directed be studied for possible inclusion—roadless areas under the jurisdiction of the National Park Service and U.S. Fish and Wildlife Service, and U.S. Forest Service “primitive” areas not already in the NWPS.¹⁹⁰ For a long time, the National Park Service remained somewhat unenthusiastic about seeking to put its land in the NWPS.¹⁹¹ It was not until 1970 that some national park areas were first included in the NWPS, and progress since then has been rather modest.¹⁹² The agency’s footdragging extended to successfully resisting a lawsuit brought by the Wilderness Society to force completion of the studies.¹⁹³ While in recent years the agency has been somewhat more energetic in pursuing NWPS designations for its lands, still today, such large and relatively wild parks like Yellowstone, Glacier, and Grand Canyon include no NWPS areas, even though NWPS units are often found on nearby land managed by other agencies.¹⁹⁴ To some extent, wilderness advocates outside the agency are responsible for this slow progress. They have not placed a high political

¹⁸⁸ 16 U.S.C. § 1132(a) (2006).

¹⁸⁹ “Potential wilderness” so far includes only areas managed by the National Park Service. The category was apparently first used in 1976. *See* Pub. L. No. 94-567, 90 Stat. 2693. For a recent example, see section 1851(c) of the Omnibus Public Land Management Act of 2009, designating a potential wilderness in Joshua Tree National Park once nonconforming uses have ceased and sufficient inholdings have been acquired to establish a “manageable wilderness unit.” A “potential wilderness” area around Drake’s Bay in Pt. Reyes National Seashore figured prominently in a notorious and bitter dispute over whether an oyster company should be allowed to continue to operate, a dispute which divided environmentalists and led to hard-fought litigation, moving toward conclusion as of this writing. *Drakes Bay Oyster Co. v. Jewell*, No. 13-15227, 2014 WL 114699 (9th Cir. 2014). At least once Congress has used the phrase “intended wilderness” to mean the same thing as “potential wilderness.” Pub.L.No. 94-357, 90 Stat. 906 (Alpine Lakes Area Management Act).

¹⁹⁰ 16 U.S.C. § 1132(a)–(b) (2006).

¹⁹¹ *See* KEITER, *supra* note 36, at 22–23; SELLARS, *supra* note 162.

¹⁹² *Id.*

¹⁹³ *Wilderness Soc’y v. Norton*, 434 F.3d 584, 587 (D.C. Cir. 2006); KEITER, *supra* note 36, at 23. As early as 1972 wilderness advocates were lamenting the Park Service’s “lack of enthusiasm for the whole wilderness process.” McCloskey, *supra* note 104, at 359. At the other end of Pennsylvania Avenue, the Congress has itself moved at a fairly glacial pace in responding to executive branch recommendations to add Park system areas to the NWPS. Recommendations totaling nearly six million acres have been pending before Congress for several decades.

¹⁹⁴ KEITER, *supra* note 36, at 22; SELLARS, *supra* note 141.

priority on including park areas in the NWPS, because they are already generally protected by both agency policy and agency regulation.¹⁹⁵

The third category includes areas of federal land that, while not formally part of the NWPS, are subject to a specific congressional requirement that they be managed essentially to preserve their wilderness qualities, until Congress provides otherwise. These are NWPS candidate “areas in waiting,” and might be dubbed congressionally-designated wilderness study areas, or CWSAs.¹⁹⁶ The largest component of lands in this category is currently nearly thirteen million acres of federal lands managed by BLM.¹⁹⁷ These lands were identified as having “wilderness characteristics” and are being managed as WSAs under the terms of section 603 of the Federal Land Policy & Management Act of 1976.¹⁹⁸ By specifically mandating that these areas generally be managed “in a manner so as not to impair the[ir] suitability . . . for preservation as wilderness,” until Congress “has determined otherwise,” Congress gave these areas more protection than it gave to areas singled out for “study” in the original Wilderness Act.¹⁹⁹ This category also includes some lands in the Tongass National Forest in Alaska, and some lower forty-eight national forest areas like the Palisades WSA south of Teton Pass in Wyoming, designated by Congress in 1984.²⁰⁰

The fourth category includes federal lands that the pertinent federal agency has officially determined will be managed essentially or nearly as wilderness, through a formal regulation, a management plan, or some other kind of specific executive branch designation.²⁰¹ Lands in this category differ from lands in the second and third categories because here it is the agency, and not Congress, that has required wilderness-like management.²⁰² This means that not just Congress, but the agency itself, can repeal or modify the protections afforded for lands in this category. This is in fact the largest category of wildlands outside the NWPS.²⁰³ By far the largest component of

¹⁹⁵ ALLIN, *supra* note 2, at 270; *see generally* NAT'L PARK SERV., 2006 MANAGEMENT POLICIES, WILDERNESS PRESERVATION MANAGEMENT ch. 6 (2006).

¹⁹⁶ The first legislative use of the term “wilderness study area” that was accompanied by such protection was apparently the act including several areas in the eastern United States in the NWPS in 1975. Act of Jan. 3, 1975, Pub. L. No. 93-622, § 3(a), 88 Stat. 2096, 2097. TURNER, *supra* note 2, at 424 n. 82.

¹⁹⁷ Bureau of Land Mgmt., *Wilderness Study Areas*, http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/wilderness_study_areas.html (last visited Apr. 18, 2014).

¹⁹⁸ 43 U.S.C. § 1782(a) (2006). *See generally* Leshy, *supra* n. 157.

¹⁹⁹ 43 U.S.C. § 1782(c) (2006).

²⁰⁰ *See* Tongass Timber Reform Act of 1990, Pub. L. No. 101-626, 104 Stat. 4426, where Congress laid a statutory layer of protection over some 720,000 acres of land in the Tongass that had been protected in a forest plan; and Pub. L. No. 98-550 (1984), 98 Stat. 2810 (creating Palisades WSA).

²⁰¹ GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LANDS AND RESOURCES LAW 965-67 (7th ed. 2014).

²⁰² *Id.*

²⁰³ *Id.* at 966.

this “wilderness-lite” category is the lands subject to the National Forest Roadless Rule, discussed further below.²⁰⁴

The fifth, informal category includes lands with qualities that arguably meet the Wilderness Act’s definition of wilderness, but which have been given no formal or official recognition of that fact, by either Congress or the managing federal agency.²⁰⁵ Lacking such recognition, lands in this category generally remain legally open to wilderness-destroying actions, at least so long as other applicable legal requirements are met.²⁰⁶ This may be labeled “de facto” wilderness.²⁰⁷ Unlike the first four categories, this one has no readily determined size, but is more in the eye of the beholder.²⁰⁸ Wilderness advocacy groups outside the government have in recent years conducted their own “citizens’ inventories” of such lands in many states and published the results. The most prominent of these is in Utah, discussed further below.

C. The Question of Minimum Size

Closely related to the last category of “de facto” wilderness is the question whether tracts of land should have a minimum acreage in order to be eligible for protection as wilderness. The smaller NWPS areas can be, the more “de facto” wilderness there can be and, to wilderness advocates, the larger the amount of unfinished business for Congress.

The guidance the Wilderness Act itself provides on the minimum size issue is less than clear-cut. It defined wilderness as having “at least five thousand acres of land or . . . of sufficient size as to make practicable its preservation and use in an unimpaired condition.”²⁰⁹ As noted earlier, the Act also directed the Interior Secretary to review “every roadless area of five thousand contiguous acres or more” in units of the national park system, and “every such area of, and every roadless island within,” national wildlife refuge system units.²¹⁰ Congress used the same rule of thumb when, in 1976, it directed the Bureau of Land Management to identify “those roadless areas of five thousand acres or more and roadless islands” that have wilderness characteristics.²¹¹

²⁰⁴ See *infra* Section V(A).

²⁰⁵ *Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1077–78 (9th Cir. 1994).

²⁰⁶ The federal courts have, for example, decided that while agencies do not have to manage de facto wilderness lands to protect their wild qualities, any wilderness-impairing actions have to be evaluated under laws like the National Environmental Policy Act, requiring the managing agency to study the impact of proposed changes that may have a significant environmental effect. *Id.* at 1078.

²⁰⁷ *Id.* at 1079.

²⁰⁸ Some federal land management agencies have evolved even more complex typology. See NATIONAL PARK SERVICE, REFERENCE MANUAL #41 (2013), available at http://www.nps.gov/policy/Reference%20Manual%2041_rev.htm (which includes categories like proposed wilderness, proposed potential wilderness, recommended wilderness, and recommended potential wilderness).

²⁰⁹ 16 U.S.C. § 1131(c)(3) (2006).

²¹⁰ *Id.* § 1132(c).

²¹¹ 43 U.S.C. § 1782(a) (2006).

Five thousand acres is about eight square miles. Obviously the smaller the area, the less solitude and other wilderness values might be present. Leopold and Marshall, pioneers of the wilderness movement, did not have a rigid definition.²¹² Marshall once wrote that tracts as small as a thousand acres could have primeval conditions of value to science, and more than one hundred scientists agreed in a 1997 letter to President Clinton.²¹³

While Congress's study directives have generally adhered to the 5,000-acre minimum (other than for islands), Congress's decisions to include areas in the NWPS do not apply a rigid standard.²¹⁴ According to one estimate, about fifty NWPS areas, or one out of every fifteen, are freestanding tracts of fewer than 5,000 acres, and not islands.²¹⁵

D. Evolving Threats to Existing and Potential NWPS Areas

The nature of threats to wild areas has changed substantially since 1964. Many of the compromises, exemptions, and grandfather clauses written into the Wilderness Act have proved to be rather inconsequential. One reason for this is the common congressional practice of gerrymandering the boundaries of NWPS areas to reduce the potential for conflict, by excluding places thought to contain high values for nonwilderness uses such as prime dam sites, geology favorable to minerals, or rich stands of timber.²¹⁶ Another reason is that NWPS areas are usually remote and in rugged or otherwise difficult to access terrain, increasing the costs of exploiting their

²¹² Aldo Leopold proposed a minimum size that would allow for a two-week pack trip, and in another memo suggested 250,000 acres. SUTTER, *supra* note 2, at 70, 72. The Forest Service's "U Regulations," issued through Bob Marshall's efforts in 1939, created a category of "wild areas," tracts between 5,000 and 100,000 acres, distinguished from "wilderness" areas, which were over 100,000 acres. *See id.* at 253.

²¹³ Andy Kerr, "Small" Wilderness: No Big Deal, at 4, <http://www.andykerr.net/storage/other-matters/uploads/LOP%208%20Small%20Wilderness.pdf> (last visited April 18, 2014).

²¹⁴ *Id.* at 2.

²¹⁵ *Id.* at 6–7. These small areas are scattered across about half the 50 states. *Id.*

²¹⁶ Congress gerrymandered 150,000 acres out of a NWPS area it established in the Misty Fjords National Monument in 1980, to make room for development of the Quartz Hill molybdenum deposit, thought to be one of the world's largest. *See* LESHY, *supra* note 70, at 227; *see also* Se. Alaska Cons. Council v. Watson, 697 F.2d 1305 (9th Cir. 1983). Only once, so far as I have been able to determine, has Congress, in adding an area to the NWPS, explicitly accommodated mineral development. A 1980 designation of the River of No Return Wilderness in Idaho included a "special management zone" that remains open to the location of claims for cobalt under the Mining Law of 1872, and makes cobalt development a "dominant use" of that land. Act of July 23, 1980, Pub. L. No. 96-312, § 5(d)(1), 94 Stat. 948. Protracted litigation has plagued proposals to mine under Montana's Cabinet Mountains Wilderness, but this is based on the determination that the mining claims, located before the area was put in the NWPS, are "valid existing rights." *See, e.g.,* Wilderness Soc'y v. Dombeck, 168 F.3d 367, 375–77 (9th Cir. 1999) (affirming the Forest Service's determination that the claims contained such rights); *see also* Southeast Alaska Cons. Council v. Watson, 697 F.3d 1305 (9th Cir. 1983). A debate over a proposed copper mine in the Glacier Peak Wilderness in Washington between geologist Charles Park and former Sierra Club Executive Director David Brower was recounted in John McPhee's classic ENCOUNTERS WITH THE ARCH-DRUID (1971).

resources.²¹⁷ A third reason is that developing resources of NWPS areas, even if technically allowable under the Act, likely face tougher regulation. This is because agencies, often spurred by the threat of litigation from wilderness advocates, usually work hard to minimize impacts on wild values.²¹⁸

A fourth reason is that efforts to exploit the exceptions to the Act to build dams or develop minerals trigger publicity and protest.²¹⁹ The political power of the “wilderness” label makes it difficult to persuade the general public to support building water projects or developing mines or related industrial facilities in NWPS areas. Here, one may find distinct echoes of the successful fight against the proposed Echo Park Dam in Dinosaur National Monument, and the eventual siting of the substitute dam in the undesignated Glen Canyon. The preservation ideal embodied in the Wilderness Act—zealously defended by wilderness advocates—has proved powerful enough to blunt the effect of the exceptions built into the Act’s plain terms. In short, the prospect that any proposal to exploit the Act’s exceptions would meet significant opposition and regulatory delay has helped ensure that few such ideas see the light of day.

The water project exception has never been invoked, although reportedly it took former President Gerald Ford lobbying President Ronald Reagan to kill a proposed water project in the Eagles Nest Wilderness above Vail, Colorado.²²⁰ None of the two Democratic and two Republican Interior Secretaries holding office between 1964 and 1981 ever proposed to lease minerals in NWPS areas during the twenty year “window” the Act provided. This changed when President Reagan appointed the flamboyantly libertarian James Watt in 1981. His strident efforts to issue oil and gas leases in NWPS areas prompted Congress, then still substantially influenced by wilderness champions like Morris Udall, to promptly close the window a couple of years ahead of schedule, by means of a rider attached to the Interior Department’s annual funding bill.²²¹ In contrast to the leasing exception, the exception

²¹⁷ See Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wilderness*, 34 ENVTL. L. 1015, 1043 (2004) (many NWPS areas are in remote locations, making resource extraction more difficult).

²¹⁸ See, e.g., Operations within National Forest Wilderness, 36 C.F.R. § 228.15 (2012) (special regulations applying to hardrock mining in Forest Service NWPS areas).

²¹⁹ LESHY, *supra* note 70, at 226–28 (quoting a mining company geologist as observing that “public opinion is the greatest enforcer of conservation measures.”).

²²⁰ The Denver Water Board long wanted to build a trans-basin diversion in the area. The lobbying effort to persuade President Reagan not to exercise this authority eventually involved not only former President Gerald Ford, on behalf of his fellow residents of Vail, but also Mrs. Joseph Coors. Eric Morgenthau, *Water Dispute Between Denver and Vail Gets Nasty, Boils Over into White House*, WALL ST. J., Aug. 21, 1981, at 21, col. 4; John D. Leshy, *Water and Wilderness Law and Politics*, 23 LAND & WATER L. REV. 389, 402, n.54 (1988).

²²¹ See 30 U.S.C. § 226-3 (2006). Some of the NWPS areas involved in the oil and gas leasing imbroglio were iconic, like the Bob Marshall Wilderness in Montana. But some were less known, like the Capitan Wilderness in New Mexico, a corner of which was leased, perhaps inadvertently, by the BLM in 1982. Disclosure of this in the New York Times, along with the fact that this was the location where the original Smokey the Bear cub had been rescued from a forest fire in the 1940s, helped convince the local member of Congress, Manuel Lujan (later to become President George H.W. Bush’s Secretary of the Interior) to join forces with Mo Udall and support the rider closing the leasing window. Senator Scoop Jackson led the charge in the

allowing for the location of new claims under the Mining Law of 1872 remained open the full twenty years, until the end of 1984. While a few claims continued to be located in NWPS areas, almost no mining has ever occurred.²²²

The Act's protection for existing domestic livestock grazing has proved more durable. Grazing continues to be a big presence in many NWPS areas.²²³ About half of the national forest wilderness areas have some livestock use; the proportion for BLM areas is almost certainly substantially higher.²²⁴ The Act provides that livestock grazing "where established prior to" an area's inclusion in the NWPS, "shall be permitted to continue subject to such reasonable regulations as are deemed necessary" by the Forest Service or the BLM.²²⁵ But it does not specifically address whether these agencies can initiate livestock grazing in NWPS areas where the use was *not* established prior to its inclusion in the NWPS. The question is, then, whether grazing of domesticated livestock is incompatible with the statutory definition of wilderness.²²⁶ No less a wilderness advocate than Aldo Leopold opined nearly a century ago that "cattle ranches [in wilderness] would be an asset from the recreational standpoint because of the interest which attaches to cattle grazing operations under frontier conditions," and that ranchers themselves would benefit from protection against "settlers and the hordes of motorists" which follow the construction of roads in formerly wild country.²²⁷

Senate, and with the help of House Appropriations Committee Chair Sidney Yates, outmaneuvered the Chair of the Senate Energy and Natural Resources Committee, James McClure of Idaho. *See* TURNER, *supra* note 2, at 234–37. Congress did allow the Interior Secretary to issue permits for mineral exploration in WSAs "by means not requiring construction of roads . . . if such activity is conducted in a manner compatible with the preservation of the wilderness environment" 30 U.S.C. § 226-3(b) (2006).

