THE EMERGING LAW OF OUTDOOR RECREATION ON THE PUBLIC LANDS

BY

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Outdoor recreation is assuming a prominent role across the public lands, presenting the responsible federal agencies with difficult, new management challenges. Since World War II, recreational uses of public lands have been on a steady upward trajectory, which has only accelerated during this century. Today, an increasingly diverse array of outdoor activities, each pressing for greater access to the public domain, is spawning considerable controversy while raising corresponding environmental concerns. The outdoor recreation industry is now an economic powerhouse and, together with recreation participants, is becoming a notable political force. Curiously, prevailing law says very little about recreation on the public lands, unlike the laws governing timber, mining, and other resource uses. Instead, Congress has broadly delegated management authority to the responsible agencies and otherwise primarily relied upon special protective designations—national parks, wildlife refuges, and wilderness areas—and various funding mechanisms to meet recreation demands. As a result, the agencies, presidents, and courts are piecemeal developing what amounts to a common law of outdoor recreation. This Article explains how that is occurring and what it portends for recreation policy on the public lands, while also suggesting additions to the governing law.

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I. INTRODUCTION

Outdoor recreational activity is now ubiquitous across the nation's public lands, presenting increasingly difficult management challenges for responsible federal agencies. The expansive federal public lands have long served as a kind of "commons" for recreation, offering attractive open spaces where everyone was welcome and could pursue an array of outdoor activities. Since the post-war 1950s, the number of visitors seeking recreational opportunities has grown enormously while land managers have found themselves hard-pressed to provide necessary space, facilities, and services to accommodate the escalating demands and activities.[1] As the ranks of recreationists have swelled, environmental damage has become ever more visible along with conflicts between the participants—personified by intense controversies over motorized use, wilderness designation, mountain biking, and

[1] ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS 268 (2003) [hereinafter KEITER, KEEPING FAITH WITH NATURE]; ERIC M. WHITE ET AL., U.S. DEP'T OF AGRIC., FEDERAL OUTDOOR RECREATION TRENDS: EFFECTS ON ECONOMIC OPPORTUNITIES 2–3 (2016). *See infra* notes 30–56 and accompanying text.

hunting.[2] These growing problems, though commonly linked to individual choice in recreational preferences, are also coupled to powerful economic and political forces that are driving what some now regard as an "industrial scale" recreation problem.[3] Curiously, despite the level of conflict that pervades recreational activity on the public lands today, the legal framework governing what has become a dominant use of these spaces is remarkably embryonic.[4]

The federal public lands sprawl across 640 million acres, representing about twenty-eight percent of the U.S. land base.[5] Mostly located in the western United States, these lands are overseen by four land management agencies with diverse legal responsibilities. The National Park Service and the U.S. Fish & Wildlife Service (FWS) operate under largely preservationist—or dominant use—legal regimes that embrace recreation as a principal use.[6] In contrast, the Forest Service and the Bureau of Land Management (BLM) are governed by multiple use mandates that include recreation as a permitted use along with other more consumptive ones.[7] Although each agency's resource management priorities have evolved over time, they are all beset today with recreational management challenges linked to the sheer number of people seeking their own individual outdoor experiences. Wilderness hikers, mountain bikers, off-road vehicle (ORV) enthusiasts, hunters, anglers, kayakers, backcountry skiers, climbers, bird watchers, and many others have all staked claims to the public domain in pursuit of their own preferred activity, but they cannot all play amicably in the same place. Collectively, they have spawned an outdoor recreation economy that accounted for 2.2 percent of the nation's gross domestic product in 2017, putting it well ahead of mining, timber, livestock grazing, and most other natural resource-related industries.[8] Not only

[2] Jan G. Laitos & Rachael B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENV'T L. 1091, 1104 (2004); Charlotte Simmonds et al., *Crisis in Our National Parks: How Tourists Are Loving Nature to Death*, GUARDIAN (Nov. 20, 2018), https://perma.cc/Y3TG-7EDP. *See also infra* notes 44–56 and accompanying text.

[3] Todd Wilkinson, *The Question That None of Greater Yellowstone's Conservation Groups Are Willing to Confront*, MOUNTAIN J. (Aug. 7, 2020), https://perma.cc/HX4E-A7UL; *cf.* EDWARD ABBEY, DESERT SOLITAIRE: A SEASON IN THE WILDERNESS 45 (1968) (coining the term "industrial tourism").

[4] Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 203, 242 (1999).

[5] CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020).

[6] National Park Service Organic Act, 54 U.S.C. § 100101 (2018) (National Park Service); National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd(a)(3) (2018) (U.S. Fish & Wildlife Service).

[7] Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (2018) (Forest Service); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1702(c), 1712(c)(1) (2018) (BLM).

[8] *News Release: Outdoor Recreation Satellite Account, U.S. and Prototype for States, 2017*, BUREAU ECON. ANALYSIS (Sept. 20, 2019), https://perma.cc/BF4P-3PRL [hereinafter *News Release: Outdoor Recreation Satellite Account*]. *See infra* notes 152–154 and accompanying text (describing recent economic growth in the outdoor recreation sector).

must land managers balance between differing recreational uses and prioritize among recreation and consumptive uses, but they must also take account of conservation and environmental concerns, including wildlife habitat, water quality, and aesthetic values.

For over a century, outdoor recreation has drawn attention from diverse quarters. From their earliest days, the Park Service and Forest Service have engaged in a competitive rivalry to provide wilderness and other recreational opportunities to adventurous visitors,[9] while the hunting and fishing community has long ties to the national wildlife refuges.[10] The BLM, a relative latecomer to the recreational scene,[11] has recently found itself embroiled in an array of wilderness, ORV, and related controversies.[12] Since the 1950s, several high-profile commissions have been convened to examine and improve available recreational opportunities.[13] Periodically, Congress has established new recreation-related designations on the public lands, such as national recreation areas and wilderness areas, and also created new funding mechanisms designed to support recreational opportunities.[14] However, other than mostly general references to outdoor recreation in the organic legislation governing the land management agencies, Congress has provided little definitive guidance on the subject. This leaves recreation policy primarily in the hands of the individual agencies and, more recently, the courts, guided largely by conservation-related statutes and available funding. Thus, without the extensive legal standards that govern other public land resources and uses, such as timber harvesting, mining, livestock grazing, water usage, and energy development, recreation law and policy is evolving piecemeal with little congressional direction. Whether this is sufficient in light of the powerful forces driving modern recreational use is open to question.

This Article will address the evolution, application, and future of the law governing recreation on the public lands. It begins with a historical overview of federal recreation policy to clarify how the issue has evolved over time. It then examines the recreation controversies and challenges confronting the land management agencies today, including the role economic and political pressures play in these issues. Next, it reviews the existing laws and policies governing recreation on the public lands as well as the important role that courts are playing in resolving

[9] SAMUEL TRASK DANA & SALLY K. FAIRFAX, FOREST AND RANGE POLICY: ITS DEVELOPMENT IN THE UNITED STATES 131–32 (2d ed. 1980).

[10] Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 474 (2002) [hereinafter Fischman, *The National Wildlife Refuge System*].

[11] JAMES R. SKILLEN, THE NATION'S LARGEST LANDLORD: THE BUREAU OF LAND MANAGEMENT IN THE AMERICAN WEST 32, 43 (2009).

[12] *See infra* notes 96–108 (describing BLM's increasing involvement in managing recreation and off-road vehicles).

[13] *See infra* notes 53–56 and accompanying text (describing President Reagan's Presidential Commission on Outdoor Recreation Resources Review).

[14] *See infra* notes 26–29, 37–41, 129–134 and accompanying text.

recreation-related controversies and articulating an emergent common law of outdoor recreation. It concludes by assessing the current legal framework and then outlining suggestions to improve the existing legal structure.