²²² *See* note 216 *supra*.

²²³ Michael P. McClaran, *Livestock and Wilderness: A Review and Forecast*, 20 ENVTL. L. 857, 857–58 (1990); Harold Shepard, *Livestock Grazing in BLM Wilderness and Wilderness Study Areas*, 5 J. ENVTL. L. & LITIG. 61 (1990); *see generally* DEBRA L. DONAHUE, *THE WESTERN RANGE REVISITED* 171–72 (1999).

²²⁴ *See* Bureau of Land Mgmt., *Frequently Asked Questions*, http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/wilderness2/Wilderness_FAQ.html (last visited Apr. 18, 2014).

²²⁵ 16 U.S.C. § 1133(d)(4) (2006).

²²⁶ One court has assumed that livestock grazing can be introduced into NWPS areas where it had not existed earlier. It did so, remarkably, in upholding a federal program to kill mountain lions in NWPS areas in order to protect that livestock grazing. *Forest Guardians v. Animal & Plant Health Inspection Serv.*, 309 F.3d 1141 (9th. Cir. 2002).

²²⁷ Aldo Leopold, *The Wilderness and Its Place in Forest Recreation Policy*, 19 J. FORESTRY 721 (1921). Wallace Stegner, a strong wilderness advocate, acknowledged that, if properly regulated to protect the environment, livestock grazing might be tolerated in wilderness:

I have known enough range cattle to recognize them as wild animals; and the people that herd them have, in the wilderness context, dignity and rareness; they belong on the frontier, moreover, and have a look of rightness. The invasion they make on the virgin country is sort of an invasion that is as old as Neanderthal man, and they can, in moderation, even emphasize a man's feeling of belonging to the natural world.

The Wilderness Idea, in *WILDERNESS: AMERICA'S LIVING HERITAGE* 100 (D. Brower ed., 1961).

Most ranchers have not bought into Leopold's suggestion that they may benefit from NWPS designation. It is much more common for ranchers to oppose expanding the NWPS. Their opposition can be influential, because ranchers exercise far more political power in many western states than their numbers suggest.²²⁸ This is also changing, albeit slowly. In part this is due to the changing makeup of the public land ranching industry. As traditional ranchers age, their offspring choose other livelihoods, and less traditional "amenity" ranchers—seeking a lifestyle and not a livelihood—buy them out. In part it is because livestock grazing in wilderness is often more expensive because of isolation and marginal forage.²²⁹ An emerging trend is for wilderness advocates to make deals with ranchers to buy out their permits in NWPS candidate areas and, in exchange, to gain their support—or at least their non-opposition—for including the areas in the NWPS. As a result of such arrangements, Congress has approved "cattle-free" wilderness in Steens Mountain and Cascade-Siskiyou in Oregon, Owyhee in Idaho, in the California Desert, and even in some areas in Utah.²³⁰

That water or mineral developments are nearly impossible in a NWPS area is, of course, not to say that their potential is irrelevant to areas that are eligible for NWPS protection. Each new area added to NWPS is effectively scrutinized for its potential for mining, water development, and logging.²³¹ As noted above, it is common for NWPS boundaries to be drawn in such a way as exclude likely prospects for mineral or water development, or stands of trees with significant commercial value.²³²

Altogether, however, the threats of mining, grazing, logging and water projects have become somewhat overshadowed by a huge new challenge, one that was not in the picture in 1964—the all terrain or off road vehicle (ORV).²³³ Its roots go back more than a century, and were fed by the availability of Army surplus jeeps after World War II,²³⁴ but the modern ORV burst on the scene only after the Wilderness Act became law. It comes in many varieties, with two, three or four wheels, generally characterized by large tires with deep, open treads, a flexible suspension, high clearance, low gearing, and a powerful engine.²³⁵ It allows sightseeing in areas far from paved roads. The rise of the ORV and its cousins—snowmobiles and jet skis—means, as the title of the leading book on the subject put it, there is

²²⁸ See generally DONAHUE, *supra* note 223, at 70–73.

²²⁹ See generally COGGINS ET AL., *FEDERAL PUBLIC LAND & RESOURCES LAW* 773-75 (7th ed. 2014).

²³⁰ See John D. Leshy & Molly S. McUsic, *Where's the Beef: Facilitating Voluntary Retirements of Federal Land from Livestock Grazing*, 14 N.Y.U. ENVTL. L.J. 368, 387–88 (2008).

²³¹ See, e.g., TURNER, *supra* note 2, at 267–89, 397–99.

²³² 3 GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 25:3 (West 2d ed. 2007).

²³³ DAVID HAVLICK, *NO PLACE DISTANT: ROADS AND MOTORIZED RECREATION ON AMERICA'S PUBLIC LANDS* (2002); Jan G. Laitos & Rachael B. Gamble, *The Problem With Wilderness*, 32 HARV. ENVTL. L. REV. 503, 527 (2008).

²³⁴ Jason Tanz, *DRIVING: Making Tracks, Making Enemies*, N.Y. TIMES, Jan. 2, 2004, <http://www.nytimes.com/2004/01/02/travel/driving-making-tracks-making-enemies.html?page=wanted=all&src=pm> (last visited Apr. 18, 2014).

²³⁵ HAVLICK, *supra* note 233, at 108–09.

“No Place Distant.”²³⁶ Practically nonexistent in 1964, today there are upwards of six million of these machines in use.²³⁷

ORVs, being “motorized vehicles,” “motorized equipment,” and a “form of mechanical transport,” are clearly forbidden in NWPS areas by the Act.²³⁸ But their proliferation has made them a major consideration when proposals are made to expand the NWPS. As Paul Sutter wrote, these new forms of motorized transport have become, to modern wilderness politics, what the automobile was to wilderness politics in the years before and shortly after World War II.²³⁹ Then, the focus was fighting proposals to build roads to allow travel by ordinary vehicles.²⁴⁰ Now, in many kinds of wild terrain, roads need not be “constructed,” for ORVs themselves can make the roads, and in the process can destroy an area’s wilderness qualities.

The framers of the Wilderness Act, so motivated by the threat of vehicular intrusions into wild areas, and so forward-thinking in many ways, did not anticipate the ORV threat. Indeed, as noted above, they did not even bother to define what a “road” is.²⁴¹ The framers were primarily concerned with the visual and auditory intrusions that roads bring to wild areas.²⁴² That of course remains a central concern, although since 1964, knowledge has accumulated about the other adverse impacts of roads, on drainage, wildlife dispersal and migration patterns, and air and water quality.²⁴³

This makes the definition of “road” a very important issue in the politics of expanding the NWPS. Many federal lands are traversed by jeep tracks created substantially or solely by vehicular use.²⁴⁴ More are steadily being

²³⁶ *Id.*

²³⁷ U.S. DEP’T OF AGRIC., OFF-HIGHWAY VEHICLE RECREATION IN THE UNITED STATES AND ITS REGIONS AND STATES: AN UPDATE NATIONAL REPORT FROM THE NATIONAL SURVEY ON RECREATION AND THE ENVIRONMENT 9 (2008), *available at* <http://www.fs.fed.us/recreation/programs/ohv/IrisRecIrpt.pdf>.

²³⁸ 16 U.S.C. § 1133(c) (2006).

²³⁹ SUTTER, *supra* note 2, at 257; Laitos & Gamble, *supra* note 233, at 527–28.

²⁴⁰ *See, e.g.,* SUTTER, *supra* note 2, at 70–72, 126–29, 216–18.

²⁴¹ In the statutory vacuum, agencies have evolved their own definitions of “road” which are similar, but not identical. *See, e.g.,* 43 C.F.R. § 19.2(e) (2010) (Fish and Wildlife Service and Park Service definition of “roadless area” to mean, among other things, where there is “no improved road that is suitable for public travel by means of four-wheeled, motorized vehicles intended primarily for highway use”). The Forest Service defines “roadless area” as an area “within which there are no improved roads maintained for travel by means of motorized vehicles intended for highway use.” *Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1076 (9th Cir. 1994). The BLM’s definition comes from the House Committee Report on its governing statute, FLPMA, which defined “road” narrowly, to include only those vehicle tracks “which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.” H. R. Rep. No. 94-1163, at 17 (1976). In 2006, however, the BLM unhelpfully muddled the waters by adopting a provision in its Manual (not a formal regulation) that creates a category of “primitive road,” which is defined similarly to a “way” in the FLPMA legislative history; i.e., “maintained solely by the passage of vehicles.” Its effect is to open up a much larger area of lands under its supervision to all-terrain vehicle travel. Instruction Memorandum No. 2006-173 (2006).

²⁴² ALLIN, *supra* note 2, at 102–08, 115–36.

²⁴³ This field of study was captured in the path-breaking, interdisciplinary book, *ROAD ECOLOGY: SCIENCE AND SOLUTIONS* (R.T.T. Forman et al. eds., 2003).

²⁴⁴ *See* 36 C.F.R. pt. 294 (2013).

created by ORV use.²⁴⁵ If these are “roads,” the areas they traverse may not fit the Wilderness Act’s criteria. While the Wilderness Act does not itself provide a ready way to control the impacts of ORVs on areas that are candidates for inclusion in the NWPS,²⁴⁶ other laws and regulations may. A federal court, applying an Executive Order signed by President Nixon and BLM regulations implementing it, has recently ruled that BLM failed to live up to its obligation to minimize the impact of ORV use to protect environmental and related values on several million acres of land in Utah.²⁴⁷ This decision was not based on the Wilderness Act, but it could, if followed by other courts and obeyed by the BLM, have a significant impact on whether NWPS protection might eventually be applied to such areas.

The rise of the ORV and the related concern about how to define “road” have combined to throw a spotlight on an obscure federal law, enacted as part of the Mining Act of 1866.²⁴⁸ This provision, quaintly called R.S. 2477,²⁴⁹ extended a simple invitation to all comers to establish transportation networks on federal land: “The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.”²⁵⁰ These scant twenty words have emerged as a major obstacle to expanding the NWPS, particularly on the Colorado Plateau and in Alaska. That this should happen is in one sense remarkable, because Congress repealed R.S. 2477 twelve years after adopting the Wilderness Act.²⁵¹

But the repeal was, as is often the case, expressly made “subject to valid existing rights.”²⁵² Sadly, R.S. 2477 never required any paperwork or other formal means to establish that such “highways” had in fact been “constructed” to qualify as acceptance of the federal invitation.²⁵³ Moreover, no statute of limitations applies to bar the assertion of old R.S. 2477 claims.²⁵⁴ Wilderness opponents, including many local governments and the states of Utah and Alaska, have seized the opening created by these shortcomings to assert R.S. 2477 claims throughout areas that are candidates for NWPS protection.²⁵⁵ Their objective, not disguised, is to thwart expansion of the

²⁴⁵ See, e.g., HAVLICK, *supra* note 233, at 86–100.

²⁴⁶ Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 66 (2004).

²⁴⁷ S. Utah Wilderness Alliance v. Burke, No. 2:12CV257DAK, 2013 WL 5916815, at *1–2, *19 (D. Utah Nov. 4, 2013).

²⁴⁸ Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, 253, *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793.

²⁴⁹ The label derives from its codification as Revised Statute 2477 in a nineteenth century compendium of federal laws. R.S. 2477 (1875).

²⁵⁰ *Id.*

²⁵¹ The repeal was part of the general cleanup of old public land laws in the Federal Land Policy and Management Act of 1976. See Pub. L. No. 94-579, §§ 701–706, 90 Stat. 2743, 2786–94.

²⁵² *Id.* § 701(h), 90 Stat. 2743, 2786.

²⁵³ See R.S. 2477; S. Utah Wilderness Alliance v. Bureau of Land Mgmt. (*SUWA*), 425 F.3d 735, 741 (10th Cir. 2005).

²⁵⁴ See R.S. 2477.

²⁵⁵ See Steve Bloch, *RS 2477 Update: Laying Solid Legal Groundwork*, REDROCK WILDERNESS: NEWSLETTER OF THE S. UTAH WILDERNESS ALLIANCE, Autumn/Winter 2013, at 16, *available at* http://action.suwa.org/site/DocServer/Autumn-Winter_2013_WEB.pdf?docID=11561; see also *SUWA*, 425 F.3d at 742.

NWPS. In June 2013, the state of Utah filed twenty-two lawsuits asserting more than 14,000 claims covering tens of thousands of miles.²⁵⁶ A key court previously ruled that each such claim must be litigated in federal court, segment by segment.²⁵⁷ The result threatens to provide employment for many lawyers on all sides for several decades.

E. Fabulous Success

Perhaps the most notable thing about implementation of the Wilderness Act is how the NWPS has grown by leaps and bounds. From the original fifty-four charter areas comprising nine million acres,²⁵⁸ it now includes more than 750 areas extending over nearly 110 million acres,²⁵⁹ a fifteen-fold increase in the number of areas, and a twelve-fold increase in acreage. Originally thirteen states were represented in the system.²⁶⁰ Today, there are wilderness areas in forty-four states across the country.²⁶¹ The NWPS includes nearly one out of every six acres of federal land administered by the four federal land agencies, and almost one out of every twenty acres in the entire United States.²⁶²

Significantly, the vast majority of these additions did not result from the 1964 Act's agency study process. Proposals to add lands to the NWPS were freely formulated by conservationists and steered through Congress by friendly members, sometimes over the opposition of the managing federal agency.²⁶³ The spread of the NWPS across the country has responded to Leopold's call, made in one of his earliest writings on the subject, for wilderness areas in each state in order to make the "wilderness experience more accessible to those who desired it."²⁶⁴ While many of these proposals were based at least in part on agency inventories, some were based on "citizen inventories," conducted by wilderness advocates outside the agency. Often, a threat of resource development spurred wilderness advocates and supporters in Congress to work to enact legislation putting the threatened lands in the NWPS. When the New York Port Authority eyed New Jersey's Great Swamp, a National Wildlife Refuge, as the site of an airport, opponents

²⁵⁶ See Bloch, *supra* note 255.

²⁵⁷ *SUWA*, 425 F.3d at 757 (holding that BLM did not have primary jurisdiction to make the determinations administratively). The impact of this ruling on wild values is uncertain. On the one hand, it means that judgments about the validity of these claims by federal land managing agencies like BLM would receive no deference from the courts. On the other hand, it raises the cost for the claimants, because it means they must carry the burden of showing the validity of each claim bit by bit.

²⁵⁸ Wilderness Soc'y, *Wilderness Act*, <http://wilderness.org/article/wilderness-act> (last visited Apr. 18, 2014).

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² CAROL HARDY VINCENT, CONG. RESEARCH SERV., RL 32393, FEDERAL LAND MANAGEMENT AGENCIES: BACKGROUND ON LAND AND RESOURCE MANAGEMENT 2 (2004), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32393.pdf>.

²⁶³ See generally TURNER, *supra* note 2, at 112–26, 217–22.

²⁶⁴ SUTTER, *supra* note 2, at 79.

successfully persuaded Congress to put about 3,700 acres in the NWPS in 1968, the first refuge lands to be so designated.²⁶⁵ Other threats prompted advocates to push the Endangered American Wilderness Act through Congress in 1978.²⁶⁶

In acreage terms, the vast bulk of NWPS expansion has come in Alaska, mostly through the landmark Alaska National Interest Land Conservation Act of 1980, or ANILCA, which in a single stroke tripled the size of the NWPS.²⁶⁷ It put, for example, 18.5 million acres of National Wildlife Refuge land in the NWPS (more than twenty times the acreage of Refuge land in the NWPS in the lower forty-eight); thirty-two million acres of National Park System land (ten times the amount of NPS acreage in the NWPS in the lower forty-eight), as well as five million acres of national forest lands.²⁶⁸ Even today, with substantial additions to the NWPS in the lower forty-eight states since 1980, Alaska still accounts for more than half of the total NWPS acreage (fifty-seven million acres, in forty-eight units).

The scale of the NWPS likely exceeds even the most optimistic expectations of the framers of the Wilderness Act. But it would be a mistake to measure the Act's success only by lands formally part of the NWPS. The Act's legacy fairly includes acreage in various study phases for NWPS consideration, described above, as well as acreage being managed substantially to preserve roadless qualities, like the lands subject to the Forest Service's Roadless Rule, discussed further below. When these other lands—managed largely for protection of their wild qualities in the shadow of the Wilderness Act—are included, the total approaches two hundred million acres, or nearly 10% of the land area in the nation. All told, the Act is a majestic achievement, truly remarkable for a nation with a deep commitment to economic development, rapid transportation and private property rights, and infused with a distrust of government, particularly the national government.

V. CHANGES IN FEDERAL LAND POLICY SINCE 1964

As the Wilderness Act evolved through implementation, the rest of the federal land management world did not stand still. To the contrary, it changed too, in ways that have had, and will continue to have, significant impact on the future of legal wilderness.

²⁶⁵ See TURNER, *supra* note 2, at 61–65; Great Swamp Wilderness Act, Pub. L. No. 90-532, 82 Stat. 883 (1968).

²⁶⁶ See ALLIN, *supra* note 2, at 186, 192–93.