II. HISTORICAL OVERVIEW: OUTDOOR RECREATION DURING THE 20TH CENTURY

The wide-open spaces found on the nation's diverse public lands have long attracted recreational interest and participants. Beginning with the national parks, the four federal land management agencies have each supported and encouraged recreational activities on their landholdings, though under different legal regimes and on different time trajectories. As public interest in outdoor recreation mounted during the 20th century, both Congress and the President engaged the issue through legislation, review commissions, and executive orders. The result was a series of legislative enactments, executive actions, and milestone reports addressing outdoor recreation generally while the individual agencies were mostly left to develop their own recreation policies and responses.

A. Federal Recreation Milestones: Facing a Gathering Storm

In the early 20th century, interest in outdoor recreation on the federal estate was just beginning. A handful of mostly undeveloped national parks—several championed by the legendary conservationist John Muir—attracted a few stalwart individuals with the money and time to travel by rail to such distant locales as Yellowstone, Yosemite, Sequoia, and Mt. Rainier in the then-remote western states.[15] They mostly came for the scenery, though Muir also extolled the recreational and spiritual renewal aspects of a trip to the mountains.[16] The original forest reserves—established during the 1890s and soon converted into the national forest system—also offered recreational opportunities, but they were mainly valued for their timber, water, and other consumptive resources, including minerals, forage, fish, and game.[17] Elsewhere the federal government was intent on disposing of its landholdings to encourage settlement and development of the sparsely populated West.[18] Most citizens were focused on making a living with little time for recreational pursuits.

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[15] *See* ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 57–63 (4th ed. 2010).

[16] ROBERT B. KEITER, TO CONSERVE UNIMPAIRED: THE EVOLUTION OF THE NATIONAL PARK IDEA 65–66 (2013) [hereinafter KEITER, TO CONSERVE UNIMPAIRED].

[17] SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890–1920, at 36–37 (1959).

[18] DANA & FAIRFAX, *supra* note 9, at 10–13, 29.

The situation changed within a couple decades. In 1903, President Theodore Roosevelt created the nation's first wildlife refuge at Pelican Island, Florida, laying the groundwork for what has become the national wildlife refuge system.[19] In 1916, Congress formalized the national park system, instructing the new National Park Service to manage the parks both for "conservation" and "public enjoyment."[20] Secretary of the Interior Franklin Lane interpreted the Park Service's new mandate to include recreation, not only describing the new system as "the nation's playground" but also asserting that "the recreational use of the national parks should be encouraged in every practicable way."[21] In 1920, Forest Service Chief Henry Graves—who had opposed creation of the national park system out of fear the new agency would purloin prime national forest lands for new parks—released a paper entitled *A Crisis in National Recreation*, which not only staked out an outdoor recreation role for the national forests but also advocated transferring the Park Service to the Department of Agriculture.[22] At Aldo Leopold's behest, the Forest Service soon entered the recreation arena by administratively establishing wilderness areas designed to accommodate multi-day pack trips.[23] Once the automobile appeared early in the century, travel to these attractive yet distant western settings soon became a possibility for a larger segment of the population.[24] Meanwhile, these early outdoor recreation developments ignited a rivalry between the Park Service and Forest Service that endures yet today.

Although the Great Depression of the 1930s dampened public interest in recreational pursuits, the decade nonetheless witnessed several developments that would eventually lure more people outdoors. The New Deal unleashed the Civilian Conservation Corps (CCC) on the public lands, where CCC workers built new roads, trails, visitor centers, campgrounds, bridges, and other facilities that enabled the public to more easily visit and recreate in these areas.[25] In 1934, at the behest of waterfowl hunters, Congress passed the Migratory Bird Hunting Stamp Act,[26] establishing a dedicated annual revenue stream to purchase lands for the fledgling wildlife refuges.[27] In 1936, perceiving the need for a national recreation policy, Congress adopted the Parks, Parkway, and

19 Fischman, *The National Wildlife Refuge System*, *supra* note 10, at 471–72.

20 Act of Aug. 25, 1916, ch. 408 § 1, 39 Stat. 535 (1916) (codified at 54 U.S.C. § 100101).

21 *Secretary Lane's Letter on National Park Management*, *in* AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS 48, 48–50 (Lary M. Dilsaver ed., 1994) [hereinafter *Secretary Lane's Letter*].

22 Henry S. Graves, *A Crisis in National Recreation*, 26 AM. FORESTRY 391, 398, 400 (1920).

23 DANA & FAIRFAX, *supra* note 9, at 132–33.

24 RUNTE, *supra* note 15, at 63.

25 DANA & FAIRFAX, *supra* note 9, at 144–45; *see also* CONRAD L. WIRTH, PARKS, POLITICS, AND THE PEOPLE 94–157 (1980) (detailing the CCC's work in the national parks).

26 16 U.S.C. §§ 718–718(h) (1934).

27 Mark Madison, *A History of the Federal Duck Stamp*, U.S. FISH & WILDLIFE SERV. NORTHEAST REGION, https://perma.cc/XZ5W-ZJCU (last visited Nov. 11, 2020).

Recreation Act,[28] which enlisted the Park Service to inventory the nation's federal, state, and municipal lands for their recreation potential and to recommend a comprehensive recreation policy. That same year, recognizing the recreation possibilities associated with the large federal water projects then underway in the West, Congress also established the first National Recreation Area at Lake Mead on the Colorado River,[29] which the Park Service was soon charged with managing. But as the country emerged from the Great Depression, World War II erupted, bringing an abrupt halt to the budding interest in outdoor recreation.

Once the war ended, the floodgates opened as a war-weary nation sought relief in the outdoors. Several factors fueled the emergent interest in outdoor recreation, among them a strong economy, increased leisure time, rapid population growth, and a budding interstate highway system that soon made automobile travel to distant destinations much easier.[30] New recreational equipment, including lightweight camping gear, surplus jeeps from the war, and more durable skis and rafts, also helped spur the outdoor recreation boom.[31] Moreover, people started moving westward, prompting dramatic growth in western cities and thus bringing more people into closer contact with the public lands.[32] During the mid-1950s, the Park Service responded with its Mission 66 program, designed to upgrade national park facilities to accommodate fast-growing visitor numbers.[33] And in 1958, Congress established a high-profile Outdoor Recreation Review Commission (ORRC), chaired by the philanthropist Laurance Rockefeller, to survey the nation's recreational landscape and suggest ways to meet the burgeoning demand.[34]

The Commission's sweeping 1962 report catalogued existing recreational activities and opportunities at the federal, state, and local

[28] Act of June 23, 1936, ch. 735, § 1, 49 Stat. 1894 (1936) (codified at 16 U.S.C. § 17k). Notably, the Park Service's responsibilities under the act did not extend to national forest lands—an intentional exclusion that testified to the intense rivalry between the two agencies. DANA & FAIRFAX, *supra* note 9, at 153.

[29] RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY 137–38 (1997).

[30] SAMUEL P. HAYS, BEAUTY, HEALTH, AND PERMANENCE: ENVIRONMENTAL POLITICS IN THE UNITED STATES, 1955–1985, at 3–4, 34–35 (1987); KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 47.

[31] KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 47.

[32] CHARLES WILKINSON, FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST 178–82, 184, 199, 213 (1999); *see also* PETER WILEY & ROBERT GOTTLIEB, EMPIRES IN THE SUN: THE RISE OF THE NEW AMERICAN WEST 12–13 (1982) (chronicling the rapid settlement and development of the Southwest during the mid- twentieth century).

[33] DANA & FAIRFAX, *supra* note 9, at 191–92.

[34] Outdoor Recreation Resources Review Act, Pub. L. No. 85-470, 72 Stat. 238 (1958); DANA & FAIRFAX, *supra* note 9, at 196.

levels, and offered extensive recommendations.[35] Although much of the report focused on expanding state and local recreational opportunities, it called for a new bureau of outdoor recreation, a permanent funding source to acquire recreationally valuable lands, and new recreation-focused designations on public lands.[36] A receptive Congress responded to these recommendations, promptly creating a new Bureau of Outdoor Recreation in the Department of the Interior to coordinate federal recreation policy.[37] Congress also adopted the Land and Water Conservation Fund Act,[38] which has become the major source of funding for new federal land acquisitions, and passed the Wilderness Act of 1964,[39] the Wild and Scenic Rivers Act of 1968,[40] and the National Trails Act of 1968[41]—all representing a significant commitment to enhancing recreational opportunities on the public lands. At the same time, Congress and the President were busy adding new units to the national park system,[42] while Congress also embedded recreation in the Forest Service's management responsibilities.[43]

In 1964, Congress chartered the Public Land Law Review Commission (PLLRC) to reexamine the badly outdated legal framework governing the public lands.[44] Its comprehensive final report included recreation-related proposals that reinforced and expanded the earlier ORRC recommendations.[45] The PLLRC called for protecting unique, nationally significant areas for recreational use, expanding the Land and Water Conservation Fund, a recreation user fee, new statutory

[35] OUTDOOR RECREATION REVIEW COMM'N, OUTDOOR RECREATION FOR AMERICA 5–10, 14–19 (1962).

[36] *Id.* at 6; *see* GEORGE H. SIEHL, THE POLICY PATH TO THE GREAT OUTDOORS: A HISTORY OF THE OUTDOOR RECREATION REVIEW COMMISSIONS 3 (2008) (discussing the findings of the 1962 Outdoor Recreation Review Commission report).

[37] The statute also directed the Secretary of the Interior to "maintain a continuing inventory and evaluation of outdoor recreation needs and resources" and to "formulate and maintain a comprehensive nationwide outdoor recreation plan" that, among other things, identified "critical outdoor recreation problems [and] recommend[ed] solutions." 16 U.S.C. § 460l-1 (2018). The Bureau of Outdoor Recreation, however, proved short lived; it was eliminated administratively by Interior Secretary James Watt during the early 1980s with some of its functions transferred to the Park Service. SIEHL, *supra* note 36, at 8.

[38] Land and Water Conservation Fund Act, Pub. L. No. 88-578, title 1, § 2, 78 Stat. 897 (1964) (codified at 54 U.S.C. §§ 200301–200310). Notably, Congress funded the Land and Water Conservation Fund from federal offshore oil and gas revenues rather than from the general treasury.

[39] Wilderness Act of 1964, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified at 16 U.S.C. §§ 1131–1136).

[40] Wild and Scenic Rivers Act of 1968, Pub. L. No. 96-542, 82 Stat. 906 (1968) (codified at 16 U.S.C. §§ 1271–1287).

[41] National Trails Act of 1968, Pub. L. No. 90-543, 82 Stat. 919 (1968) (codified at 16 U.S.C. §§ 1241–1251).

[42] KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 237–38.

[43] Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (2018) (enumerating "outdoor recreation" as one purpose of the national forests).

[44] Pub. L. 88-606, 78 Stat. 982 (1964).

[45] THE PUB. LAND L. REV. COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 197–216 (1970).

guidelines to resolve recreation-related conflicts, and regulations to reduce recreation-caused damage to the lands.[46] To buttress these recommendations, this section of the report was illustrated with graphic photos depicting serious environmental damage due to uncontrolled ORV activity, massive desert motorcycle races, and sheer overuse of popular areas.[47] In 1969, shortly before the PLLRC completed its work, Congress enacted the National Environmental Policy Act (NEPA),[48] engrafting a new environmental analysis requirement onto federal agency decision processes.[49] Eventually, Congress responded to the PLLRC's recommendations by adopting the Federal Land Policy and Management Act of 1976 (FLPMA),[50] which gave the BLM a long-awaited organic charter, and by amending the Land and Water Conservation Fund Act to increase the funding available to purchase land for recreational purposes.[51] Moreover, unable to ignore mounting ORV damage on the public lands, presidents Nixon and Carter penned executive orders that have become the principal legal basis for regulating motorized use on federal lands.[52]

Recreation concerns rose again on the national agenda during the 1980s, culminating in another recreation review commission. In 1985, when a series of high-level meetings and reports on the state of recreation across the nation failed to stir congressional action,[53] President Reagan created the Presidential Commission on Outdoor Recreation Resources Review that proceeded to hold widespread public hearings and to collect additional data on recreational activity. The Commission's ensuing *Americans Outdoors* report highlighted recent demographic changes and called for more local recreation opportunities and better coordination among the federal land management agencies.[54] Acknowledging the growth in different types of recreational activities and the expanding role of recreation in local economies, the Commission also recommended additional Land and Water Conservation Act funding, more emphasis on recreation on the multiple use lands, new recreational use management standards, and the establishment of

[46] *Id.* at 198, 203, 205, 206.

[47] *Id.* at 207, 208, 210.

[48] National Environmental Policy Act, Pub. L. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C. §§ 4321–4370h).

[49] 42 U.S.C. § 4332(2)(C). *See* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348–49 (1989) ("It [NEPA] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts.").

[50] Federal Land Policy and Management Act of 1976, Pub. L. 94-579, 90 Stat. 2744 (1976) (codified at 43 U.S.C. §§ 1701–1787).

[51] DANA & FAIRFAX, *supra* note 9, at 214–16.

[52] Exec. Order No. 11,644, 3 C.F.R. 368 (1972); Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (1977).

[53] SIEHL, *supra* note 36, at 7–11.

[54] REPORT OF THE PRESIDENT'S COMMISSION, AMERICANS OUTDOORS: THE LEGACY, THE CHALLENGE 173–76, 182, 191 (1987).

recreation activity zones.[55] In little more than twenty years, the recreation onslaught first identified by the 1958 commission had become reality, prompting even the development-oriented Reagan administration to acknowledge the important role that recreation was assuming on the public lands.[56]

B. Recreation and the Agencies: Rising on the Agenda

These overarching outdoor recreation milestones were also manifested in related developments involving the individual public land management agencies. Throughout the 20th century, Congress persistently added new units to the national park and wildlife refuge systems, capped off with passage of the Alaska National Interest Lands Conservation Act of 1980,[57] which nearly tripled the size of both systems. At the same time, Congress was busy creating a multitude of new Park Service-administered designations—national recreation areas, national seashores, national lakeshores, national preserves, and the list goes on—each offering different recreational experiences, often much closer to urban population centers than the more remote western national parks.[58] By the 1950s, when the Park Service embarked on Mission 66 to enhance deteriorated park facilities,[59] visitation was rising steeply, going from 26 million visits in 1948 to 71 million in 1960, and then reaching 285 million visits in 2000.[60] Despite a few dips, visitation numbers have continued to rise into the 21st century, though Congress has not added significant new acreage to the system, which stands at 422 units covering nearly 85 million acres.[61]

Congress responded to this tremendous growth by further elucidating the Park Service's management responsibilities. In 1976, Congress amended the National Parks Organic Act by directing the agency to prepare general management plans to better manage visitation.[62] Eight years later, in the so-called Redwood Amendment,[63] Congress clarified that resource conservation was the agency's top priority. With these clear directions, the Park Service began imposing some limits on visitors by requiring permits to engage in such popular

55 *Id.* at 173–77, 181–82, 192; DANA & FAIRFAX, *supra* note 9, at 214.

56 For the most part, however, the Commission's work focused on local recreation issues and the role of the private sector. SIEHL, *supra* note 36, at 12–13.

57 Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, 94 Stat. 2371, 2371 (1980).

58 KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 237–38.

59 SELLARS, *supra* note 29, at 181; WIRTH, *supra* note 25, at 262.

60 *Visitation Numbers*, NAT'L PARK SERV., https://perma.cc/Q57P-F2K7 (last updated Mar. 10, 2020).

61 *About Us*, NAT'L PARK SERV., https://perma.cc/9AAG-QA7M (last updated Nov. 4, 2020).