²⁶⁷ 16 U.S.C. §§ 3101–3233 (2006); NASH, *supra* note 2, at 273. Alaska contained no charter NWPS areas. Besides the massive additions in ANILCA, Congress included some areas in southeast Alaska in the NWPS in the Tongass Timber Reform Act of 1991. Pub. L. No. 101-626, § 202; 16 U.S.C. § 539d (2006). Bob Marshall, who spent many months in Alaska, had decades earlier grasped the scale of the opportunity it afforded for wildland protection. NASH, *supra* note 2, at 288.

²⁶⁸ Craig Allin devotes an entire chapter of *The Politics of Wilderness Preservation* to ANILCA. See ALLIN, *supra* note 2, at 206–65.

A. Broadening of Agency Authorities and Appetites to Protect Natural Values on Their Lands Outside the Wilderness Act's Umbrella

The four major federal land management agencies—the Forest Service, Park Service, Fish & Wildlife Service, and Bureau of Land Management—have undergone some very significant changes since 1964.²⁶⁹ Two of these changes are particularly noteworthy. One has to do with the agencies' general management responsibilities. The other involves the proliferation of the practice of labeling particular tracts of land under their care for special kinds of management. Each is addressed in turn.

The marching orders of the agencies are much less distinct from each other than they were in 1964. There are still some important differences, to be sure. The Forest Service and the BLM operate under a “multiple use” mandate,²⁷⁰ where all kinds of uses—up to and including mining, energy development, timber harvesting, livestock grazing—are allowed.²⁷¹ By contrast, the National Park Service and the U.S. Fish & Wildlife Service are legally considered “dominant use” agencies, with NPS primarily tasked with protecting nature for future generations and serving visitors, while the USFWS focuses primarily on protecting wildlife and their habitat, while promoting wildlife-related recreation.²⁷² Mineral development and commercial logging are generally forbidden in the park system, and greatly discouraged in the wildlife refuge system.²⁷³

But there remains an enormous degree of commonality among the four agencies' management. Each of these agencies still has authority to build roads and take numerous other actions that can destroy “wilderness” qualities.²⁷⁴ More important for present purposes, however, is the other side

²⁶⁹ See *infra* notes 270-82 and accompanying text.

²⁷⁰ For example, Congress finally gave BLM a governing charter in the Federal Land Policy & Management Act of 1976 (FLPMA). 43 U.S.C. § 1731 (2006). Like the basic laws governing the Forest Service, FLPMA speaks of “multiple use” and achieving “sustained yield” of the renewable resources under BLM's care. Compare 16 U.S.C. § 529 (2006) (delineating Forest Service's management authority), with *id.* § 1732 (delineating BLM's management authority). The key concepts are defined a little differently. Compare 16 U.S.C. § 531(a), (b) (2006) (defining “multiple use” and “sustained yield” for Forest Service laws), with 43 U.S.C. § 1732(c), (h) (2006) (defining “multiple use” and “sustained yield” for FLPMA). There are some other differences: e.g., the statutory provisions for timber harvesting on the national forests are lavishly detailed, while FLPMA is largely silent on the subject. Compare, e.g., 16 U.S.C. § 472a (2006) (outlining, at length, requirements for timber harvest on national forests), with 43 U.S.C. § 1736a (2006) (creating a revolving fund to receive proceeds from salvage timber sales on BLM lands).

²⁷¹ See text accompanying notes 53-64 *supra*.

²⁷² Compare *id.* § 1 (detailing NPS general management direction), with *id.* § 668dd(d)(3)(A)(i), (iv) (detailing management direction for USFWS).

²⁷³ See 43 C.F.R. § 3811.2-2 (2012) (explaining near prohibition on mining in the parks system); 50 C.F.R. § 27.64 (2012) (prohibiting mining in the wildlife refuge system, unless otherwise authorized by law); *id.* § 29.1 (restricting various extractive uses in refuges); 16 U.S.C. § 668dd(d)(3)(A) (2006) (part of the 1997 National Wildlife Refuge Organic Act, which contains a strict “compatibility test” for determining when nonwildlife related uses are appropriate).

²⁷⁴ See, e.g., 43 U.S.C. § 1761 (2006) (granting BLM, through the Secretary of the Interior, and USFS, through the Secretary of Agriculture, authority to permit roads); 16 U.S.C. § 8 (2006)

of the coin: namely, that each of these agencies has general authority to take actions to protect “wilderness.”²⁷⁵ That authority has been buttressed substantially since 1964 by laws like the Endangered Species Act of 1973 (ESA)²⁷⁶ and the National Environmental Policy Act of 1969 (NEPA),²⁷⁷ which apply equally to all these agencies.²⁷⁸

Taken together, those changes mean that all four agencies pay much more attention to wildlife habitat and other environmental values than they did when the Wilderness Act was enacted. Also, greater ecological understanding makes them much more aware of the interconnectedness of landscapes, which means all four agencies pay much more attention than they formerly did to what happens on lands outside their boundaries. All are increasingly concerned, for example, with issues like wildfire and invasive species. Also, all four agencies now have fairly elaborate systems to prepare plans governing management of areas under their care. These plans typically address issues of development versus preservation, such as road-development and ORV use, in geographic planning areas under their stewardship. Finally, the Wilderness Act itself has brought the four agencies into closer alignment—as noted earlier, a substantial percentage of each of their lands is being managed under the Act, or under its umbrella (in various study phases), or in its shadow (pursuant to measures like the Roadless Rule, discussed further below).²⁷⁹

This broadening and substantial homogenizing of management mandates has meant that preserving natural conditions—the overriding concern of the Wilderness Act—has become much more of a focus for all the federal land managing agencies than it was when the Act was passed.

Moreover, agencies today have a much wider array of management tools than were available in 1964 to protect natural values, including “wilderness” qualities, on lands they manage. Federal lands can be designated as “areas of critical environmental concern,”²⁸⁰ “research natural

(granting National Park Service, through the Secretary of the Interior, road-building authority in the national park system).

²⁷⁵ The Forest Service and the BLM can protect wild qualities through “multiple-use” decision making. *See* notes 270–71 *supra* and accompanying text. The National Park Service and the Fish & Wildlife Service can protect wild qualities through their “dominant use” decision making. *See* note 272 *supra* and accompanying text.

²⁷⁶ 16 U.S.C. §§ 1531–1543 (2006).

²⁷⁷ 42 U.S.C. §§ 4321–4370f (2006).

²⁷⁸ *See* Endangered Species Act of 1973, 16 U.S.C. § 1536(a) (2006) (mandating that “[a]ll . . . Federal agencies . . . shall . . . utilize their authorities in furtherance of the purposes of [the ESA]”); National Environmental Policy Act, 42 U.S.C. § 4332 (2006) (outlining the statutory obligations of “all agencies of the Federal Government”).

²⁷⁹ *See* University of Montana, *Wilderness Statistics Reports: Wilderness Acreage By Agency*, <http://www.wilderness.net/NWPS/chartResults> (last visited Apr. 18, 2014) (showing that the NWPS includes about 4% of BLM land, 14% of USFWS land, about 19% of USFS land, and 52% of NPS land). Another nearly 30% of Forest Service land is covered by the Roadless Rule, discussed *infra* notes 289–309. One other way agencies have worked together is in jointly launching and operating the Arthur Carhart National Wilderness Training Center and the Aldo Leopold Wilderness Research Institute on the campus of the University of Montana.

²⁸⁰ 43 U.S.C. § 1712(c)(3) (2006) (directing the Interior Secretary to “give priority to the designation and protection of areas of critical environmental concern” in developing and

areas,” or “critical habitat,” or otherwise managed according to the dictates of section 7(a)(2) of the Endangered Species Act, or protected in a myriad of other ways. While some tools, like those in the Endangered Species Act, are designed for a specific purpose—there, protecting imperiled species—they can sometimes provide strong protection for wild qualities.²⁸¹ All these tools can be and often are brought to bear to limit or prevent road-building, logging and other more intensive forms of development on many acres of federal land.²⁸²

These post-1964 developments mean that the choice of whether and how to protect “wilderness” qualities of a particular tract of federal land is no longer simply one of whether to put it under the umbrella of the Wilderness Act. That is now just one of many tools available to serve that end.

The Antiquities Act, which authorizes the President to protect “objects of historic or scientific interest” on lands “owned or controlled by the United States,”²⁸³ deserves special mention in this context. Strictly speaking, it does not belong in the category of post-1964 innovations. Predating the Wilderness Act by almost six decades, it has long been used by presidents of both political parties to fashion strong and durable protections for large tracts of federal land.²⁸⁴ At first glance, this might seem surprising, because the Act limits the President to designating “the smallest area [of federal land] compatible with the proper care and management of the objects [of historic or scientific interest] to be protected.”²⁸⁵ But that language proved supple enough to allow larger landscapes to be protected. As long ago as 1920, a unanimous Supreme Court, in an opinion by Justice Van Devanter from Wyoming, had no difficulty upholding President Theodore Roosevelt’s use of the Act to protect nearly a million acres of the Grand Canyon.²⁸⁶ In the years since enactment of the Wilderness Act, presidents have vigorously used it to protect wild qualities of vast tracts. Their decisions have been uniformly upheld by the courts. The most prominent example was Jimmy Carter’s use of the Act to protect some fifty-six million acres of mostly roadless, undeveloped land in Alaska in 1978, when Congress had dragged its feet on protecting them through legislation.²⁸⁷ Two years after President Carter’s

revising BLM land use plans). The ACEC has never achieved much use or prominence as a tool to protect wilderness-like qualities, but the potential is there.

²⁸¹ Steven G. Davison, *Alteration of Wildlife Habitat as Prohibited Taking under the Endangered Species Act*, 10 J. LAND USE & ENVTL. L. 155, 198, 220 (1995).

²⁸² See Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wilderness*, 34 ENVTL. J. 1015, 1015 (2004) (discussing alternative methods of preserving wildlands).

²⁸³ 16 U.S.C. § 431 (2006).

²⁸⁴ See, e.g., John D. Leshy, *Shaping the Modern West: The Role of the Executive Branch*, 72 U. COLO. L. REV. 287, 295 (2001).

²⁸⁵ 16 U.S.C. § 431 (2006).

²⁸⁶ *Cameron v. United States*, 252 U.S. 450, 454–55 (1920).

²⁸⁷ See generally TURNER, *supra* note 2, at 159–81.

bold action, Congress effectively ratified this protection in the Alaska National Interest Lands Conservation Act.²⁸⁸

The U.S. Forest Service's so-called Roadless Rule, crafted in the Clinton Administration, ranks right alongside Jimmy Carter's actions in the pantheon of significant executive branch actions protecting wild qualities of federal land outside the umbrella of the Wilderness Act.²⁸⁹ As noted earlier, the Wilderness Act directed the Forest Service to review about five million acres of so-called "primitive" areas²⁹⁰ for possible inclusion in the NWPS. Remarkably, however, the Act was silent about other roadless areas found on the national forests.²⁹¹ It turned out that these other areas encompassed a lot of land, nearly sixty million acres—an area larger than all but the ten largest states.²⁹²

Although Congress had not required the Forest Service to study these other roadless areas under its management, the agency came fairly quickly to understand that, given the political power of wilderness advocates, it would not be able to ignore the potential of these lands for possible inclusion in the NWPS. So, in the early 1970s, the agency decided to conduct a comprehensive, one-time review of all of these areas, and choose which ones to recommend to Congress to be included in the NWPS.²⁹³ Thus began what came to be known as the RARE ("roadless area review and evaluation") process, a forty-year odyssey through RARE I, RARE II, RARE III, much litigation, and, finally, the adoption of the Roadless Rule at the tail end of the Clinton Administration, in early 2001.²⁹⁴ Only after four decades did the saga come to an apparent end, in 2012, when the Supreme Court declined to review a lower court decision that had left the Rule in place.²⁹⁵

²⁸⁸ 16 U.S.C. §§ 3101–3233 (2006). In the modern era, almost all of the land preservation activity under the Antiquities Act was by Democratic Presidents. President George W. Bush vigorously used the Act to protect marine areas that exceeded all of the acreage preserved by all previous presidents under the Act. Other modern Republican Presidents—Ford, Nixon, Reagan and George H.W. Bush—hardly used it at all. See Brent J. Hartman, *Extending the Scope of the American Antiquities Act*, 32 PUB. LAND & RESOURCES L. REV. 153, 161–62 (2011).

²⁸⁹ See 36 C.F.R. §§ 294.10–294.14 (2002).

²⁹⁰ 16 U.S.C. § 1132(b) (2006).

²⁹¹ See FOREST SERV., U.S. DEP'T OF AGRIC., SUMMARY OF PUBLIC COMMENT: ROADLESS AREA CONSERVATION PROPOSED RULE AND DEIS 2000 xiv (2000).

²⁹² See Wilderness Soc'y, *Legal Status of the Roadless Area Conservation Rule*, <http://wilderness.org/resource/legal-status-roadless-area-conservation-rule> (last visited Apr. 18, 2014).

²⁹³ ROTH, *supra* note 49, at 11. In 1971, the President's Council on Environmental Quality recommended that President Nixon issue an Executive Order requiring the Forest Service to inventory all the roadless areas under its management, and requiring it and the NPS and USFWS (but not the BLM) to protect all their roadless areas from impairment until Congress acts. See Michael McCloskey, *Wilderness Movement at the Crossroads, 1945–1970*, 41 PAC. HIST. REV. 346, 361 n.36 (1972). It was killed by opposition from industry and Secretary of Agriculture Clifford Hardin, among others. John B. Flippen, *The Nixon Administration, Timber, and the Call of the Wild*, 19 ENVTL. HIST. REV. 37, 43–44 (1995).

²⁹⁴ Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3,244 (Jan. 12, 2001).

²⁹⁵ *Wyoming v. U.S. Dep't of Agric.*, 661 F.3d 1209, 1272 (10th Cir. 2011), cert. denied 133 S. Ct. 417 (2012).

The Roadless Rule bans nearly all road building and logging on practically all of the 58.5 million acres the Forest Service ultimately inventoried as “roadless.”²⁹⁶ To that extent, it approaches NWPS status, with two big differences. First, it is only a regulation, adopted by the Department of Agriculture as a matter of executive branch policy, and therefore subject to change not only by future Congresses, but also by future Administrations. Second, the Rule is less protective than wilderness in some respects, the most important of which is that it does not prohibit ORVs in roadless areas.²⁹⁷

While the Rule is subject to change by the agency, it has, notably, escaped significant modification since it was adopted. This is not for lack of trying. Not enthusiastic about the rule, the George W. Bush Administration invited the thirty-eight states and Puerto Rico that contain such areas to petition for its modification.²⁹⁸ However, only three states did so—Alaska, Colorado and Idaho.²⁹⁹ The changes Colorado and Idaho wanted turned out to be relatively small. Alaska sought and obtained a broad exemption, which was initially reversed and recently reinstated in the courts.³⁰⁰ Meanwhile Wyoming, which had not filed a petition, challenged the Rule’s legal basis.³⁰¹ The other states that joined the litigation—California, Montana, Oregon, and Washington—took the side of the United States in defending the rule.³⁰²

The primary legal argument made by Wyoming and its allies—ORV users and the mining industry—was that the Rule “essentially mirrors the Wilderness Act by a different label,” and thus violated Congress’s injunction in the Wilderness Act that only it, and not the Executive, can create legal “wilderness.”³⁰³ The Tenth Circuit Court of Appeals rejected the argument: “As a general matter, the Roadless Rule restricts only two activities—road construction and commercial timber harvesting, unless an exception applies.”³⁰⁴ It went on to point out that the Rule does *not* incorporate the Wilderness Act’s general prohibitions of “commercial enterprise,” “motor vehicles, motorized equipment or motorboats,” all types of “mechanical transport,” and of any “structure or installation.” Therefore, the court concluded, “the Roadless Rule did not designate de facto administrative wilderness areas in contravention of the procedures set out in the Wilderness Act.”³⁰⁵

²⁹⁶ See 66 Fed. Reg. 3244, 3272-73 (2001).

²⁹⁷ *Ibid.*

²⁹⁸ See Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1171 (2004).

²⁹⁹ See WILDERNESS SOC’Y, ROADLESS FOREST PROTECTION 39-41 (2008), available at <http://wilderness.org/sites/default/files/legacy/roadless-forest-protection-CBB-09.pdf>.

³⁰⁰ See *Organized Village of Kake v. U.S. Dep’t of Agric.*, No. 11-35517, 2014 WL 1229762, at *1 (9th Cir. Mar. 26, 2014).

³⁰¹ *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209 (2007).

³⁰² Brief for States of California, Montana et al. as Amici Curiae Supporting Appellants at 2, *Wyoming v. USDA*, 661 F.3d 1209 (Nos. 09-8075 & 08-8061).

³⁰³ *Wyoming v. USDA*, 661 F.3d at 1229-30.

³⁰⁴ *Id.* at 1230.

³⁰⁵ *Id.* at 1230, 1234. The Idaho variant on the national Roadless Rule withstood legal challenges brought from both directions, by conservationists and by industry, in *Jayne v.*

Despite these differences, areas governed by the Roadless Rule look like and are managed mostly like NWPS areas, because almost all road-building and other permanent developments are forbidden in them.³⁰⁶ Significantly, however, the Roadless Rule does not itself ban motorized vehicles operating off of what are considered established roads.³⁰⁷ This illustrates why ORVs are currently the biggest threat to expanding the NWPS.