62 Pub. L. No. 94-458, 90 Stat. 1943 (1976).

63 Pub. L. No. 95-250, tit. I, § 101(b), 92 Stat. 166 (1978) (codified at 16 U.S.C. § 1a–1).

activities as rafting the Grand Canyon and backcountry camping.[64] In 1998, Congress revamped national park concession policies, limiting in-park services and accommodations to those "necessary and appropriate" in the national park setting.[65] Meanwhile, gateway communities continued to grow ever more dependent economically on park visitation, while concessioners and local businesses regularly sought Park Service permits to offer visitors a growing number of recreational activities within the parks.[66]

The national wildlife refuge system, though less well known than the national park system, has long provided recreational opportunities to its devotees, particularly the waterfowl hunting community. Consisting of 568 refuges and covering roughly 95 million acres under the auspices of the FWS,[67] the national wildlife refuge system was cobbled together during the 20th century through a series of executive orders and congressional designations that inserted the federal government into the state-dominated realm of wildlife management. The Migratory Bird Treaty Act of 1918 gave the national government authority over migratory birds,[68] while the Migratory Bird Hunting Stamp Act of 1934 (also known as the Duck Stamp Act) required hunters to buy a federal stamp (license) to hunt waterfowl,[69] which has since provided $800 million used to protect 5.7 million acres of wildlife habitat.[70] In 1937, Congress added the Federal Aid in Wildlife Restoration Act[71] (also known as the Pittman-Robertson Act) that included an excise tax on the sale of firearms and ammunition to support state wildlife habitat protection efforts.[72] Enacted at the behest of the hunting and fishing community, these laws collectively employ the "user pays" principle to generate funds that support the refuges and related wildlife management efforts, which also ensures hunters a strong voice in refuge management practices. In 1962, facing mounting post-war visitation pressures, Congress adopted the Refuge Recreation

64 KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 71–72.

65 National Parks Omnibus Management Act of 1998, Pub. L. 105-391, §§ 401–409, 112 Stat. 3497, 3503–13 (1998) (codified at 54 U.S.C. §§ 100702, 100703, 100706).

66 KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 91–95, 103.

67 The 95 million–acre figure omits the multi-million acre marine refuges that the FWS manages. *Public Lands and Waters*, U.S. FISH & WILDLIFE SERV., https://perma.cc/GV4U-EMNA (last updated Aug. 12, 2020).

68 Act of July 3, 1918, ch. 128, 40 Stat. 755 (codified at 16 U.S.C. §§ 703-712); Missouri v. Holland, 252 U.S. 416 (1920).

69 Act of Mar. 16, 1934, ch. 71, § 9, 48 Stat. 451 (1934) (codified at 16 U.S.C. §§ 718–718(h)); *History of the Federal Duck Stamp*, U.S. FISH & WILDLIFE SERV., https://perma.cc/6YFM-DJTR (last updated Dec. 15, 2017).

70 *History of the Federal Duck Stamp*, *supra* note 69.

71 Federal Aid in Wildlife Restoration Act (Pittman-Robertson Act), 16 U.S.C. §§ 669–669l (2018).

72 16 U.S.C. §§ 669–669i (2018). Congress followed the Pittman-Robertson Act with the Dingell-Johnson Sportfishing Act, 16 U.S.C. §§ 777–777l (2018), which also included an excise tax of fishing equipment that has been used since 1950 to support sport fishing and habitat acquisition.

Act.[73] It instructed the U.S. Fish & Wildlife Service to use a "compatibility" standard to determine permissible recreational activities, hinging on whether the activity interfered with the primary purposes for which a refuge was established.[74]

Subsequently, Congress adopted the National Wildlife Refuge System Administration Act of 1966,[75] which it later amended with the National Wildlife Refuge System Improvement Act of 1997.[76] This legislation introduced a revised "compatibility" standard to govern recreational use and further refined refuge management responsibilities.[77] The 1997 Act expressly denominated conservation as the refuge system's primary purpose,[78] while also enumerating a hierarchy of permitted uses beginning with "wildlife dependent recreation" followed by "other recreational uses."[79] The statutory combination of the "compatibility" standard and enumerated uses represents the most detailed congressional effort to oversee recreational use on the public lands. It governs how the FWS manages the more than 53 million people who annually visit the national wildlife refuges.[80]

During the 20th century, the Forest Service found recreation becoming an increasingly important part of its resource management agenda. As automobile use increased following World War I, more and more visitors sought out the national forests for recreational purposes, reaching 11 million visits in 1924.[81] During the 1920s, the Forest Service—prodded by Aldo Leopold and Arthur Carhart—embraced the wilderness idea, and then formalized it in regulations as a distinct recreational experience.[82] A decade later, the Forest Service Chief

[73] Refuge Recreation Act, Pub. L. 87-714, 76 Stat. 653 (1962) (codified at 16 U.S.C. §§ 460k–460k(4)).

[74] 16 U.S.C. § 460k.

[75] National Wildlife Refuge System Administration Act of 1966, Pub. L. 89-669, 80 Stat. 926 (1966) (codified at 16 U.S.C. §§ 668dd–668ee).

[76] National Wildlife Refuge System Administration Improvement Act of 1997, 16 U.S.C. §§ 668dd–668ee (2018). *See generally* Fischman, *The National Wildlife Refuge System*, *supra* note 10, at 481–90, 514–91 (discussing and analyzing both the 1966 and 1997 refuge system acts).

[77] *See* Fischman, *The National Wildlife Refuge System*, *supra* note 10, at 527–28, 547–62 (discussing the 1997 Amendments as they relate to the revised compatibility standard and refuge management generally).

[78] 16 U.S.C. § 668dd(a)(2). *See generally* Fischman, *The National Wildlife Refuge System*, *supra* note 10, at 516–26 (analyzing conservation as a primary purpose under the 1997 amendments).

[79] 16 U.S.C. § 668dd(a)(4)(H)–(K). *See generally* Fischman, *The National Wildlife Refuge System*, *supra* note 10, at 526–38 (analyzing the hierarchy of permitted uses).

[80] JAMES CAUDILL & ERIN CARVER, U.S. FISH & WILDLIFE SERV., BANKING ON NATURE 2017: THE ECONOMIC CONTRIBUTIONS OF NATIONAL WILDLIFE REFUGE RECREATIONAL VISITATION TO LOCAL COMMUNITIES 4 (2019).

[81] DANA & FAIRFAX, *supra* note 9, at 131. *See generally* Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 312–33 (1985) (providing a more detailed historical examination of the role of recreation in the Forest Service during much of the 20th century).

[82] DANA & FAIRFAX, *supra* note 9, at 132–34.

officially identified recreation as a major use of the national forests,[83] while the CCC was busy building roads and trails that helped spur more recreational interest in the forests. Recreation demands on the national forests mounted following World War II, rocketing from 18 million visitors in 1946 to 46 million visitors in 1955, and then to 133 million in 1964.[84] The Forest Service responded to this development with Operation Outdoors, which not only further legitimized recreation as a forest use, but also put it in the agency's annual budget.[85] In 1960, Congress passed the Multiple-Use Sustained-Yield Act,[86] and notably enumerated "outdoor recreation" first among the listed uses. Ski areas also began appearing across the national forests,[87] representing a marriage between the agency and the private sector that enticed yet more people to visit the forests and spurred real estate development activity near several areas.

Following World War II, however, the Forest Service embarked on an all-out timber production effort, alienating many of its recreation constituencies and prompting them to seek legislative recognition of the wilderness concept. Congress obliged in 1964 with passage of the Wilderness Act,[88] which contained strong recreational overtones and protected designated wilderness lands from industrial, commercial, or mechanical uses.[89] The latter part of the 20th century witnessed the Forest Service enmeshed in bitter timber wars and related wilderness preservation battles over its resource management priorities. As these controversies played out, Congress added significant national forest acreage to the wilderness system,[90] the federal courts brought the agency's timber juggernaut to an abrupt standstill,[91] and the Clinton administration extended legal protection to 58.5 million acres of roadless national forest lands.[92] All of this signaled a radical shift

[83] *Id.* at 155. During the 1930s, the Forest Service also further refined its wilderness regulations, establishing three categories of roadless areas: wilderness, wild, and recreation, and permitting more uses in the latter two areas than in the pure wilderness category. *Id.* at 157.

[84] JOHN FEDKIW, MANAGING MULTIPLE USES ON NATIONAL FORESTS, 1905–1995: A 90-YEAR LEARNING EXPERIENCE AND IT ISN'T FINISHED YET 56 (1998), https://perma.cc/GD4V-PTA4.

[85] *Id.* at 58–59. *See generally* U.S. DEP'T. OF AGRIC., FOREST SERV., OPERATION OUTDOORS PART 1 NATIONAL FOREST RECREATION (1957), https://perma.cc/5FV4-893P [hereinafter OPERATION OUTDOORS] (discussing updates to the Operation Outdoors program and its successes).

[86] 16 U.S.C. §§ 528–531 (1960). *See* Wilkinson & Anderson, *supra* note 81, at 322.

[87] HAL K. ROTHMAN, DEVIL'S BARGAINS: TOURISM IN THE TWENTIETH-CENTURY AMERICAN WEST 202–25 (1998).

[88] Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (1964).

[89] *See id.* §§ 1131(c), 1133(b)–(c).

[90] KEITER, KEEPING FAITH WITH NATURE, *supra* note 1, at 198–203.

[91] *Id.* at 87–95.

[92] Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3272 (Jan. 12, 2001) (codified at 40 C.F.R. 294).

toward conservation and recreation on the nation's federal forests.[93] By then, several national forests situated near major urban areas—the White River in Colorado and the Wasatch-Cache in Utah, for example—were becoming known and managed primarily for their recreational attributes.[94] By 1995, annual visitation to the 188 million-acre national forest system topped 345 million visitors per year, an eight-fold increase from the 1955 number.[95] A new era in forest management priorities and challenges was upon the agency.

As public interest in outdoor recreation grew during the latter half of the 20th century, the BLM-managed lands were becoming a more popular recreational destination. Through the 1950s, absent much recreational activity on these public lands, Congress basically ignored the BLM's early efforts to secure recognition or funding for a recreation program.[96] This pattern of congressional neglect was manifest in the Wilderness Act of 1964, which pointedly omitted BLM lands from the statute's coverage.[97] But by the late 1960s, popular interest in the austere, desert-like lands administered by the BLM was rising, abetted by books like Edward Abbey's *Desert Solitaire*,[98] along with the availability of post-war surplus jeeps and new camping gear that made these remote lands more accessible. Population growth in Las Vegas, Phoenix, Los Angeles, and other southwestern cities brought more people closer to the BLM's desert lands, spurring weekend jeep safaris, cross country motorcycle races, and other activities on these seemingly vast landscapes.[99]

In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA),[100] giving the BLM a new multiple use management standard that included recreation, wildlife, and wilderness, as well as new resource planning responsibilities.[101] By

93 *See* Jack Ward Thomas, *Stability and Predictability in Federal Forest Management: Some Thoughts from the Chief*, 17 PUB. LAND & RESOURCES L. REV. 9, 15 (1996) (asserting national forests and public lands generally were being managed de facto primarily for biodiversity).

94 KEITER, KEEPING FAITH WITH NATURE, *supra* note 1, at 263.

95 *See* FEDKEW, *supra* note 84, at 57.

96 DANA & FAIRFAX, *supra* note 9, at 194–95. Congress did give the BLM's predecessor agency some quite modest authority related to recreation in the Recreation and Public Purposes Act of 1926, which allowed the agency to sell or lease lands to local governments for recreation purposes. The Taylor Grazing Act of 1934, and the Oregon and California Act of 1937 also contained brief references to recreation on the public lands. *Id.*; *see also* SKILLEN, *supra* note 11, at 44.

97 *See* John D. Leshy, *Wilderness and its Discontents—Wilderness Review Comes to the Public Lands*, 1981 ARIZ. ST. L.J. 361, 362–67 (1981).

98 ABBEY, *supra* note 3, at 1–2. *See also* COLIN FLETCHER, THE MAN WHO WALKED THROUGH TIME 3 (1967); EDWARD ABBEY, THE MONKEY WRENCH GANG 23 (1975).

99 JAMES MUHN & HANSON R. STUART, OPPORTUNITY AND CHALLENGE: THE STORY OF THE BLM 128–32 (1988).

100 Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701–1782 (1976). The FLPMA legislation grew out of the PLLRC report. *See supra* note 50 and accompanying text.

101 43 U.S.C. §§ 1701(a)(8), 1702(c), 1712(c), 1782 (1976).

then, Congress had vested the BLM with oversight of a new King Range National Conservation Area,[102] the agency was administratively setting aside select areas for recreation and conservation purposes,[103] and President Nixon had issued an executive order regulating ORVs on the nation's public lands.[104] These shifts in the agency's management responsibilities coincided with a further surge in recreational interest as visitation to BLM lands grew to 56.4 million in 1987, representing a three-fold increase in just twenty years.[105]

As the 20th century wound down, the BLM found itself being pulled in quite different directions. During the 1980s, the Reagan administration—under Interior Secretary James Watt—emphasized energy production and other consumptive uses on BLM lands.[106] During the 1990s, however, the Clinton administration—under Interior Secretary Bruce Babbitt—promoted a strong conservation agenda that included establishment of the first BLM-managed national monument (Grand Staircase-Escalante in southern Utah) and a new National Landscape Conservation system.[107] Throughout these years, intense controversy raged over the BLM's new wilderness responsibilities, prompted in part by the advent of ever-more rugged ORVs and mountain bikes. Regularly hosting more than 50 million visitors annually during the 1990s, recreation was plainly moving up on the BLM's resource management agenda.[108]

III. RECREATION IN THE 21ST CENTURY: MOUNTING PROBLEMS AND CONFLICTS

As the 21st century has unfolded, recreational activity on the public lands has shown no sign of abating. Indeed, the Obama administration consciously promoted this development through its well-publicized America's Great Outdoors program.[109] With the number of visitors seeking adventure or respite in the western open spaces escalating almost annually, the responsible public land agencies have faced mounting management challenges ranging from environmental degradation and conflicts among users to funding shortfalls and enforcement problems. Local communities have likewise been affected,

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102 King Range National Conservation Area Act, Pub. L. 91-476, 84 Stat. 1067 (1970) (codified at 16 U.S.C. § 460y–9).

103 MUHN & STUART, *supra* note 99, at 191–94.

104 Exec. Order No. 11,644, 3 C.F.R. 368 (1972); *see infra* notes 270–280 and accompanying text.

105 MUHN & STUART, *supra* note 99, at 251.

106 SKILLEN, *supra* note 11, at 124–25.

107 BRUCE BABBITT, CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA 166–67 (2005); John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENV'T L. 199, 216–17, 219 (2001).

108 MUHN & STUART, *supra* note 99, at 251.

109 KEN SALAZAR, SEC'Y OF THE INTERIOR ET AL., AMERICA'S GREAT OUTDOORS: A PROMISE TO FUTURE GENERATIONS 15 (2011).

often experiencing considerable economic growth in the service sectors while simultaneously facing escalating infrastructure, search and rescue, and other costs. State tourism promotional campaigns have abetted this growth, and also helped to spawn new state outdoor recreation offices. All of this growth is manifested in the overall economic impact that recreation has on state and local economies as well as the national economy, where it now officially figures into gross domestic product calculations. An emergent economic and political dynamo, outdoor recreation is putting serious strains on the very public land resource that supports it.