The Roadless Rule experience teaches volumes about the evolution of the Wilderness Act since 1964. Most importantly, it has, in one dramatic executive branch gesture, made an area almost 50% larger than the New England states formally subject to restrictions that resemble, if not exactly duplicate, the NWPS.³⁰⁸ It is a vivid illustration of how much authority agencies possess outside the Wilderness Act's umbrella to protect wild areas, in a rather durable way, even if not quite as protective, or as permanent, as the NWPS itself. The Rule's survival also furnishes a useful barometer of modern public opinion on protecting wild areas, and shows the "stickiness" of formal executive branch actions to protect wild qualities of land under its control. It seems unlikely the Executive Branch will rescind it, at least wholesale. Political leaders might just appreciate the wisdom of Aldo Leopold's famous dictum that a "thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."³⁰⁹

B. New Congressional Categories or Labels for Protecting Natural Values on Tracts of Federal Land

Congress has not just given agencies many new tools since 1964 to protect wild qualities of tracts of land they manage. Over the same time period, Congress has itself expanded its use of old, and invented new, special designations that can operate to protect wild qualities of tracts of federal land. The former include national monuments and national recreation areas. Not content to rely on presidential exercises of Antiquities Act authority, Congress has sometimes legislated its own national

Sherman, 706 F.3d 994 (9th Cir. 2013). Compared to how the 9.3 million acres involved would have been managed under the national rule, the Idaho variant managed 3.25 million acres more strictly—for example, by imposing stricter limitations on road construction—and the remaining acreage somewhat less strictly—for example, by allowing some logging and temporary roads in order to reduce wildfires under limited circumstances. See FOREST SERV., SUMMARY OF PUBLIC COMMENT: PROPOSED ACTION (IDAHO ROADLESS RULE) 54–55 (2000), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5052643.pdf.

³⁰⁶ See Monica Voicu, *At a Dead End: The Need for Congressional Direction in the Roadless Area Management Debate*, 37 *ECOLOGY* L.Q. 487, 498 (2010).

³⁰⁷ John C. Adams & Stephen F. McCool, *Finite Recreation Opportunities: The Forest Service, The Bureau of Land Management, and Off-Road Vehicle Management*, 49 *NAT. RESOURCES J.* 45, 46–47 (2009).

³⁰⁸ See Voicu, *supra* note 306, at 498.

³⁰⁹ ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 262 (1949).

monuments.³¹⁰ Congress has also applied the “national recreation area” label (first used for large tracts around federal dams and reservoirs) to more than three dozen places, some embracing a million acres or more.³¹¹ And Congress expanded on the national seashore idea it first used in 1937, to create a large collection of lakeshores and seashores—e.g., Apostle Islands National Lakeshore and Gulf Islands National Seashore, both in 1970³¹²—within the national park system.³¹³

More important, however, Congress has itself fashioned and applied new designations, resulting in new collections of federal conservation lands. One, a program adopted four years after the Wilderness Act to protect “wild and scenic” river corridors, is like the system created by the Wilderness Act, an overlay on federal land management agency authority, which can be applied to lands managed by any of the four agencies.³¹⁴ Another new designation—“national conservation area” (NCA)—has been applied mostly to BLM lands, starting with the BLM-managed, 68,000 acre King Range National Conservation Area on California’s north coast in 1970.³¹⁵ In the years since, Congress has created well over a dozen more NCAs.³¹⁶ There are “national scenic areas,” such as the Mono Basin National Forest Scenic Area, established in 1984, and the Columbia River Gorge, established in 1986.³¹⁷ There are “national preserves,” such as the Big Thicket National Preserve.³¹⁸ New labels are invented with some regularity. In 2000, for example, Congress created the Steens Mountain Cooperative Management and Protection Area (CMPA) on 428,156 acres of BLM-managed land in eastern Oregon.³¹⁹ In 2006 it created the Rio Grande Natural Area in Colorado.³²⁰ In 2009 it established the “Ancient Bristlecone Pine Forest” on national forest land in Nevada, and directed it to be managed for, among other things, the “maintenance of near-natural conditions by ensuring that all activities are subordinate to the needs of protecting and preserving bristlecone pines and

³¹⁰ For example, the 110,000-acre Mt. St. Helens National Volcanic Monument, established by Congress in 1982. 16 U.S.C. § 431 note (2006).

³¹¹ See *id.* §§ 460–460j.

³¹² *Id.* §§ 459h, 460w.

³¹³ Cape Hatteras National Seashore was the first, in 1937. 50 Stat. 669, 670 (1937) (codified at 16 U.S.C. § 459 (2006)). Picture Rocks National Lakeshore was the first of several national lakeshores in the Great Lakes region. Pub. L. No. 89-668, 80 Stat. 922 (1966).

³¹⁴ Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–1287 (2006). The prime movers of this legislation were the same as with the Wilderness Act, and they crafted it in part based on what they learned in the earlier struggle. ALLIN, *supra* note 2, at 172–76.

³¹⁵ Act of Oct. 21, 1970, Pub. L. No. 91-476, 84 Stat. 1067.

³¹⁶ BUREAU OF LAND MGMT., NATIONAL LANDSCAPE CONSERVATION SYSTEM: NATIONAL CONSERVATION AREAS AND SIMILAR DESIGNATIONS, *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Law_Enforcement/nlcs/ncas.Par.24063.File.dat/NCAs_and_Sim_Q2_2014.pdf. This category also includes Riparian National Conservation Areas, beginning with the San Pedro in Arizona in 1988. See 16 U.S.C. § 460xx (2006).

³¹⁷ Pub. L. No. 99-663, 100 Stat. 4274 (codified as amended at 16 U.S.C. § 554 (2006)).

³¹⁸ Pub. L. No. 93-439, 88 Stat. 1254 (codified as amended at 16 U.S.C. § 698 (2006)).

³¹⁹ Pub. L. No. 106-399, 114 Stat. 1644 (codified as amended at 16 U.S.C. § 460nnn et ff. (2006)).

³²⁰ 16 U.S.C. §§460rr–460rr-2(g) (2006).

wood remnants.”³²¹ A Rocky Mountain Front Heritage Act introduced in the current Congress by Montana’s two senators would designate 208,160 acres of most national forest land, along with some BLM land, as a “Conservation Management Area,” which would impose some limits on ORV travel and logging, while also adding 67,000 acres to the Bob Marshall NWPS complex.³²²

While using the same label on different tracts of land might suggest a kind of uniformity, in fact there is no unifying template—or “organic act,” as it is known in the federal land management world—for such designations like the one the Wilderness Act provides for legal “wilderness.” Moreover, these proliferating new conservation labels do not, by their own terms, substitute for, nor preclude, wilderness designation. Congress can and sometimes does include lands in any of these labeled areas in the NWPS.³²³ As this suggests, the protections afforded by these new designations usually do not mirror the stringency of the Wilderness Act’s prohibitions on things like “motorized equipment” and “mechanical transport.” But generalization is hazardous. While these newer statutes tend to have somewhat looser management restrictions than apply to NWPS areas, it is worth recalling that the Wilderness Act itself contains some “exceptions” from strict preservation, such as the presidential authority to build water projects.³²⁴ To the extent one of these other designations prohibits developments like water projects or livestock grazing, it is more protective than a NWPS designation.

Although they tend to be less protective of wild qualities than the Wilderness Act, these newer designations do move the needle toward the preservation end of the development/preservation spectrum. They increase an area’s visibility with the general public. They attract funds, federal and nonfederal, for improved management. They enlarge the constituency for conserving natural qualities of land. The limits they put on the discretion of the managing agency to destroy or impair those qualities can provide a useful purchase for judicial review to check agency discretion.³²⁵ And they can, in some places, work in tandem with the NWPS to foster a more holistic management approach—of strictly protected core areas surrounded by land areas where protections gradually diminish.

While these other designations that have proliferated since 1964 lack the cultural and political potency of, and tend to offer somewhat less protection than, the NWPS label, they illustrate that there are many ways to

³²¹ 16 U.S.C. § 539o; Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 1808, 123 Stat. 991.

³²² Rocky Mountain Front Heritage Act, S. 364, 113th Cong. § 1 (2013).

³²³ For example, 42,585 acres of the King Range NCA was put in the NWPS in 2006. Pub. L. No. 109-362, 120 Stat. 2064 (2006)).

³²⁴ 16 U.S.C. § 1133(d)(4) (2006).

³²⁵ See, e.g., *Hells Canyon Preservation Council v. Richmond*, 841 F. Supp. 1039, 1046–47 (D. Or. 1993) (finding that the purpose and management mandate of the Hells Canyon National Recreation Act requires the federal land managers “to do more than simply maintain the status quo” in the NRA, for the statute emphasizes the “recreational and ecologic values” unique to the HCNRA, and “subordinate[s]” other uses like timber harvesting, mining and grazing to “this overriding concern”).

protect wild qualities of tracts of federal lands besides including them in the NWPS.

VI. THE FUTURE OF WILDERNESS

What might all this mean for the future? Safeguarding and expanding the NWPS is a matter of law and politics, and both have become more complicated in the last half-century. The discussion that follows considers, first, the future of the NWPS and the legal protections now in place to protect it; and second, the future of proposals to expand the system by adding new areas to it. Of course, the two are closely linked. How existing NWPS areas are managed has implications for how receptive Congress might be to future expansions. Looming over both, and considered in the third subsection below, is a destabilizing climate, which could have profound implications for both the legal and the political viability of wilderness.

A. The Future of the Act's Protections for Existing NWPS Areas

All of the many changes since 1964 do not obscure a fundamental truth: The Wilderness Act's framework remains the gold standard for protecting "wildness." Although the land protection toolbox now fairly overflows, the strongest and most permanent method to protect significant tracts of land is still for Congress to put them in the NWPS. Its protections are familiar and tested, in the field and in the halls of agency bureaucracies. Its advocates are passionate and diligent. The courts—at least courts below the Supreme Court—respect the label and mostly enforce the terms of the Act rather strictly. The "wilderness" brand also retains substantial power with the public and, therefore, in the political marketplace. Moreover, the label has "stickiness," because Congress has never removed an entire area from the NWPS.³²⁶

This does not mean that wilderness advocates should be complacent. Legal protections are always vulnerable to being watered down by a combination of lax or indifferent executive branch management and congressional oversight, and courts unwilling to give close scrutiny of executive branch behavior. So far, however, a congressional decision to include an area in the NWPS itself does tend to strengthen the resolve of both executive agencies and life-tenured federal judges to enforce the legal

³²⁶ Congress has sometimes excised small portions of areas. For example, Mt. Nebo wilderness was reduced in size to accommodate a mine. Mount Nebo Wilderness Boundary Adjustment Act, Pub. L. No. 107-334, 116 Stat. 2876 (2002) (codified at 16 U.S.C. § 1132 (2006)). See also the Cumberland Island Wilderness Boundary Adjustment Act of 2009, Pub. L. No. 108-447, § 145, 118 Stat. 3072, 3072-74 (reversing *Wilderness Watch v. Mainella*, 375 F.3d 1085 (11th Cir. 2004)); Sequoia and Kings Canyon National Parks Backcountry Access Act, Pub. L. No. 112-128, 126 Stat. 373 (2012) (vacating an injunction issued in *High Sierra Hikers Ass'n v. U.S. Dep't of the Interior*, 848 F. Supp. 2d 1036 (N.D. Cal. 2012), discussed *infra* in text accompanying note 334.

protections. Moreover, it also makes it more difficult for Congress to change its mind and undo or relax protections.

Since the Wilderness Act became law, however, the politics of both NWPS protection and NWPS expansion has become more complicated by arguments among preservation advocates between what might be called the “purists” and the “pragmatists.” These arguments emerged soon after enactment.³²⁷ Adherents of both points of view have long been found in the ranks of the federal land management agencies, in their leadership, and across the spectrum of nonprofit organizations and trade associations.³²⁸ Agency personnel were some of the original “purists.” Some pressed this position to minimize the size of the NWPS, and others did it out of philosophical conviction.³²⁹

Some in the purist camp have had success in recent years persuading courts to stringently apply the Wilderness Act’s management prescriptions in existing NWPS areas. For example, the Act states that, “subject to existing private rights, there shall be no *commercial enterprise . . . within* any wilderness area.”³³⁰ The meaning of the italicized words is not as straightforward as it may seem at first glance. In the leading case, a federal court of appeals interpreted them to prohibit a sockeye salmon enhancement project that involved collecting eggs inside a NWPS area, incubating them in a hatchery outside, and releasing them back in the NWPS.³³¹ The fish were then subject to commercial harvest, but only after they left the NWPS.³³² To take another example, the Act allows “commercial services” inside the NWPS “to the extent necessary for activities which are proper for realizing the recreational or other wilderness purposes of the areas.”³³³ The courts have narrowly interpreted this exception, and sometimes ordered managing agencies to more seriously consider limiting the use of pack animals by commercial outfitters in NWPS areas.³³⁴ A related controversy involves whether agencies should prohibit fixed anchors in NWPS areas to facilitate climbing.³³⁵

³²⁷ The very first NWPS proposal to reach Congress after 1964 turned into an intense divisive struggle over whether to add 2,000 acres to a 143,000-acre wilderness proposal in the Los Padres National Forest in 1967 and 1968. McCloskey, *supra* note 104, at 355–57. In the end, the 2,000 acres were excluded, but generally protected by the Forest Service. *Id.* at 357.

³²⁸ TURNER, *supra* note 2, at 54–58, 75, 79–81, 114, 121, 129–30, 180, 190, 240.

³²⁹ *Id.* at 54–58, 80–82.

³³⁰ 16 U.S.C. § 1133(c) (2006) (emphasis added).

³³¹ Wilderness Soc’y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1058, 1070 (9th Cir. 2003) (en banc). The program started out as a government research project prior to Congress including the area in the NWPS, but eventually turned into a commercial operation. *Id.* at 1065.

³³² *Id.* at 1066.

³³³ 16 U.S.C. § 1133(d)(5) (2006).

³³⁴ High Sierra Hikers Ass’n v. Blackwell, 390 F.3d 630 (9th Cir. 2004); High Sierra Hikers Ass’n v. U.S. Dep’t of the Interior, 848 F. Supp. 2d 1036 (N.D. Cal. 2012).

³³⁵ Agencies have studied this issue for years inconclusively. THE WILDERNESS ACT HANDBOOK, *supra* note 186, at 61–62. The Forest Service has come under fire for allowing the Idaho Department of Fish & Game to use airstrips and cabins grandfathered into the Frank Church River of No Return Wilderness in operations to kill wolves, in order to shield the clients

The courts' reading of the Act in these cases is a fair one, though reasonable arguments can be made on the other side. When the courts restrict the scope of activities allowable within the NWPS they are creating winners and losers. This can have political repercussions. The winners are those who want a more "pure" approach. The losers are those who do not regard relatively small-scale or mostly psychological intrusions (like the salmon enhancement project) as seriously interfering with what they see as the primary important wilderness value—an overall appearance of naturalness and relative solitude.

This has implications not just for how existing NWPS areas are managed, but also for the politics of NWPS expansion. Losers in these disputes may be more inclined to oppose expansion, or to advocate for trimming the boundaries of new NWPS proposals, to seek special carve-outs in particular NWPS proposals, and perhaps, ultimately, to seek amendments to the Wilderness Act itself. Indeed, some of the restrictive rulings have attracted congressional attention, and two of them have been overturned by site-specific legislative fixes.³³⁶

This might suggest that the purist approach should be relaxed to prevent the Act from becoming a target for legislative adjustment, and also to attract more supporters for NWPS designations and for larger NWPS areas. But the argument needs to be made cautiously. The question is how much relaxation is appropriate, and the slope can be slippery. Too many seemingly small compromises can undermine, perhaps fatally, the integrity of the NWPS, much like too many rivets popping on an airplane wing can bring the aircraft down. There is no self-evident place to draw the line, and reasonable people can disagree. As Bertrand Russell once said, "pragmatism is like a warm bath that heats up so imperceptibly that you don't know when to scream."³³⁷

B. The Future of Proposals to Add New Areas to the NWPS

The first thing to note in considering future expansion of the NWPS is that Congress's pace in making wilderness decisions has slowed to a crawl, and until very recently, had halted entirely for a period of years.³³⁸ Since the enactment of ANILCA at the end of the Carter Administration, about twenty-eight million acres has been added to NWPS.³³⁹ Take out a glut of RARE II bills in the 98th Congress (1983–1984), and another glut of bills, including a big one in the California Desert, in the 103rd Congress (1993–1994), and the

of elk hunter outfitters from competition. See Rob Chaney, *USFS Chief: Wilderness Conservation to Continue as Opportunities Shrink*, THE MISSOULAN, March 5, 2014.

³³⁶ See *supra* note 326.

³³⁷ 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 151 (3d ed. 2000).

³³⁸ Wilderness.org, *113th Congress Wilderness Bills*, <http://wilderness.org/article/113th-congress-wilderness-bills> (last visited Apr. 18, 2014).