A. Soaring Visitation and Related Impacts

By any measure, recreational activity is omnipresent on the public domain. The two public land agencies devoted to conservation and recreation—the National Park Service and the FWS—have both experienced a steady increase in visitor numbers. In 1960, recreational visits to the national parks reached 71.5 million; by 2019 that number had climbed to 327 million visitors—a four-fold increase in sixty years.[110] During the past twenty years, annual park recreation visits have risen by more than 50 million,[111] abetted in part by the National Park Service's 2016 centennial celebrations and "Find Your Park" campaign.[112] The impact of this growth in visitor numbers is acutely felt at individual parks. Yellowstone National Park has seen visitation grow from 1.4 million in 1960 to 2 million in 1980 to more than 4 million today.[113] At Grand Canyon National Park, visitation was at 1.2 million in 1960, growing to 2.3 million in 1980, and then soaring to nearly 6 million in 2019.[114] Visitation to the national wildlife refuges has likewise trended upward, though at a slower pace. In 2004, the refuges hosted 36.7 million visitors, which rose to more than 53 million visitors in 2017.[115] The popular Oregon Islands National Wildlife Refuge alone

110 For year-by-year national park visitation numbers since 1904, see *Visitation Numbers*, NAT'L PARK SERV., https://perma.cc/3ULQ-X4HV (last updated Mar. 10, 2020).

111 *Id.*

112 *See Find Your Park*, NAT'L PARK SERV., https://perma.cc/H2NB-3LWK (last updated Mar. 2, 2018) (In 2016, to celebrate the National Park Service's 100th birthday, the National Park Service "launched a movement to spread the word about the amazing places we manage").

113 For year-by-year Yellowstone visitation statistics since 1872, see John William Uhler & Mitakuye Oyasin, *Yellowstone National Park Visitor Statistics*, YELLOWSTONE UP CLOSE & PERSONAL, https://perma.cc/7M3A-9HWZ (last visited Nov. 13, 2020).

114 For Grand Canyon visitation statistics, see *How Many Visitors Come to See the Grand Canyon?*, GRANDCANYON.COM, https://perma.cc/Y6CU-EPBL (last visited Nov. 13, 2020); *Visitation Numbers*, NAT'L PARK SERV., https://perma.cc/9822-9THZ (last updated Mar. 10, 2020).

115 *See Banking on Nature/Impacts*, U.S. FISH & WILDLIFE SERV., BRANCH OF ECON., https://perma.cc/JL44-F9EH (last updated May 1, 2020).

recorded more than 10 million recreation visits in 2017.[116] Although Congress has expanded both conservation systems during the past sixty years, visitation has substantially outpaced the addition of more parks and refuges.

The multiple use public lands—national forests and BLM-administered lands—have similarly witnessed substantial growth in recreational visits during recent years, transforming recreation into a de facto dominant use on these lands.[117] In 1955, the national forests received 46 million visitors, a fourfold increase since the mid-1930s;[118] by 2016, visitation had swelled to 148 million annually, a nearly threefold increase during the past sixty years.[119] Across the national forest system, sixty percent of visitors engaged in physically active recreational pursuits; the most common activities involved hiking, walking, and downhill skiing,[120] while roughly 9 million visitors enjoyed a wilderness experience.[121] At individual forests, visitation numbers can be impressive. Situated near Denver, the White River National Forest in Colorado—home to eleven ski areas and eight wilderness areas—hosted more than 12 million recreation visits in 2017, an increase of more than 2 million since 2007.[122] Although the BLM reports more modest visitor numbers, its previously overlooked lands are now regularly attracting recreational interest, as is evident around the towns of Moab and Grand Junction, where mountain bike routes have replaced prior mining activities.[123] Though early BLM figures for recreation visits are rough estimates, the agency reported more than 7 million people visiting its California Desert Area lands during the late 1960s.[124] In 2001, the BLM public lands hosted 62.25 million visitor days, which grew to over 71 million by 2019, split roughly between developed recreation sites and

116 U.S. FISH & WILDLIFE SERV., DIVISION OF ECON., THE ECONOMIC CONTRIBUTIONS OF RECREATIONAL VISITATION AT OREGON ISLANDS NATIONAL WILDLIFE REFUGE 2 (2019).

117 Laitos & Carr, *supra* note 4, at 203, 242.

118 OPERATION OUTDOORS, *supra* note 85, at Preface.

119 U.S. DEP'T OF AGRIC., FOREST SERV., NATIONAL VISITOR USE MONITORING SURVEY RESULTS: NATIONAL SUMMARY REPORT 10 (2016). More recent Forest Service recreation visitor data was collected in a much more sophisticated and systematic manner than was available to the agency during the 1950s and is therefore likely to be more accurate than earlier data or estimates. *Id.* at 5.

120 *Id.* at 4. Nearly half of all visitors were local residents, traveling less than 50 miles for their forest visit. *Id.* at 9, 20.

121 *Id.* at 10–11.

122 The White River National Forest is the most visited national forest in the country. The visitation numbers are from U.S. DEP'T OF AGRIC., FOREST SERV., WHITE RIVER NATIONAL FOREST VISITOR USE REPORT: NATIONAL VISITOR USE MONITORING (2017), https://perma.cc/W95V-J6GB; U.S. DEP'T OF AGRIC., FOREST SERV., WHITE RIVER NATIONAL FOREST VISITOR USE REPORT: NATIONAL VISITOR USE MONITORING (2007), https://perma.cc/2CY4-AAY6.

123 *See, e.g.*, *Utah Mountain Biking Opportunities: Moab Area*, BUREAU OF LAND MGMT., https://perma.cc/X6DT-BPDP (last visited Feb. 4, 2021).

124 MUHN & STUART, *supra* note 99, at 193. The BLM also estimated 56.4 million visits to its lands in 1987. *Id.* at 251.

dispersed areas.[125] In short, recreation is now taking center stage on the multiple use lands and cannot be ignored by agency managers.

The range of recreational activities occurring on the public lands has evolved over time. In 1918, at the inception of the national park system, Interior Secretary Franklin Lane offered a list of favored outdoor sports in the parks: "mountain climbing, horseback riding, walking, motoring, swimming, boating, and fishing."[126] A century later, that list seems remarkably incomplete, at least for the public lands at large, given the litany of activities and gadgets that are now popular: downhill and cross country skiing, ATVing, dirt biking, mountain biking, snowmobiling, personal watercraft use, kayaking, rock climbing, base jumping, long distance competitive racing (by foot and bike), hang gliding, heli-skiing, bouldering, geo-caching, slack lining, and the list keeps growing.

Plainly, this range of activities is rife with the opportunity for conflict among users, and many of these activities also impact the landscape. Motorized and mechanical recreation devices (ATVs, snowmobiles, mountain bikes) allow users to penetrate deep into the backcountry, where their presence can disrupt the solitude other visitors seek, disturb wildlife, and cause environmental damage.[127] Adrenaline-driven thrill seekers interested in conquering the outdoors are after a different experience than those seeking a contemplative, slower-paced nature experience.[128] Hunters, anglers, and trappers tend to view the animals found on the public lands as a consumptive resource, while photographers, bird watchers, and others experience wildlife quite differently. These various experiences have been both enabled and affected by new technological developments—GPSs, cell phones, the internet, social media, GoPro cameras, and ultralight gear to name a few—that have emboldened recreationists to go further, faster, and more brazenly, posing greater risks to themselves, others, and the landscape. How to accommodate these diverse recreational activities and users on the increasingly crowded public domain is a constant challenge for the agencies as well as our political institutions.

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125 *See* BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 2001, at tbl. 4-1 (2001) (showing the recreation site and dispersed area use in 2001); BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 2019, at tbl. 4-1 (2020) (showing the recreation site and dispersed area use in 2019).

126 *Secretary Lane's Letter*, *supra* note 21, at 50.

127 GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 892–907 (7th ed., 2014); KEITER, KEEPING FAITH WITH NATURE, *supra* note 1, at 262–68; *see also* FRANK LANCE CRAIGHEAD, CRAIGHEAD INST., WILDERNESS, WILDLIFE, AND ECOLOGICAL VALUES OF THE HYALITE-PORCUPINE-BUFFALO HORN WILDERNESS STUDY AREA 32–33 (2015), https://perma.cc/26TA-8KBK (reviewing the impact of mechanized recreational activities on wildlife with extensive literature citations).

128 *See generally* JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 14 (1980) (distinguishing between different types of recreational choices and experiences to argue that national parks should promote a more nature-centric, contemplative visitor experience).

Congress has sought, with limited success, to address the mounting interest in recreation on the public lands. One approach has been to create more protected areas—national parks, monuments, refuges, wilderness areas, and the like—where recreation is a primary, statutorily endorsed use. Since the wilderness system's inception in 1964, Congress has protected more than 110 million acres on lands administered by all four public land agencies,[129] but the pace and size of new additions has dwindled in recent years.[130] Similarly, after a period of remarkable growth through 1980, Congress has since made only occasional large additions to the national park system.[131]

Another approach has been through through the appropriations process. However, congressional appropriations to the Land and Water Conservation Fund to acquire new lands for federal recreational purposes has vacillated wildly since the Fund's inception. The amount appropriated annually has only once reached the authorized $900 million, level, ranging instead from about $60 million during the 1960s to roughly $200 million during the last ten years.[132] Nonetheless, purchases with these funds have added more than 2.5 million acres to the federal public domain for recreational purposes.[133] Congress has also provided the public land agencies with funds to support recreation management, but these appropriations have consistently fallen short of their needs, even after adoption of the fee demonstration program.[134] The Park Service sports a facilities and deferred maintenance budget shortfall that is now nearly $12 billion, yet has received only modest assistance from Congress.[135] Likewise, the Forest Service's deferred maintenance backlog totals $5.2 billion,[136] the FWS's backlog sits at $1.3 billion, and the BLM's at $0.96 billion.[137] The net result of these congressional actions has been a notable—but inconsistent—commitment to increase the federal land base allocated primarily for

[129] Robert B. Keiter, *Toward a National Conservation Network Act: Transforming Landscape Conservation on the Public Lands into Law*, 42 HARV. ENV'T L. REV. 61, 74 (2018) [hereinafter Keiter, *Toward a National Conservation Network Act*]. Notably, more than two-thirds of the Park Service–administered and FWS-administered wilderness acreage is located in Alaska. *Id.* at 138.

[130] *Id.* at 73.

[131] KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 241.

[132] CAROL HARDY VINCENT, CONG. RESEARCH SERV., RL33531, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY, AND ISSUES 13 (June 19, 2019).

[133] COGGINS ET AL., *supra* note 127, at 402.

[134] *See infra* notes 420–427 and accompanying text.

[135] CONG. RESEARCH SERV., R43997, DEFERRED MAINTENANCE OF FEDERAL LAND MANAGEMENT AGENCIES: FY 2009–FY2018 ESTIMATES AND ISSUES 3 (2019). The Park Service's deferred maintenance figure includes critical infrastructure such as historic buildings, roads, trails, picnic tables, employee housing, sewer systems, and the like, which require ongoing maintenance that Congress has regularly overlooked.

[136] *Id. See also* Lenise Lago, Forest Service Associate Chief, *Reducing Our Deferred Maintenance Backlog*, U.S. DEP'T OF AGRIC, FOREST SERV. (June 21, 2019), https://perma.cc/2YJF-38TL.

[137] CONG. RESEARCH SERV., R43997, DEFERRED MAINTENANCE OF FEDERAL LAND MANAGEMENT AGENCIES: FY 2009–FY2018 ESTIMATES AND ISSUES 3 (2019).

recreational purposes, additional yet generally inadequate funding measures,[138] and little guidance on resource use priorities or recreational management strategies, particularly on the multiple use lands.

Not surprisingly, the extraordinary growth in recreation on the public lands has provoked mounting controversy at several levels. At one level, it involves a conflict between recreational use and conventional commodity development uses, such as mining, grazing, timber harvesting, and energy production. Hikers, mountain bikers, and hunters rarely seek out clearcuts, cows, or oil fields. At another level, the controversy is framed in terms of recreation versus conservation, reflecting the environmental harm that can accompany particular recreational uses. Prime examples being erosion scars and wildlife displacement attributed to off highway vehicles, mountain bikes, and even mountain climbers disturbing nesting raptors, as well as overuse at popular camping sites or trails.[139] Similar environmental concerns also regularly surface at developed recreation sites, particularly involving proposals to establish or expand national forest ski areas.[140] Yet another level of controversy involves conflicts among recreational users. Backcountry hikers, hunters, skiers, and birdwatchers do not relish encounters with noisy ORVs, helicopters, or even mountain bikes that can disturb natural quiet and wildlife, thus spoiling the experience. Moreover, as new recreational pursuits and gadgets emerge—cross-country bicycle racing, slack lining, wingsuit gliding, GPS devices, drones, and electric bikes being a few examples—agency managers face difficult choices as to their appropriate place on the public domain.[141] These controversies are not uniform across the public lands; rather, they

[138] In July 2020, however, Congress passed the Great American Outdoors Act, which will ensure a stable annual funding for the Land and Water Conservation Fund and help address the agencies' growing maintenance backlog. *See infra* notes 414–415 and accompanying text.

[139] DOUGLAS S. OUREN ET AL., DEP'T OF INTERIOR, ENVIRONMENTAL EFFECTS OF OFF-HIGHWAY VEHICLES ON BUREAU OF LAND MANAGEMENT LANDS: A LITERATURE SYNTHESIS, ANNOTATED BIBLIOGRAPHIES, EXTENSIVE BIBLIOGRAPHIES, AND INTERNET RESOURCES, REPORT NO. 2007–1353, at xii (2007), https://perma.cc/U2M8-5UJU. *See also* CRAIGHEAD, *supra* note 127, at 30–33 (reviewing studies on the impact of mountain bikes on wildlife). *Compare* Michael J. Vandeman, *Science Proves Mountain Biking Is More Harmful Than Hiking: The Impacts of Mountain Biking on Wildlife and People*, CULTURE CHANGE (July 3, 2004), https://perma.cc/AK7U-4GUD (claiming mountain biking is more harmful than hiking), *with* Gary Sprung, *Natural Resource Impacts of Mountain Biking*, AM. TRAILS (Oct. 1, 2003), https://perma.cc/NB68-3NB2 (stating that research does not support that mountain biking is more harmful than hiking).

[140] *See, e.g.*, *Methow Valley Citizens Council*, 490 U.S. 332, 339 (1989) (challenging new ski area proposal); Colo. Wild v. U.S. Forest Serv., 523 F. Supp. 2d 1213, 1218–19 (D. Colo. 2007) (challenging land exchange to facilitate construction of new ski area).

[141] *See* SEC'Y OF THE INTERIOR, ORDER NO. 3376, INCREASING RECREATIONAL OPPORTUNITIES THROUGH THE USE OF ELECTRIC BIKES (Aug. 29, 2019). *See also* Justin Housman, *Lawsuits Stack Up Against Fed's Decision to Allow E-Bikes on Public Land*, ADVENTURE J. (Dec. 10, 2019), https://perma.cc/2ZXW-XX75.

are often heightened in national park, wilderness, and other protected areas where tighter restrictions usually apply.