³³⁹ Wilderness.net, *Number of Wilderness Acres Legislated by Year*, <http://www.wilderness.net/NWPS/chartResults> (last visited Apr. 18, 2014).

acreage added drops to about eleven million.³⁴⁰ The 112th Congress was the first since 1965–1966 not to make any additions to the NWPS.³⁴¹ Moreover, the bills that have any prospect of serious consideration in the Congress are quite small, in acreage terms.³⁴² This is so even though many tens of millions of acres of federal land likely meeting the criteria for inclusion remain outside the NWPS.³⁴³

Many factors have contributed to this slowdown. The most immediate, and obvious, stem from polarized public opinion, a breakdown in the legislative process, and a diminished regard for the national government. Decisions whether to add areas to the NWPS implicate the inherent tensions in American society between the national and the local, and to some extent between the public and the private—for example, governmental control versus the freedom to roam with ORVs. There is no doubt that, compared to 1964, Americans today are much more cynical about the capacity of government at all levels to make sound decisions, and are particularly disaffected with the national government, which administers the NWPS.³⁴⁴

While “wilderness” has been a potent brand since 1964, in recent years it has become polarizing. Conservatives have made some headway demonizing the label, echoing, perhaps unconsciously, the centuries-old idea that wilderness was a primary obstacle to establishing a thriving civilization in America.³⁴⁵ Closely related to this is the fact that the wilderness issue has become increasingly partisan, with Democrats tending to support and Republicans tending to oppose. This has been a profound change. When Hubert Humphrey introduced the first version of what became the Wilderness Act into the Congress in 1964, his nine cosponsors included Republican Senators from California, Maine, Oregon, Pennsylvania, and

³⁴⁰ *Id.*

³⁴¹ The drought was broken in early 2014 when legislation to put nearly half of the 70,000-acre Sleeping Bear Dunes National Lakeshore in Michigan in the NWPS was approved by Congress. Sleeping Bear Dunes National Lakeshore Conservation and Recreation Act, Pub. L. No. 113-87 (2014).

³⁴² Around two dozen NWPS enlargement bills are pending in the current 113th Congress that could add several million acres to the NWPS across thirteen states, but the prospect of enactment of most of them is dim. *See, e.g., 113th Congress Wilderness Bills, supra* note 338.

³⁴³ Of course, the total depends to some extent on how one defines a “road,” and on whether one uses a minimum 5,000-acre size or simply looks for wilderness qualities, including the capacity to provide “solitude,” regardless of acreage. Doug Scott cites “very rough and preliminary” estimates, using computerized mapping that identified tracts of a minimum of 1,000 acres without roads, of more than 300 million acres of roadless national forest and BLM land, including more than 200 million acres outside Alaska. SCOTT, *supra* note 21, at 96–97 n.4, 170–71.

³⁴⁴ THOMAS E. MANN AND NORMAN J. ORNSTEIN, *IT’S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM* (2012).

³⁴⁵ One conservative group cheekily borrows the label to demonize it. The “National Wilderness Institute” is a right wing so-called “wise use” group favoring free market exploitation of natural resources, protecting and extending private property rights, and reducing government ownership and regulation of property. Its advisory board includes very conservative opponents of the NWPS among Republican members of Congress, as well as President Reagan’s third Interior Secretary, Donald Paul Hodel. National Wilderness Institute, *Organization*, <http://www.nndb.com/org/530/000103221/> (last visited Apr. 18, 2014).

South Dakota.³⁴⁶ The Act's most important House champion was a Republican, John Saylor of Pennsylvania, who argued in 1956 that "we Americans are the people we are largely because we have had the influence of the wilderness on our lives."³⁴⁷ Republican Senator James Buckley of New York (brother of noted conservative William F. Buckley) was a principal co-sponsor of the 1975 statute putting eastern areas in the NWPS. Today, many states with large acreages likely eligible for inclusion in the NWPS are colored shades of political red.³⁴⁸ It is difficult to imagine today a member of Congress from Idaho espousing, as Frank Church did, the importance of legally protecting places where "one can still escape the clutter of roads, signposts, and managed picnic grounds."³⁴⁹ Even blue states long supportive of land conservation, such as Washington, have added almost no NWPS areas for several decades.³⁵⁰

These trends have long cycles, of course. The most prominent and popular skeptic of national government in modern times was Ronald Reagan.³⁵¹ Yet, putting Alaska to one side, on his Administration's watch more land outside of Alaska was added to the NWPS than under any other

³⁴⁶ ALLIN, *supra* note 2, at 105. When the Wilderness Act was adopted in 1964, the Democrats were in firm control of Congress, but the measure attracted a lot of Republican support, with a final vote of 373 to 1 in the House, and 73 to 12 in the Senate. This is not to deny that most of the leaders of the opposition to the original Wilderness Act were conservative western Republicans like Senators Allott of Colorado, Goldwater of Arizona, and Bennett of Utah. But the Republican Party platform in 1956 contained this plank: "We recognize the need for maintaining isolated wilderness areas to provide opportunity for future generations to experience some of the wilderness living through which the traditional American spirit of hardihood was developed." The American Presidency Project, Political Party Platforms: Republican Party Platform of 1956, <http://www.presidency.ucsb.edu/ws/?pid=25838> (last visited Apr. 18, 2014). The 1960 and 1964 Republican platforms were silent on the subject. The 2008 Republican platform cautioned that any new "designation of National Wilderness areas . . . should be undertaken only with the active participation and consent of relevant state and local governments and private property owners." The 2004 and 2012 Platforms were silent on the subject. The Tea Party and its allies are no friends of wilderness; indeed, they are not friendly to federal land ownership in general. In January 2014, the Republican National Committee adopted a resolution decrying that the nation's public lands are "being managed perpetually for their conservation value," and calling for the transfer of public lands to all willing western states.

³⁴⁷ Nash, *supra* note 2, at 248; *see also* Thomas G. Smith, Green Republican: John Saylor and the Preservation of America's Wilderness (2006).

³⁴⁸ Wilderness.net, *Number of Wilderness Units by States*, <http://www.wilderness.net/NWPS/chartResults> (last visited Apr. 18, 2014).

³⁴⁹ *See* Sara Dant, *Making Wilderness Work: Frank Church and the American Wilderness Movement*, 77 PAC. HIST. REC. 237, 244 (2008).

³⁵⁰ The 106,577-acre Wild Sky Wilderness was designated in 2008, breaking a drought that had persisted since 1984. *Wild Sky Passage Celebrated*, ALPINE, 2008, at 1-2. The Sleeping Bear Dunes wilderness legislation enacted in 2014 was given a floor vote in the House of Representatives only because the local member of Congress, Dan Benishek, persuaded the House Republican leadership the measure was important to his bid for reelection. Press Release, Dr. Benishek Authors Bill to Protect Sleeping Bears Dune National Lakeshore, *available at* <http://benishek.house.gov/press-release/dr-benishek-authors-bill-protect-sleeping-bear-dunes-national-lakeshore>.

³⁵¹ In his inaugural address, President Reagan famously offered that "government is not the solution to our problem; government is the problem." *Inaugural Address*, <http://www.reagan.utexas.edu/archives/speeches/1981/12081a.htm> (last visited Apr. 18, 2014).

President.³⁵² It is not beyond imagining that expansion of the NWPS might once again find favor across the political spectrum, though there is no currently obvious path to that end.

A second reason for the slowdown in NWPS expansion is the lack of low-hanging fruit. Most of the nation's large tracts of wild areas without significant conflicts are already in the NWPS.³⁵³ This includes much of Alaska, an immense state with little human settlement. It also includes many so-called "rocks and ice" areas—rugged, remote areas at higher elevations—in the lower forty-eight.³⁵⁴ Most of what remains is, by definition, more accessible to intensive human use. Moving down from mountain peaks, one encounters more timber and other resources desired by those with non-wilderness objectives, more livestock grazing and fences, and more ditches and two-track trails. Many such areas also contain significant inholdings, parcels in state or private ownership.³⁵⁵ Generally speaking, Congress will not put an area in the NWPS if the inholdings are too large a proportion of the total, because of the management problems they can create.³⁵⁶

To deal with such problems, wilderness advocates sometimes have to make difficult decisions about whether to (a) alter the boundaries of proposed NWPS areas, (b) grandfather nonconforming uses, (c) craft special management language to address these problems, (d) negotiate land exchanges to remove inholdings, or, if the challenges are too intractable, (e) consider alternative kinds of protective designations.

A third reason for the slowdown is that there is somewhat less pressure on Congress to act on NWPS expansion bills than in the past. Ironically, this is due in part to the success wilderness advocates have achieved in protecting the wild qualities of many areas by means other than adding them to the NWPS. For example, while NWPS candidates in the national park system are not under an express "no impairment" mandate,³⁵⁷ the National Park Service is, as a practical matter, under little pressure to build roads or undertake other wilderness-disqualifying developments in them. The same is true outside the park system, with some important exceptions having mainly

³⁵² See WILLIAM N. ROM & KIM ELLIMAN, ENVIRONMENTAL POLICY AND PUBLIC HEALTH: AIR POLLUTION, GLOBAL CLIMATE CHANGE, AND WILDERNESS 273 (2012). A major reason for this was a successful effort led by John Seiberling (D. OH) to legislate wilderness proposals involving Forest Service land state by state rather than westwide. Andy Wiessner, personal communication with author, April 8, 2014.

³⁵³ See John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RESOURCES & ENVTL. L. 1, 6 (2005).

³⁵⁴ See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 964-66 (7th ed. 2014); Leshy, *supra* note 353, at 3, 6.

³⁵⁵ See Leshy, *supra* note 353, at 6.

³⁵⁶ Although it did not involve a NWPS area, the point was illustrated by the recent complaint of an oil and gas company that a proposal advanced by conservationists to create a 1.5 million acre NCA on BLM land in Wyoming's Red Desert would "sterilize" the uses of state and private land found within its borders. Benjamin Storrow, *Environmentalists, Energy Industry Clash over Wyoming Red Desert Proposal*, CASPER STAR TRIBUNE, Sept. 6, 2013, http://trib.com/news/updates/environmentalists-energy-industry-clash-over-wyoming-red-desert-proposal/article_e731bfd5-416f-5386-a4da-3c8984fe8654.html (last visited Apr. 18, 2014).

³⁵⁷ See *supra* text accompanying notes 147–49.

to do with controlling ORV use. Thus, while the Forest Service's Roadless Rule is neither quite as protective nor quite as durable as NWPS status, it has, as indicated earlier, already survived one fairly hostile administration and a major court challenge.³⁵⁸ The Rule's survival and acceptance reduce somewhat the need for wilderness advocates to put areas covered by it in the NWPS, at least areas not experiencing significant ORV use.

This is not to say that no candidate areas are threatened. But for the most part, the threats are less obvious, and somewhat more difficult to fight. Put simply, the basic threat to most candidates for the NWPS today is not drilling rigs or backhoes or chainsaws, but increased ORV traffic.³⁵⁹ ORVs, as noted above, create roads by use.³⁶⁰ Once that use is established, the users have expectations of its continuation that are hard for the political system to dislodge or overcome.

Further, while I noted earlier that a congressional decision to include an area in the NWPS tends to strengthen the resolve of both executive agencies and life-tenured federal judges to protect the area, this is not always true. Experience with BLM wildlands proves the point. A significant proportion of wild BLM lands not already in the NWPS are in a management category called "wilderness study areas" (WSAs).³⁶¹ As noted earlier, in 1976, Congress required BLM to manage these lands "so as not to impair [their] suitability . . . for preservation as wilderness" by Congress, "*until Congress has determined otherwise*."³⁶²

The italicized words give these WSAs some protection but, it turns out, not the same amount of protection as lands already in the NWPS. Most notably, ORVs are not forbidden in BLM WSAs.³⁶³ This became particularly significant when, in its only foray to date into the law of "wilderness," a unanimous Supreme Court made it difficult for wilderness advocates to challenge BLM's tolerance of ORV use in these places.³⁶⁴ This 2004 decision, *Norton v. Southern Utah Wilderness Alliance*, is a sobering reminder that, even when lands are queued up at the portal of admission to the NWPS, and subject to a "nonimpairment" mandate, they are not as fully protected as they would be if they made it through the door.

Two categories of federal lands that can have characteristics making them eligible for the NWPS have little or no formal protection against impairment of these qualities. These are (a) tracts under 5,000 acres,

³⁵⁸ See *supra* text accompanying notes 289–309.

³⁵⁹ See, e.g., *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 65–66 (2004).

³⁶⁰ See *supra* text accompanying notes 244–45.

³⁶¹ 43 U.S.C. § 1782 (2006).

³⁶² *Id.* (emphasis added).

³⁶³ See, e.g., *Norton*, 542 U.S. at 56–61.

³⁶⁴ See *id.* The Court held that the courts should not check BLM's passivity because BLM had no "duty" under FLPMA to act to regulate ORV use to protect wilderness characteristics. *Id.* at 66. But where the agency does take action, the federal courts can intervene. *Id.* at 61–62. Thus, a federal court enjoined a Forest Service decision to increase tenfold the number of skiers who could heli-ski in the congressionally designated Palisades WSA in Wyoming. *Greater Yellowstone Coal. v. Timchak*, No. CV-06-04-E-BLW, 2006 WL 3386731 at *4, *7 (D. Idaho Nov. 21, 2006).

regardless of which agency is managing them; and (b) tracts over 5,000 acres that were, inadvertently or not, left out of the agencies' prior inventories. Information on how much acreage might be involved in either category is not easy to come by. In category (b), nearly all the attention has been focused on lands managed by the BLM. Wilderness advocates have long claimed that BLM's initial inventory of "wilderness study areas," conducted shortly after FLPMA was adopted in 1976, was seriously flawed, and improperly excluded millions of acres, leaving them with little protection for their wilderness characteristics.³⁶⁵ The dispute mostly centers on some five to nine million acres of land in Utah, most of it in the so-called redrock canyonlands country.³⁶⁶

Summarizing a third of a century of contention in a few sentences, Democratic presidential administrations worked to have BLM re-inventory these lands, and create new WSAs where appropriate.³⁶⁷ Republican administrations resisted, relying on legal opinions narrowly construing applicable law, and friendly court settlements with wilderness opponents led by the state of Utah.³⁶⁸ Wilderness advocates have challenged such actions, but so far have been unable to persuade a court to hear their case on its merits.³⁶⁹ When the Obama Administration adopted a "wildlands" policy designed to protect the wilderness characteristics of BLM lands outside of formal WSAs,³⁷⁰ Republicans controlling the House of Representatives succeeded in attaching a rider to an appropriations bill that scotched the effort.³⁷¹ This has left things in a kind of legal limbo. The BLM retains some authority to maintain such lands' wild qualities, albeit without formally giving them any kind of "wilderness" label. Recent court decisions have bolstered this authority, and opened the door to a more systematic review of these lands, by rejecting as inadequate BLM's attempts to carry out the directive in its own regulations—regulations formally unrelated to wilderness—to "minimize" the impact of ORVs on BLM lands.³⁷² If Congress

³⁶⁵ Matt Jenkins, *Wilderness Takes a Massive Hit*, HIGH COUNTRY NEWS, Apr. 28, 2003, <http://www.hcn.org/issues/249/13907> (last visited Apr. 18, 2014).

³⁶⁶ S. Utah Wilderness Alliance v. Norton, 457 F. Supp. 2d 1253, 1257 (D. Utah 2006). The website of the Southern Utah Wilderness Alliance has much information on this. Southern Utah Wilderness Alliance, www.SUWA.org (last visited Apr. 18, 2014).

³⁶⁷ Matt Gouras, *New Wilderness Protections Called for by Obama Administration*, HUFFINGTON POST, Nov. 10, 2011, http://www.huffingtonpost.com/2011/11/11/obama-urges-new-wilderness-protections_n_1088039.html (last visited Apr. 18, 2014).

³⁶⁸ Matthew Daly, *Western Republicans Decry Obama Wilderness Policy*, SEATTLE TIMES, Mar. 1, 2011, http://seattletimes.com/html/localnews/2014365035_apuswildernessrulescongress2ndldwritethru.html (last visited Apr. 18, 2014).

³⁶⁹ See generally *Norton*, 457 F. Supp. 2d 1253.

³⁷⁰ Secretarial Order No. 3310 (Dec. 22, 2010) directed BLM to "protect wilderness characteristics" on its lands through "land use planning and project-level decisions" unless the BLM determined that impairment of those characteristics was "appropriate and consistent with other applicable requirements of law and other resource management considerations."

³⁷¹ See Pub. L. No. 112-10, § 1769, 125 Stat. 155 (2011).

³⁷² See, e.g., *S. Utah Wilderness Alliance v. Burke*, No. 2:12CV257(DAK), 2013 WL 5916815, at *3 (D. Utah Nov. 4, 2013). *Norton v. SUWA* did not control this litigation, because here BLM had taken action by designating certain trails as open to ORV use, and thus brought into play its own

were interested in or capable of making decisions about expanding the NWPS, progress could be made in resolving these disputes, but those conditions are currently lacking.

Other changes since 1964 have impacted the politics of NWPS expansion. The technology for accessing and surviving in wild areas has evolved dramatically. Besides ORVs, high-tech mountain bikes, hang gliders, cell phones, GPS, foam pads, polypropylene, Gore-Tex and all sorts of contrivances make sojourns in the wilderness easier, more “fun,” and arguably less “wild.” Aldo Leopold observed more than three-quarters of a century ago how “woodcraft” was becoming “the art of using gadgets.”³⁷³ The effects of these technological advances on culture and popular support for preserving wild values are not easy to gauge. ORVs, mountain bikes, and gadgetry help bring many people into backcountry areas who would not otherwise be there. Being there may enhance their appreciation of “wildness,” but the question is whether many of them would support NWPS designation for an area if it meant relinquishing their vehicles or some of their gadgetry. Some businesses purveying high-tech gear, like Patagonia, Black Diamond, North Face and REI—whose former CEO, Sally Jewell, is now the Secretary of the Interior—tend to strongly support the NWPS and its expansion.³⁷⁴ ORV manufacturers and dealers, not so much.³⁷⁵

Perhaps the biggest effect of gadgetry, writ large, is that it may wean younger generations away from cultivating an appreciation for wilderness. Smartphones and social media are in some ways the antithesis of experience in the wild. This is part of a larger societal trend, including the development of what Richard Louv called “nature-deficit disorder.”³⁷⁶ In the long run, of course, if wilderness is less valued by younger people, not only expanding, but simply maintaining, the NWPS will be increasingly difficult.

As noted earlier, the politics of NWPS expansion can be significantly influenced by the divide between “purists” and “pragmatists” on key issues.³⁷⁷ Purists, unsurprisingly, tend to favor “pure” NWPS expansion bills, and oppose what they call “quid pro quo” wilderness. These are bills that would add areas to the NWPS, but include other features designed to placate opponents, such as land exchanges or other measures to facilitate development of lands not put in the NWPS. Purists tend to be reluctant to

regulations requiring such designations to “minimize” impact on the environment, including wilderness values. *Id.* at 3–4.

³⁷³ SUTTER, *supra* note 2, at 98.

³⁷⁴ See Ellis Richard, *Where Big Business Meets the BLM*, HUFFINGTON POST, Jan. 27, 2014, http://www.huffingtonpost.com/ellis-richard/where-big-business-meets-_b_4655101.html (last visited Apr. 18, 2014).

³⁷⁵ SCOTT, *supra* note 21, at 108.

³⁷⁶ See RICHARD LOUV, *LAST CHILD IN THE WOODS: SAVING OUR CHILDREN FROM NATURE-DEFICIT DISORDER* 10 (2005). On the positive side, Secretary of the Interior Sally Jewell seems to have made reversing this trend a personal priority. See Sally Jewell, U.S. Sec’y of the Interior, National Press Club Speech (Oct. 31, 2013), available at <http://www.doi.gov/news/press-releases/secretary-jewell-offers-vision-for-conservation-balanced-development-youth-engagement-in-national-press-club-speech.cfm>.

³⁷⁷ See *supra* text accompanying notes 174–86, 327–37; TURNER, *supra* note 2, at 396–98.

consider the possibility that a substantially equal measure of preservation might be obtained through a different label.³⁷⁸ Purists also tend to resist gerrymandering wilderness boundaries to “cherry-stem” roads, allowing thin ribbons of penetration into wild country by dead-end roads.³⁷⁹

Pragmatists, on the other hand, believe that “quid pro quo” wilderness is simply an illustration of the deal-making that has always characterized the legislative process.³⁸⁰ They also are more willing to accept “cherry-stemming” to secure NWPS protection,³⁸¹ and argue that such horse-trading becomes more necessary as low-hanging fruit are picked, and conflicts grow more intense. They are more willing to acknowledge that some areas can be protected nearly as well by labels other than legal “wilderness,” such as national conservation areas or national monuments.

The purists and pragmatists can also differ on a complicated issue that has come to be labeled “release.”³⁸² The issue arose most often during the RARE II era, when Congress was customarily dealing with bills to add national forest areas to the NWPS on a state-by-state basis. It would arise this way. A wilderness bill addressing national forest lands in, say, Colorado would propose to include several tracts in the NWPS, and not include several other tracts. The question was whether the bill should leave it to the Forest Service to decide whether to continue to provide any protections for the wild qualities of those tracts not included in the NWPS, or whether instead it should “release” these tracts from such protection, thus facilitating their development and use inconsistent with wild area protection. Wilderness opponents supported what came to be known as “hard” release; namely, that areas Congress has passed over once should never again be considered for the NWPS, but should instead always be available for development, whatever its implications for wild qualities. NWPS supporters, on the other hand, supported no release, leaving areas subject to protection in the discretion of the managing agency, and ultimately to reconsideration for inclusion in the NWPS at some point in the future.

With respect to national forest lands, before the Roadless Rule was adopted, Congress generally tended to compromise between these two positions, in what came to be known—to no one’s surprise—as “soft”

³⁷⁸ The leading “purist” group is Wilderness Watch, and its website has essays and white papers on the subject. See Wilderness Watch, www.wildernesswatch.org (last visited Apr. 18, 2014).

³⁷⁹ For an explanation of the criticism, see Western Watersheds Project, *Deviant Wilderness Provisions*, <http://www.westernwatersheds.org/resources/research-reports/quid-pro-quo-wilderness/deviant-wilderness-provisions/> (last visited Apr. 18, 2014).

³⁸⁰ See SCOTT, *supra* note 21, at 117–18. The leading “pragmatist” group is the Campaign for America’s Wilderness, and its website has papers and explanations of its positions. See PEW Charitable Trusts, *Campaign for America’s Wilderness*, <http://www.pewenvironment.org/campaigns/campaign-for-americas-wilderness/id/62078> (last visited Apr. 18, 2014).

³⁸¹ For an argument for cherry-stemming to remove opposition from mountain bikers, see Int’l Mountain Bicycling Ass’n, *Know the Options*, <https://www.imba.com/resources/land-protection/wilderness-guide/know-the-options/#Cherry> (last visited April 18, 2014).

³⁸² See *generally* 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 25:10 (2d ed. 2013) (detailing the debate on whether areas released from wilderness study ought to be subject to “hard” or “soft” release).

release.³⁸³ It called for a kind of “time-out” period of several years, allowing agencies discretion to take action inconsistent with wilderness qualities, after which period agencies could take formal steps to protect those qualities. The adoption of the Roadless Rule has changed this calculus somewhat. A roadless area subject to the Rule, but passed over by Congress, remains subject to the strictures of the Rule, unless Congress or the agency decides otherwise. In recent legislation designating national forest land as NWPS, Congress has not “released” any other tracts it passes over from the strictures of the Rule.³⁸⁴

Congress’s approach to the release issue has been somewhat different with respect to the BLM. Legislation putting some BLM lands in the NWPS has usually released wilderness study areas in the vicinity that were not included from the requirement in FLPMA that they be managed to preserve their suitability for designation as wilderness “until Congress decides otherwise.”³⁸⁵ In such legislation, in other words, Congress made the decision “otherwise.” But this does not fully answer the question of whether the areas are “released” from wilderness-protective management. While such legislation relieves BLM of the legal *duty* to manage such areas to preserve wilderness qualities, it does not necessarily deprive BLM of the legal *authority* to so manage such areas. Whether this is “hard” or “soft” release, in other words, depends on the extent to which BLM still retains authority to manage such areas to preserve wilderness qualities. The answer to that question is not very clear, as discussed above.³⁸⁶

In general, purists fight any effort by Congress to “release” some candidate areas not selected for inclusion in the NWPS for nonwilderness management, by eliminating protections that existing law gives to the area’s wild qualities.³⁸⁷ Pragmatists are more willing to trade the inclusion of some areas in the NWPS for the “release” of other areas to non-wilderness management.³⁸⁸

Broadly speaking, disagreements between purists and pragmatists are inevitable. Like all movements with relatively wide political support, the wilderness movement is hardly monolithic. These are, moreover, judgment calls, on which reasonable people can differ. Consider the forty-year battle over whether the coastal plain of the Arctic National Wildlife Refuge (ANWR) in Alaska should be put in the NWPS. In enacting ANILCA in 1980,

³⁸³ See, e.g., Washington State Wilderness Act of 1984, Pub. L. No. 98-339, 98 Stat. 299; *Smith v. U.S. Forest Serv.*, 33 F.3d 1072 (9th Cir. 1994) (exploring the implications of the Act’s “soft release” language).

³⁸⁴ See, e.g., Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11 § 1802, 123 Stat. 991, 1053–54 (designating new NWPS areas on national forest land in the east Sierra Nevada range).

³⁸⁵ 43 U.S.C. § 1782(c). Section 1804 of the Omnibus Public Land Management Act of 2009 expressly “released” portions of BLM wilderness study areas that it did not include in the NWPS from the strictures of FLPMA § 603.

³⁸⁶ See text accompanying notes 367-72, *supra*; Leshy, *supra* note 353, at 11.

³⁸⁷ JENNIFER LAMB, NOLS WILDERNESS ETHICS: VALUING AND MANAGING WILD PLACES (2006).

³⁸⁸ *Id.*

Congress decided against including it.³⁸⁹ To purists, this was a defeat. To pragmatists, it was a substantive victory, because ANILCA went on to provide that the coastal plain could not be opened to oil and gas development—its principal threat—without another act of Congress.³⁹⁰ Making the coastal plain part of the NWPS, in other words, would not have added an iota of legal protection against oil and gas development.

Purists can argue that “no oil and gas development without congressional approval” lacks the cultural potency, and the politically protective power, of NWPS designation; indeed, that could be said to be the reason the state and its ally, the oil industry, fought so hard to keep the area out of the NWPS.³⁹¹ They can also point out that ANILCA left the coastal plain legally open to other activities, such as roadbuilding and logging, activities that would have been prohibited had it been put in the NWPS.³⁹² Pragmatists can respond that, even though that is technically true, the lack of trees and prohibitive cost of building roads made the legal possibility of logging or road-building of no practical significance. They can also point out that, had the coastal plain been put in the NWPS, it would still be open to presidentially-approved water development projects. And they can argue that, whatever its shortcomings, ANILCA has effectively protected the coastal plain from significant development for more than a third of a century. There are no clear-cut answers, only judgment calls.

The purist versus pragmatist debate occurs in other contexts as well, in both existing and candidate NWPS areas, likewise without clear answers. What is the starting point for assessing the “purity” of a landscape, anyway? Before the advent of any humans? Before the European invasion? Or when an area was installed in the NWPS? Should native species that have been extirpated from NWPS areas be reintroduced? Does it make any difference how long ago they disappeared, and the extent to which human actions contributed to their disappearance? Also to be considered is the opposite problem—exotic or introduced species. Should stronger efforts be made to remove them from wilderness, especially if humans have had a direct role in their introduction?

³⁸⁹ See U.S. Fish & Wildlife Service, Arctic National Wildlife Refuge, *Management of the 1002 Area Within the Arctic Refuge Coastal Plain*, <http://www.fws.gov/alaska/nwr/arctic/1002man.htm> (last visited Apr. 18, 2014).

³⁹⁰ See 16 U.S.C. § 3143 (2006).

³⁹¹ On November 20, 2013, the House of Representatives approved a bill that would have opened the coastal plan to oil and gas exploration by a largely partisan vote of 228–192. Committee on Natural Resources, *Committee Legislation*, <http://naturalresources.house.gov/legislation/hr1965/> (last visited Apr. 18, 2014). President Obama has threatened a veto if the proposal survives the Senate, which is very unlikely. Breaking Energy, *President Veto Recommended for New Energy Bills*, <http://breakingenergy.com/2013/11/25/president-veto-recommended-for-new-energy-bills/> (last visited Apr. 18, 2014). It is impossible to say whether, had the coastal plain been in the NWPS, the House vote would have had a different outcome.

³⁹² Such activities would, however, have to be found compatible with the primary purpose of the Refuge, under the FWS’s strict compatibility test. 16 U.S.C. § 668dd(d)(3)(A) (2006).

C. The Impact of a Destabilizing Climate

Speculation about the future of the NWPS needs to reckon with the growing appreciation that the earth's climate is destabilizing, in substantial part because of human activity. A huge paradigm shift, the destabilizing climate will almost surely have cascading effects—altered water, wind and fire patterns, disease vectors, and so forth—throughout ecosystems, including those in NWPS areas.³⁹³ Climate models increasingly suggest to biologists that the speed and severity of the changes will severely test the resilience of many ecosystems.³⁹⁴

Climate change exacerbates some of the difficult issues mentioned above that already face wilderness land managers. An example was described in a May 2013 op-ed in the New York Times.³⁹⁵ Congress made Isle Royale in Lake Superior a national park in 1946, and put most of it in the NWPS in 1976.³⁹⁶ Moose apparently reached the island by swimming from the mainland in the early twentieth century.³⁹⁷ With no natural predators, their numbers surged and crashed and then surged again, and devastated the island's vegetation.³⁹⁸ Wolves arrived about midcentury by crossing an ice bridge from Canada, and brought the moose population under control.³⁹⁹ All this happened without direct human intervention.⁴⁰⁰ Now a warming climate has nearly ended the ice bridges, and wolf numbers are dwindling from the effects of inbreeding.⁴⁰¹ Should the Park Service rescue the wolf gene pool by importation, and restore some "balance" in the moose population?⁴⁰² Or is the core purpose of the Wilderness Act to leave natural forces alone, even if these forces are indirectly influenced by human action?⁴⁰³

Such management challenges are further complicated by uncertainty about what is actually going on with nature. At Isle Royale, for example, moose and wolves may have migrated there in the first place in part because of human hunting and trapping pressure on the mainland, so that their very

³⁹³ See AMERICAN ASSOCIATION FOR THE ADVANCE OF SCIENCE CLIMATE SCIENCE PANEL REPORT, *supra* note 10.

³⁹⁴ GLOBAL CHANGE RESEARCH PROGRAM, GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 9, 12, 79 (Thomas R. Karl et al. eds., 2009).

³⁹⁵ John A. Vucetich et al., *Predator and Prey, A Delicate Dance*, N.Y. TIMES, May 9, 2013, <http://www.nytimes.com/2013/05/09/opinion/save-the-wolves-of-isle-royale-national-park.html> (last visited Apr. 18, 2014).

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *See id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.* See generally Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL L. 83 (2013) (providing examples of human intervention to restore wildlife populations, in addition to positing that the meaning of "wilderness" cannot be something that depends upon the active manipulation by humans for its continued existence).

⁴⁰³ Vucetich et al., *supra* note 395.

presence on the Isle may be an artifact of human activities.⁴⁰⁴ To take another example, it now seems, according to some scientists, that the ecological effects of reintroducing wolves to Yellowstone have been misunderstood, and may have not, as was first touted, brought aspen and willow back to bottomlands as a result of a classic “trophic cascade.”⁴⁰⁵ This shows, one scientist argues, how the “true challenges of managing ecosystems” are underestimated. And looking a bit further down the road, management challenges might become even more daunting if, as some think, technology is not far from bringing some version of extinct animals like the woolly mammoth back to life.⁴⁰⁶

Such matters weigh on the future of legal wilderness, and are devilishly difficult to resolve practically, philosophically, and legally. It is not easy to manage nature, to mimic or restore the forces at work. As noted almost a century ago by the British biologist J.B.S Haldane, “[t]he universe is not only queerer than we suppose, but queerer than we *can* suppose.”⁴⁰⁷ From a political perspective, these manipulation issues can be very divisive. They alienate those who believe in noninvolvement from moose lovers, wolf lovers, vegetation lovers, woolly mammoth lovers, and others. Regardless of how they are ultimately resolved, just grappling with them can undermine support for the NWPS and proposals to expand it.

Moreover, if greenhouse gas emissions continue their upward trajectory, it is likely that “geo-engineering” solutions will be tried, such as salting the upper atmosphere with sulfates to reduce incoming solar radiation.⁴⁰⁸ That might make the future less ominous than it appears now, or it might not, depending on a host of factors. In any event, geo-engineering would be the ultimate in human control of nature—the most dramatic

⁴⁰⁴ See Robin J. Innes, *Alces americanus*, <http://www.fs.fed.us/database/feis/animals/mammal/alam/all.html> (last visited Apr. 18, 2014) (attributing the range expansion of moose to seeking protection from overhunting, human translocation and climate change, among other bases).

⁴⁰⁵ Arthur Middleton, *Is the Wolf a Real American Hero?*, N.Y. TIMES, March 9, 2014, available at http://www.nytimes.com/2014/03/10/opinion/is-the-wolf-a-real-american-hero.html?_r=0.

⁴⁰⁶ See, e.g., Nathaniel Rich, *The Mammoth Cometh*, N.Y. TIMES MAGAZINE, Feb. 27, 2014, available at <http://www.nytimes.com/2014/03/02/magazine/the-mammoth-cometh.html>. Rich has argued that “synthetic biology” is roughly in the position that computer science was thirty years ago, and further: “We’re programmed to be unsettled by imperfect simulations of nature—it’s a primitive instinct. But the truth is that the natural world, as we know it, is itself a distant knock-off of what existed before we got here. Do you consider your corgi a “natural” creation? American corn? Cows? Once you realize how greatly we’ve already configured nature to our liking, you can begin to think about the most responsible way to engineer nature in the future.” Rachel Nolan, *Behind the Cover Story: Nathaniel Rich on the Truth about Corgis and Synthetic Biology*, N.Y. TIMES, THE 6TH FLOOR BLOG (March 3, 2014), <http://6thfloor.blogs.nytimes.com/2014/03/03/behind-the-cover-story-nathaniel-rich-on-the-truth-about-corgis-and-synthetic-biology/>. See also D.T. Max, Green is Good, *The New Yorker* 54-63 (May 12, 2014).

⁴⁰⁷ Quoted in SIDDHARTHA MUKHERJEE, *THE EMPEROR OF ALL MALADIES* 6 (2010) (emphasis in original), citing Haldane, *Possible Worlds and Other Papers* (1928)..

⁴⁰⁸ CLIVE HAMILTON, *EARTHMASTERS: THE DAWN OF THE AGE OF CLIMATE ENGINEERING* (2013); DAVID KEITH, *A CASE FOR CLIMATE ENGINEERING* (2013).

illustration that the entire NWPS, along with the rest of the planet, is now firmly in the anthropocene era.

In this connection, wilderness advocates have long brought attention to the care with which the Act's principal drafter, Howard Zahniser, chose the word "untrammelled" in the Act's definition of wilderness.⁴⁰⁹ "Trammel" means to restrain or hinder free action—in this context, nature running free and wild, able to do its own thing.⁴¹⁰ What we now know about both past and ongoing human interference with natural forces makes the idea that legal wilderness is in fact "untrammelled" by man increasingly difficult to accept.⁴¹¹ One might try to draw a distinction between purposeful human activities to "trammel" the land, and human activities that only incidentally have that effect, such as climate-destabilizing greenhouse gas emissions. But the Act does not say that NWPS areas should "appear to be untrammelled by man." Instead, it says that such areas simply "are untrammelled by man."⁴¹² The number of experts who would deny that human-induced climate change is "trammeling" NWPS areas across the country is dwindling rapidly.⁴¹³

A changing climate heightens many of the challenges described above that wilderness advocates and wilderness managers already confront. It makes it harder to cling to the belief, long held by some wilderness advocates, that the very idea of "wilderness management" is a kind of oxymoron.⁴¹⁴ The assumption was that simply leaving land free from more intensive development would promote or restore "natural" conditions.⁴¹⁵ The belief was linked to the notion of the "balance of nature"⁴¹⁶ that was embraced by many ecologists around the time the idea of preserving wildlands was gaining currency. If enclaves of sufficient size were left to natural forces, so the argument went, that balance could be preserved.⁴¹⁷ We now understand nature is much more complicated than that.⁴¹⁸

⁴⁰⁹ See, e.g., TURNER, *supra* note 2, at 35–37.

⁴¹⁰ Wilderness.net, *What is Wilderness?*, <http://www.wilderness.net/NWPS/WhatIsWilderness> (last visited Apr. 18, 2014) (discussing the meaning of "untrammelled").

⁴¹¹ Cf. BILL MCKIBBEN, *THE END OF NATURE* 60 (2d ed. 1996).

⁴¹² 16 U.S.C. § 1131(c) (2006).

⁴¹³ See John Abraham & Danna Nuccitelli, *Climate Consensus: The 97%*, *GUARDIAN*, May 16, 2013, <http://www.theguardian.com/environment/climate-consensus-97-per-cent/2013/may/16/climate-change-scienceofclimatechange> (last visited Apr. 18, 2014); AMERICAN ASSOCIATION FOR THE ADVANCE OF SCIENCE CLIMATE SCIENCE PANEL, *supra* note 10.

⁴¹⁴ Paul R. Krausman & Brian Czech, *Wildlife Management Activities in Wilderness Areas in the Southwestern United States*, 28 *WILDLIFE SOC'Y BULL.* 550, 550 (2000).

⁴¹⁵ See Arturo Gómez-Pompa & Andrea Kaus, *Taming the Wilderness Myth*, 42 *BIOSCIENCE* 271, 272, 275 (1992) (dismissing the ecological equilibrium model).

⁴¹⁶ See J. BAIRD CALLICOTT, *CONTEMPORARY CRITICISMS OF THE RECEIVED WILDERNESS IDEA* 24, 28 (2000), available at http://www.wilderness.net/library/documents/callicott_1-4.pdf.

⁴¹⁷ See The Federal Lands Project, *Balance of Nature*, <http://www.100questionsforthegirlscouts.org/County/site/wilderness.htm> (last visited Apr. 18, 2014).

⁴¹⁸ See, e.g., DANIEL BOTKIN, *DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY* 7–9 (1990) ("Until the past few years, the predominant theory in ecology either presumed or had as a necessary consequence a very strict concept of a highly structured, ordered, and regulated, steady-state ecological system. Scientists know now that this view is wrong at local and regional levels . . .").

All this makes it more difficult to argue that “[w]ithout wilderness, there are no standards for ecological health.”⁴¹⁹ While the idea can still be advanced that the NWPS promotes scientific study, such as of the impacts of human activities on “wild” areas, the political history of the wilderness movement demonstrates that this idea, standing alone, has limited political appeal.⁴²⁰

As noted earlier, arguments for protecting wildness to preserve biodiversity have become somewhat more prominent since the Wilderness Act became law. But emphasizing this argument raises a new challenge for wilderness advocates. As the climate destabilizes, some areas once deemed worth protecting for biological and related resources may no longer be so. Ninety-eight percent of the Everglades is currently in the NWPS.⁴²¹ Should it remain so when much of it is inundated by rising sea levels, as most models predict over the next several decades? More than half of the NWPS acreage is in Alaska, and a significant portion of that is permafrost.⁴²² What does melting permafrost mean for the future of these areas?

As these challenges become more widely appreciated, popular support for the Wilderness Act’s core concept—a system of protective enclaves “untrammeled by man”—is likely to erode, subtly but inexorably.

Climate change will also increasingly affect negotiations on proposals to expand the NWPS. An example is emerging in Utah, where a deal is being discussed that could designate some BLM redrock lands as wilderness.⁴²³ These lands contain inholdings owned by the state of Utah. The proposal would trade them for BLM lands elsewhere that have potential for tar sands and oil shale development.⁴²⁴ Extraction of those carbon-rich fuels would add to the planet’s burden of greenhouse gas emissions.⁴²⁵ For some, facilitating the possibility of fueling climate change may be too high a price to pay for expanding the NWPS. Others may calculate that whether the region’s oil shale and tar sands are actually developed will turn not on whether a wilderness deal goes forward, but instead on larger considerations that have nothing to do with the NWPS—such as EPA greenhouse gas regulatory policies, how fast greener energy technologies take hold in the marketplace, and international energy markets, influenced

⁴¹⁹ McCloskey, *supra* note 293, at 352.

⁴²⁰ See TURNER, *supra* note 2, at 34. As noted earlier, Aldo Leopold did not emphasize ecological arguments for wilderness preservation. See *supra* note 135.

⁴²¹ NATIONAL PARK SERVICE, MARJORY STONEMAN DOUGLAS WILDERNESS CORE ELEMENTS 5 (2010), available at [http://www.wilderness.net/toolboxes/documents/WC/Everglades%20National%20Park%20-%20Wilderness%20Foundation%20\(2010.12\).pdf](http://www.wilderness.net/toolboxes/documents/WC/Everglades%20National%20Park%20-%20Wilderness%20Foundation%20(2010.12).pdf).

⁴²² NASH, *supra* note 2, at 274.

⁴²³ Phil Taylor, *Wilderness is Currency as Lawmaker Stalks Grand Bargain to End Land Battles*, GREENWIRE, Oct. 22, 2013, <http://www.eenews.net/stories/1059989187> (last visited Apr. 18, 2014).

⁴²⁴ *Id.*

⁴²⁵ Press Release, Natural Resources Defense Council, Controversial Oil Substitutes Sharply Increase Emissions, Devour Landscapes (June 11, 2007), available at <http://www.nrdc.org/media/2007/070611.asp>.

by government policies around the globe. For them, the land trade may be an acceptable price to pay for expanding the NWPS.

Increasing encroachment by human infrastructure on the NWPS and candidate areas poses another set of challenges. It already presents problems,⁴²⁶ and a destabilizing climate will make matters worse. Every wildfire or disease outbreak in a wild area that threatens to escape into surrounding occupied terrain can cost the NWPS, and prospects for expanding it, some political support. The framers of the Wilderness Act understood this dynamic, for the Act gives federal land managers authority to take “such measures” *inside* NWPS areas “as may be necessary in the control of fire, insects, and diseases.”⁴²⁷ Since the Wilderness Act became law, understanding has grown of the interconnectedness of large natural systems, and of how both early and modern humans have shaped ecosystems and landscapes.⁴²⁸ Although humans have altered natural fire regimes for millennia, for most of the last century, federal policy has effectively suppressed fires, even in NWPS areas.

Fire danger and fire suppression interact with the Wilderness Act in complicated ways. These days, fires caused by lightning in NWPS areas are usually allowed to burn unless they threaten neighboring communities, but that was not always the case.⁴²⁹ As the climate changes, and the bill for many decades of unnatural buildup of fuels comes due, fires grow much larger, more frequent, and more costly to fight.⁴³⁰ Compared to forty years ago, wildfires burn twice as many acres per year, and the fire season is two months longer.⁴³¹ The seven years since 1960 with the highest level of acreage burned by wildfire have all occurred since 2000.⁴³² Federal wildfire

⁴²⁶ The number of housing units within half a mile of a national forest almost quadrupled between 1940 and 2000, to nearly two million units. *Hearing Before the S. Comm. on Energy and Natural Resources*, 113th Cong. 1 (2013) (statement of Thomas Tidwell, USDA Forest Service Chief) [hereinafter *Tidwell Congressional Testimony*], available at http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=e59df65c-09c6-4ffd-9a83-f61f2822a075. The number of units within national forest boundaries (primarily on nonfederal inholdings) more than quadrupled in the same period, to 1.2 million units. *Id.* An estimated 70,000 communities exist in the so-called “wildland-urban interface.” *Id.*

⁴²⁷ 16 U.S.C. § 1133(d)(1) (2006). A leading court decision has said that the agencies must be sensitive to the need to protect wilderness values in deciding whether such actions are “necessary,” and “ensure that wilderness values are not unnecessarily sacrificed to promote the interests of adjacent landowners.” *Sierra Club v. Lyng*, 663 F. Supp. 556, 559–560 (D.D.C. 1987).

⁴²⁸ See, e.g., CRONON, *supra* note 6; MANN, *supra* note 18, at 312–26; CHARLES C. MANN, 1493: UNCOVERING THE NEW WORLD COLUMBUS CREATED (2011); SHEPARD KRECH III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY (1999).

⁴²⁹ U.S. DEP’T OF THE INTERIOR & DEP’T OF AGRIC., FEDERAL WILDLAND FIRE MANAGEMENT, POLICY AND PROGRAM REVIEW 5, 7 (1995), available at http://www.nwcg.gov/branches/ppm/fpc/archives/fire_policy/mission/1995_fed_wildland_fire_policy_program_report.pdf.

⁴³⁰ *Tidwell Congressional Testimony*, *supra* note 426; FEDERAL WILDLAND FIRE MANAGEMENT, *supra* note 429.

⁴³¹ *Tidwell Congressional Testimony*, *supra* note 426.

⁴³² Tom Kenworthy, *A Nation on Fire: Climate Change and the Burning of America*, THINKPROGRESS, Jul. 31, 2013, <http://thinkprogress.org/climate/2013/07/31/2312591/climate-change-wildfires/> (last visited Apr. 18, 2014).

fighting costs have more than tripled in the last two decades; fire suppression now comprises half the Forest Service's entire budget.⁴³³

These trends raise tough questions about how far to go to make NWPS areas more fire-adapted by conventional means—for example, prescribed fire or mechanical thinning. Currently, prescribed fire is legally permitted, and sometimes practiced, in NWPS areas.⁴³⁴ Timber harvesting by mechanical means for fire-control-related purposes is also legally possible, but generally not practiced. As more and larger wildfires occur and threaten structures and communities, these policies will likely be re-examined, by both the executive agencies and by Congress. Support for NWPS expansion may erode and ultimately, perhaps, lead to calls loosening current management strictures inside NWPS areas.⁴³⁵

While all these challenges can create some uneasiness about the future of legal wilderness, the picture is not completely bleak. The NWPS itself is not under assault, at least yet. No serious proposals have ever been made to remove entire areas from it.⁴³⁶ Traditional foes of expanding the NWPS—the mining and logging industries and water developers—are somewhat less engaged than they were.⁴³⁷ Compromises have been made and are still being sought to allow expansion of the NWPS.⁴³⁸

Moreover, as noted earlier, in some ways lands can be restored to eligibility for the NWPS by human action—wilderness can be “created” or “recreated.” The example of logged-over eastern areas being put in the NWPS after many decades may prove useful elsewhere, although the aridity and lack of forest cover in many parts of the west could make it much more difficult to make, in the Act's words, the “imprint of man's work substantially unnoticeable.” Still, efforts to “put roads to bed” on federal

⁴³³ *Tidwell Congressional Testimony*, *supra* note 426.

⁴³⁴ See Laurie Yung, *Prescribed Fires in Wilderness – Case Study*, <http://www.wilderness.net/index.cfm?fuse=toolboxes&sec=fire> (last visited Apr. 18, 2014).

⁴³⁵ This issue was prominent in the discussions leading to the Colorado and Idaho variants on the Forest Service's Roadless Rule. See *supra* notes 299-300. Congress has engaged on this issue in designating new NWPS areas in the past couple of decades. For example, a 2001 amendment to a 2000 bill adding areas in Nevada to the NWPS provided that the Wilderness Act shall not preclude “conducting wildland fire management operations (including prescribed burns)” within wilderness areas designated by the Act. Department of the Interior and Related Agencies Appropriations Act, 2002, Pub. L. No. 107-63, § 135(f), 115 Stat. 443, *amending* Pub. L. No. 106-554 (Black Rock Desert-High Rock Canyon Emigrant Trails National Conservation Area Act of 2000). See also Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282, 116 Stat. 2005, which provided that, “[c]onsistent with section 4 of the Wilderness Act, nothing in this title precludes a Federal, State, or local agency from conducting wildfire management operations (including operations using aircraft or mechanized equipment) to manage wildfires in the wilderness areas designated by this title.”

⁴³⁶ Doubtless there are some purists who want to remove some areas from the NWPS because they have been “loved to death,” or too many accommodations have been made for visitors, such as the chains installed for hikers to navigate up the back side of Yosemite's Half Dome. Traci Cone, *Is Yosemite's Half Dome Being Loved to Death?*, USA TODAY, Feb. 3, 2012, *available at* <http://travel.usatoday.com/destinations/story/2012-02-04/Is-Yosemites-Half-Dome-being-loved-to-death/52951480/1>.

⁴³⁷ See *supra* notes 150-53; 216-22; 231-33, and accompanying text.

⁴³⁸ See Leshy, *supra* note 353, at 2.

lands can enlarge the pool of candidate areas for the NWPS.⁴³⁹ Indeed, in the last quarter of a century, some “deep ecologists” and wilderness activists have promoted the idea of “re-wilding” vast tracts of land using principles of conservation biology, but such efforts gained little political traction at any level.⁴⁴⁰

Mark Twain, who knew wilderness firsthand, once noted that “[p]rophecy is a good line of business, but it is full of risks.”⁴⁴¹ All this could change, and relatively quickly. A major energy crisis could cause the fossil fuel industry to re-engage on wilderness policy. On the other hand, it might raise the price of fuel enough to dampen ORV use. Climate change and the hydrologic cycle are joined at the hip, and many experts believe a more unstable climate, with increasingly severe and prolonged droughts in some areas, may be hard-wired into the planet’s future. This might threaten NWPS areas—many of which are located in the upper reaches of important watersheds—with developments designed to make water supplies more secure. Presidents may be asked to exercise their Wilderness Act authority to build water projects in existing NWPS areas. There could be pressure to seed clouds over such areas to enhance precipitation.⁴⁴² NWPS expansion might be thwarted if it were perceived as interfering with such measures. A spate of major fires originating in NWPS areas but causing destruction elsewhere could cause Congress to revisit some of the Wilderness Act’s restrictions. And new technologies—twenty-first century equivalents of the off-road vehicle—could emerge that threaten wilderness in ways we cannot predict.

VII. CONCLUSION

Preserving “wilderness” by law was never easy, and it has become much more complicated since the Wilderness Act was adopted a half-century ago. It has long been observed how social movements often gain political strength through charismatic appeals and then gradually, as their purposes gain acceptance, they become institutionalized, with bureaucratic

⁴³⁹ See Jeff Barnard, *Logging Roads Go Back to Nature*, REGISTER GUARD, Apr. 4, 1998, at 3A.

⁴⁴⁰ See TURNER, *supra* note 2, at 303–15. A related development was introduction of a Northern Rockies Ecosystem Protection Act that would have protected more than 13 million acres of federal land in Idaho, Montana, and Wyoming. At its high point a dozen years after its unveiling in 1992, it attracted 185 cosponsors in Congress. But the bill never gained any support from Members of Congress in those three states, and national support faded as the Congress turned more conservative. *Id.* at 315–16.

⁴⁴¹ MARK TWAIN, FOLLOWING THE EQUATOR 89 (1897).

⁴⁴² Legally, a distinction might be drawn between cloud-seeding from airplanes and from ground-level generators inside the NWPS. And it might be relevant whether or not, according to climate data, human-induced precipitation would likely exceed natural variations in precipitation.

controls taking over.⁴⁴³ A related idea, common to many fields of learning, is that knowledge becomes increasingly specialized.

These ideas may fairly be applied to the experience with the Wilderness Act. Launched with a powerful, charismatic appeal for landscape preservation, the movement has since been bureaucratized, and its implementation has become more specialized and complex. As more and more tradeoffs have to be made, the more it may be necessary to accept second- or third-best solutions. In the process, appeals based on charisma and clarity of principle may become increasingly more difficult, its champions may become disillusioned, and political support for the program may erode.⁴⁴⁴

So what is the future of the NWPS? One thing seems clear—although it will likely remain an important tool, the NWPS no longer dominates federal lands protection discussions like it once did. Concomitantly, its true champions in the Congress have dwindled to a precious few over the past half-century.⁴⁴⁵ The lack of congressional bench strength has to be of major concern to wilderness advocates. While Congress led the charge to expand the NWPS in the 1970s and 1980s, frequently overcoming agency resistance, legislative momentum has dissipated. This has shifted the task of protecting wild qualities of federal lands back to the executive branch—in a sense completing a cycle, since the executive launched the idea nearly a century ago. Further, of the many other causes of the slowdown mentioned earlier, some are unlikely to change, at least anytime soon. The congressional system seems destined to be gridlocked for several more years, at least until redistricting takes place after the 2020 census. Long-term trends like a decline in the confidence of governmental institutions are fiendishly difficult to reverse.

All this suggests that, in the near term, more pragmatism—more judicious drawing of boundaries of expansion proposals, more quid-pro-quo deals, and even more compromises in allowing more human manipulations in NWPS areas—may be called for, if the system is to remain relatively secure and to expand. The “release” issue described earlier will likely loom ever larger, especially for the nearly sixty million acres of national forest land subject to the Roadless Rule, and more than ten million acres of BLM land in “wilderness study areas.” Experience with these lands over the past few decades reveals a roughly cyclical pattern. The agencies study their lands for wilderness potential. More often than not, they have understated the amount of lands with wilderness potential and been relatively stingy in their recommendations. Congress has then made its own decisions about

⁴⁴³ See generally MAX WEBER, *ESSAYS IN SOCIOLOGY* 196–240 (H. H. Gerth & C. Wright Mills eds., 1958). Dennis Roth invoked Weber in his 1984 speculations about the future of wilderness. ROTH, *supra* note 49, at 64.

⁴⁴⁴ Something like this idea was put forward by iconoclastic economist Albert Hirschman, in *SHIFTING INVOLVEMENTS: PRIVATE INTEREST AND PUBLIC ACTION* (2002).

⁴⁴⁵ This was underscored by the recent announcement of the retirement of John Dingell, a strong supporter of the original Wilderness Act and other wilderness bills during his record-setting 58 years in Congress.

which lands to include in the NWPS, and not been very deferential to executive branch recommendations. Congress has also tended to provide some limited “release” for lands it passes over. Because of their remoteness and other factors described earlier,⁴⁴⁶ a considerable amount of these passed-over and “released” lands are not developed in a way that destroys their eligibility of the NWPS. Controversies over how these still-wild areas should be managed by the executive may be rekindled, and reach the courts. Occasionally, Congress steps in to make new NWPS decisions.

The “harder” and longer the release, and the more accessible the areas are for wilderness-destroying activities, the less opportunity for future expansion of the NWPS. Through these cycles, the acreage eligible for the NWPS shrinks somewhat, as more roads are established and more developments occur in released areas. Thirty-five years ago, for example, BLM had formally designated WSAs covering approximately twenty-five million acres of WSAs.⁴⁴⁷ Today, it has about nine million acres of NWPS areas, and thirteen million acres of WSAs.⁴⁴⁸ But this does not tell the whole story about how much “wild” land BLM actually manages, or how it manages it. As noted earlier, many other tools are now available alongside the NWPS to protect wild qualities. In fact, about five million acres of BLM wildlands (some in WSAs and some not) are now within national monuments, being managed in ways not that different from NWPS lands.⁴⁴⁹

If current trends continue, advocates for expanding the NWPS will continue to lose political strength. NWPS designation could increasingly be seen as a specialized, rather inflexible tool for dealing with the complex array of environmental threats we face. It could help lock up carbon to mitigate greenhouse gas emissions, but its relatively rigid management prescriptions may not make it the tool of choice in many situations. This would not necessarily end NWPS expansion.⁴⁵⁰ To the extent wilderness advocates are pragmatic and nimble, opportunities to add new areas might emerge through political deals tied to other conservation efforts. For example, efforts to head off bringing the sage grouse under the protection of the Endangered Species Act⁴⁵¹ might result in a package of protections for

⁴⁴⁶ See *supra* notes 216-19; 231-32 and accompanying text.

⁴⁴⁷ U.S. Dept. of the Interior, Bureau of Land Mgmt., *Wilderness Study Areas*, http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/wilderness_study_areas.html (last visited Apr. 18, 2014).

⁴⁴⁸ *Id.*; Bureau of Land Mgmt., *Frequently Asked Questions*, http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/wilderness2/Wilderness_FAQ.html (last visited Apr. 18, 2014).

⁴⁴⁹ Bureau of Land Mgmt., *National Monuments*, http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/monuments.html (last visited Apr. 18, 2014).

⁴⁵⁰ Writing in a more optimistic time, Craig Allin predicted that ultimately the NWPS could contain from 100–150 million acres. ALLIN, *supra* note 2, at 271–72. At the extreme, the radical group Earth First! called for protecting 716 million acres as wilderness in 1983, and the Wildlands Project, founded in 1991 by former Earth First! activists and some conservation biologists, proposed to protect up to half the acreage in the lower 48 states in core wilderness areas and interconnecting corridors. TURNER, *supra* note 2, at 216–17, 311.

⁴⁵¹ As a result of a settlement of litigation brought by species advocates, the Department of the Interior has a deadline to make a final decision whether to list the bird, whose habitat stretches across millions of acres, by 2015. U.S. Dep’t of Interior, Bureau of Land Mgmt., *Sage*

the bird's habitat, which could include expansion of the NWPS. President Obama's willingness to exercise Antiquities Act authority to create national monuments might spur Congress to enact legislation providing some roughly equivalent protections, which could include some NWPS enlargement.⁴⁵² Sometimes, indeed, political stars can align in a way that allows even otherwise strident wilderness opponents to support a measure adding lands to the NWPS. A proposal by the Skull Valley Band of Goshute Indians to locate a low-level radioactive waste dump on their reservation in Utah galvanized the Utah political establishment—generally not a fan of the NWPS—to craft legislation to stop it.⁴⁵³ One part of the deal Congress passed to thwart the project put part of the nearby BLM-managed Cedar Mountains in the NWPS.⁴⁵⁴

In facing up to the challenges ahead, wilderness advocates need to remind themselves that the proponents of the original Wilderness Act found it within themselves to keep their focus on the big picture, to put aside differences among themselves, and to forge compromises. For the most part their judgments were vindicated by subsequent events—their pragmatism accelerated, rather than retarded, progress toward their objective of maximizing preservation of wildlands.

Why they were able to do it with more success than contemporary wilderness advocates seem to be accomplishing is not an easy question to answer. I have tried to suggest many ways in which the world of wilderness politics is more complicated than it was in 1964. But whether this tells the whole story is a question worth contemplating, for never have wilderness advocates across the country been better funded and, on paper at least, better organized.⁴⁵⁵

Wilderness advocates also need to remind themselves that trend is not destiny. Paul Sutter concluded his fine book on the origins of the wilderness movement this way:

Grouse: Frequently Asked Questions, http://www.blm.gov/wo/st/en/prog/more/sagegrouse/frequently_asked_questions.html#what (last visited Apr. 18, 2014). See generally U.S. Fish & Wildlife Serv., *Greater Sage-Grouse*, <http://www.fws.gov/mountain-prairie/species/birds/sagegrouse/index.php> (last visited Apr. 18, 2014).

⁴⁵² This is essentially what occurred at Steens Mountain in Oregon in 2000, see note 319 *supra*, and accompanying text, and in the Owyhee Canyonlands in 2009; 16 U.S.C. § 1132 note; Pub.L. No. 111-11, 123 Stat. 1033. Not only did Congress ultimately add some areas to the NWPS, but also made some of them cattle-free. *Id.*

⁴⁵³ See Lincoln L. Davies, *Skull Valley Crossroads: Reconciling Native Sovereignty and the Federal Trust*, 68 MARYLAND L. REV. 290, 343 (2009). Utah Congressman Bob Bishop, usually a skeptic of the NWPS, was quoted as saying: "We have created wilderness the right way . . . [w]e have put another nail in the coffin of" the nuclear waste facility. *Id.*

⁴⁵⁴ Pub. L. No. 109-163, § 384, 119 Stat. 3136 (2006).

⁴⁵⁵ While the U.S. population has increased from 192 to 320 million since 1964, the membership of the Wilderness Society has grown from 35,000 to over half a million "members and supporters." See Wilderness Soc'y, <http://www.tws.org> (last visited Apr. 18, 2014); Campaign for America's Wilderness, <http://www.pewenvironment.org/campaigns/campaign-for-america-wilderness/id/62078> (last visited Apr. 18, 2014).

The founders of the Wilderness Society offered wilderness as a new preservationist paradigm because they were concerned with how the automobile, roads, and a boom in outdoor recreation were changing both the natural world and Americans' relations with nature. As we rethink our preservationist ideals today, it is worth remembering that wilderness advocacy emerged during the interwar period as the product of a similar critical endeavor.⁴⁵⁶

From the beginning, the wilderness movement was at least somewhat linked with more generic environmental causes, especially those centering around federal land management. Over time, this marriage of wilderness preservation and environmental protection may have become a double-edged sword, as the environmental movement shifted somewhat away from grassroots campaigning around federal lands and open space to focus more on greenhouse gas emissions control and energy policy reform.

From the larger perspective, the more dire forecasts about our destabilizing climate and about the great wave of extinction probably underway, with as many as one-third of all species worldwide projected to become extinct within four decades,⁴⁵⁷ raise new questions about the future of the NWPS. Is it a wise expenditure of wilderness advocacy resources to litigate whether the government can rebuild a fire lookout, or build water tanks for bighorn sheep, in a NWPS area?⁴⁵⁸ How much effort should be made to protect areas eligible for the NWPS, such as campaigning to limit ORV traffic in wilderness study areas? How much effort should be expended on "rewilding" areas, by such techniques as putting roads to bed? How much should the focus be on expanding the number of NWPS areas, through organizing and lobbying campaigns? Against gloomy forecasts of the future of nature in our planetary home, is a narrow focus on "wilderness" akin to rearranging the deck chairs on the Titanic? Should wilderness advocates instead align more strongly with others and concentrate on awakening the populace to the dangers ahead if greenhouse gas emissions are not promptly brought under control or mitigated? Or should they work harder to introduce young people to wild areas, to give them a stake in wilderness and build a future constituency for land conservation generally, as well as for the NWPS?

While legal protections for wild areas will likely continue to evolve, I hope, and expect, they will not become moribund. The campaign to maintain and expand the NWPS will likely continue, because the idea of protecting "wilderness" speaks to something deep in our culture and, indeed, the human psyche. Visionaries may emerge with the charisma and poetic power to renew and expand the movement, building on arguments like E.O. Wilson's: "wildlands are like a magic well—the more that is drawn from

⁴⁵⁶ SUTTER, *supra* note 2, at 263.

⁴⁵⁷ KOLBERT, *supra* note 7.

⁴⁵⁸ See, e.g., *Wilderness Watch v. Iwamoto*, 853 F. Supp. 2d 1063, 1063 (W.D. Wash. 2012); *Wilderness Watch v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1024 (9th Cir. 2010).

them in knowledge and benefit, the more there will be to draw.”⁴⁵⁹ The more technologically advanced and gadget-ridden our society becomes, the more it may need to have a counterbalance—landscapes without motors or mechanized transport, where nature seems to be free and unspoiled, even if it isn’t. Over the longer run, a pessimist might say, the most important value of legally protecting “wilderness” is to preserve some awe-inspiring landscapes and ecosystem remnants for what might be called ecological archeology,⁴⁶⁰ so that future generations can have a reminder of what once was—a kind of elegy.⁴⁶¹ Perhaps this is what Aldo Leopold meant when he suggested that the “richest values of wilderness lie not in the days of Daniel Boone, nor even in the present, but rather in the future.”⁴⁶² As President Johnson said in signing the Wilderness Act into law on September 3, 1964, the idea was to leave “future generations . . . a glimpse of the world as it was in the beginning.”⁴⁶³

But it is more than that. For one thing, the NPWS is also an enduring statement of trust in the usefulness of government, and especially the national government. Even in an era when that trust has undergone serious erosion, the NWPS endures. Government may not do as much as some want, as fast or as effectively as some want. But without government we would not have a NWPS of the breadth and variety we do, generally open for public visitation and inspiration at little cost. Like the people it serves, government is capable of greatness as well as folly. Surely the National Wilderness Preservation System is on the greatness end of the spectrum.

The decision America has made through its political system to preserve wild areas by law is also a profound statement of American values. It is an expression of restraint. As one of the Act’s original sponsors, Senator

⁴⁵⁹ EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 282 (1992).

⁴⁶⁰ I have borrowed this term from Professor Al Lin, who used it in a somewhat different context. See Albert Lin, Presentation at Rocky Mountain Mineral Law Foundation Institute for Natural Resources Law Teachers: Myths of Environmental Law (May 2013).

⁴⁶¹ Hollywood brought that image to the silver screen just nine years after the Wilderness Act became law, in Edward G. Robinson’s death scene in the movie “Soylent Green” (Metro-Goldwyn-Mayer 1973). Set in a dystopian world in 2022, where New York City’s population of forty million people was sustained on a foodstuff the Big-Brother-like government made from dead human bodies, Robinson (himself to die of cancer twelve days after the filming finished) checked into a government-assisted suicide clinic called “Home.” After he was given a lethal injection, he was shown films of wild nature, teeming with life now extinct, while the soundtrack played Beethoven, Grieg, and Tchaikovsky. Powerful stuff, I thought then, as a fired-up young attorney working for the Natural Resources Defense Council in California, where one of my first tasks was to help the Sierra Club litigate its challenge to the Forest Service’s initial roadless area review and evaluation process. Not so much, according to a New York Times critic, who sniffed that the film’s display of “the potential of man’s seemingly witless destruction of the earth’s resources” was not very effective. A.H. Weiler, *Screen: ‘Soylent Green,’* April 20, 1973, <http://www.nytimes.com/movie/review?res=9D05EFDD1331EF34BC4851DFB2668388669EDE> (last visited Apr. 18, 2014).

⁴⁶² Aldo Leopold Wilderness Research Institute, *Strategic Plan*, <http://leopold.wilderness.net/aboutus/plan.htm> (last visited Apr. 18, 2014); NASH, *supra* note 2, at 199.

⁴⁶³ See The American Presidency Project, *Remarks Upon Signing the Wilderness Bill and the Land and Water Conservation Fund Bill*, <http://www.presidency.ucsb.edu/ws/?pid=26481> (last visited Apr. 18, 2014).

Clinton P. Anderson of New Mexico, put it, “Wilderness is an anchor to windward. Knowing it is there, we can also know that we are still a rich nation, tending our resources as we should—not a people in despair searching every last nook and cranny of our land for a board of lumber, a barrel of oil, a blade of grass, or a tank of water.”⁴⁶⁴

Put another way, at bottom, the Wilderness Act embodies the idea that we are going to preserve something for future generations of humanity, not steal from them. The notion was nicely framed by two statements at congressional hearings in June 1957 on an early version of the Wilderness Act. A counsel for the timber industry accused wilderness advocates of “colossal selfishness” in promoting the Act. At the same hearings, David Brower of the Sierra Club argued that the current generation “is speedily using up, beyond recall, a very important right that belongs to future generations—the right to have wilderness in their civilization, even as we have it in ours.”⁴⁶⁵

The idea of preserving something of the natural world for future generations through government action is at the heart of the case for not only the Wilderness Act, but also for controlling greenhouse gas emissions. Both ask that human beings fashion ways to live more lightly on the planet. Both require governmental action to help that process along. As we face a highly uncertain future, the experience with the Wilderness Act provides a beacon of optimism. To let that beacon shine more brightly, we may need a “climate letter,” building on the example of Wallace Stegner’s “wilderness letter,”⁴⁶⁶ synthesizing in elegant prose the importance of taking action to control greenhouse gas emissions, and using the movement to protect wilderness as an inspiration. That would be an altogether fitting legacy for the Wilderness Act.

⁴⁶⁴ THE WILDERNESS ACT HANDBOOK, *supra* note 186, at 73.

⁴⁶⁵ ALLIN, *supra* note 2, at 111–12, 116–17.

⁴⁶⁶ See Letter from Wallace Stegner, Wilderness Soc’y, to David E. Pesonen, Outdoor Recreation Review Comm’n (Dec. 3, 1960), reprinted in W. STEGNER, THE SOUND OF MOUNTAIN WATER 145 (1969).