The growth in recreational activity on the public lands has significant impacts that extend well beyond the boundary lines demarking these lands. Gateway communities like Estes Park, Springdale, and West Yellowstone have long hitched their economic fortunes to nearby national parks.[142] Today, other communities situated near attractive public land venues are likewise tying themselves to these outdoor playgrounds, attracting new visitors as well as new residents whose presence generally boosts the local economy.[143] Examples include Flagstaff, Bend, Bozeman, and Moab to name a few western towns situated amidst public lands that have experienced extensive growth. The same is true for the West's many ski towns, including Vail, Steamboat, Jackson, Whitefish, Park City, and others. By several accounts, these demographic and economic shifts foreshadowed the advent of a New West,[144] one built upon the region's natural amenities that are attracting new businesses and residents with different values than longtime residents. Such growth, however, invariably taxes the local infrastructure and public services—roads, sewer systems, public schools, law enforcement, fire departments, search and rescue, and other social services. It also increases living costs, including real estate prices and local taxes, and can ignite antagonisms between old timers and newcomers.[145] The seemingly inevitable accompanying subdivision sprawl frequently fragments wildlife habitat, disrupts migration patterns, creates wildland fire hazards, and can block traditional access routes to adjacent public lands.[146] Although this movement toward recreation and tourism as preferred public land uses mirrors the shift in economic priorities that many conservation groups have long advocated, these fundamental changes in the value attached to the public lands are not without cost.

There are, moreover, other challenges related to the recreation explosion. By any measure, African-American, Latinx, Native American, Asian, and other minority populations are not well represented among those recreating on the public lands; they report feeling uncomfortable

142 *See* KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 110–11 (examining the national park-gateway community relationship).

143 HEADWATERS ECON., RECREATION COUNTIES ATTRACTING NEW RESIDENTS AND HIGHER INCOMES (2019), https://perma.cc/BSU7-8DG9.

144 *See* CTR. OF THE AM. W., ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION 12, 46 (William Riebsame et al. eds., 1997); JUSTIN FARRELL, THE BATTLE FOR YELLOWSTONE: MORALITY AND THE SACRED ROOTS OF ENVIRONMENTAL CONFLICT 6 (2015).

145 Lori M. Hunter et al., *The Association Between Natural Amenities, Rural Population Growth, and Long-Term Residents' Economic Well-Being*, 70 RURAL SOC. 452, 455–56 (2005).

146 Andrew J. Hansen et al., *Ecological Causes and Consequences of Demographic Change in the New West*, 52 BIOSCIENCE 151, 152 (2002). *See* DOUGLAS E. BOOTH, SEARCHING FOR PARADISE: ECONOMIC DEVELOPMENT AND ENVIRONMENTAL CHANGE IN THE MOUNTAIN WEST 109 (2002).

and unwelcome in spaces long the domain of predominantly white, Anglo users.[147] The nation's youth, imbued with our electronic, web-dominated culture, are likewise not playing outdoors as in the past, fostering a worrying condition now dubbed "nature deficit disorder."[148] Efforts are afoot by the land management agencies, constituent organizations, and others to address these problems. The goal is to ensure equal access and treatment by attracting more communities of color and young people outdoors in a welcoming, non-threatening environment.[149] This is clearly the fair and morally just thing to do. These are public spaces owned by all citizens and underrepresented groups contribute through taxes to the federal funding that supports outdoor recreation opportunities on the public lands. It is also important for personal health and childhood development reasons, as has become evident during the coronavirus pandemic.[150] Only by engaging the nation's increasingly diverse and youthful populace can the land management agencies, outdoor recreation enthusiasts, and related businesses secure the necessary constituencies and political support going forward to maintain the public lands as outdoor playgrounds available to all.

B. The Economics and Politics of Outdoor Recreation

These interrelated changes in public land priorities and local communities are unlikely to subside given the mounting economic importance of recreation at the national, state, and local levels as well as related political implications. In 2016, formally acknowledging this emergent reality, Congress incorporated outdoor recreation expenditures into the nation's gross domestic product calculations.[151] The Bureau of Economic Analysis (BEA) then reported that in 2017 outdoor recreation accounted for 2.2 percent or $427.2 billion of the nation's economic output,[152] surpassing mining, utilities, farming, and

147 *See* Reyna Askew & Margaret A. Walls, *Diversity in the Great Outdoors: Is Everyone Welcome in America's Parks and Public Lands?*, RESOURCES (May 24, 2019), https://perma.cc/5N56-GTHQ; David Flores et al., *Recreation Equity: Is the Forest Service Serving Its Diverse Publics?*, 116 J. OF FORESTRY 266, 266, 270 (2018); *Recreating in Color: Promoting Ethnic Diversity in Public Lands*, U.S. FOREST SERV., https://perma.cc/S5G8-TQDN (last visited Nov. 16, 2020); David Scott & KangJae Jerry Lee, *People of Color and Their Constraints to National Park Visitation*, GEORGE WRIGHT F., no. 1, 2018, at 73, 76.

148 *See* RICHARD LOUV, LAST CHILD IN THE WOODS: SAVING OUR CHILDREN FROM THE NATURE-DEFICIT DISORDER 32–34 (2005).

149 *See infra* notes 493, 497 and accompanying text.

150 Meg St-Esprit McKivigan, *"Nature Deficit Disorder" Is Really a Thing*, N.Y. TIMES (June 23, 2020), https://perma.cc/LQ2T-TL89.

151 Outdoor Recreation Jobs and Economic Impact Act of 2016, Pub. L. 114-249, 130 Stat. 999 (2016).

152 *News Release: Outdoor Recreation Satellite Account, U.S. and Prototype for States, 2017, BEA 19–45*, BUREAU OF ECON. ANALYSIS (Sept. 20, 2019), https://perma.cc/Y8VN-SZJP [hereinafter BEA]. A 2017 Outdoor Industry Association report concluded that the outdoor recreation economy generated $887 billion in consumer spending, supported 7.6

ranching. According to the BEA, the outdoor recreation economy grew by 3.9 percent, significantly outpacing the 2.4 percent growth rate for the overall economy.[153] For the western public land states, outdoor recreation and tourism consistently rank among each state's most important economic sectors in terms of gross domestic output and jobs.[154] The public land agencies have also each calculated their contribution to local economic welfare based on recreation. In 2016, the Park Service determined that recreational visitation to the parks generated $18 billion in economic activity and accounted for 318,000 jobs; the Forest Service put their visitation figures at $9 billion in economic activity and 148,000 jobs; the FWS calculated that refuge visitation added $3.2 billion and accounted for 41,000 jobs; and the BLM came in at $3 billion generated and 48,000 jobs.[155] Acknowledging this reality, several states have recently established outdoor recreation offices to promote recreational activity and related business development opportunities statewide—a clear recognition of the important economic role recreation now occupies at the state and local level.[156]

These eye-opening figures represent an outdoor recreation industry that embraces numerous economic sectors and diverse players, all of whom jointly constitute an imposing constituency in the political realm.[157] Core elements of the recreation economy include product manufacturers (North Face, Remington, Polaris, Trek, and Black Diamond, to name a few), equipment and clothing retailers (REI, Cabela's, LL Bean, Patagonia, and others), and consumers (hikers, bird watchers, hunters, anglers, ATV riders, mountain bikers, skiers, climbers, and many others). The Outdoor Industry Association, which represents manufacturers, retailers, and related organizations, boasts several hundred members; it takes an active role in promoting outdoor sports but also lobbies and advocates for conservation purposes, acknowledging that public lands and waters "are the backbone of our outdoor recreation economy."[158] The outdoor recreation economy also

million jobs, accounted for $65.3 billion in federal tax revenue, and another $59.2 billion in state and local tax revenue. OUTDOOR INDUS. ASS'N, THE OUTDOOR RECREATION ECONOMY 2 (2017), https://perma.cc/BX9Y-8D68.

153 BEA, *supra* note 152.

154 ANNE A. RIDDLE, CONG. RESEARCH SERV., R45978, THE OUTDOOR RECREATION ECONOMY 7–8, fig. 4 (2019).

155 CAUDILL & CARVER, *supra* note 80, at 1; RIDDLE, *supra* note 154, at 14, tbl. 2.

156 Margaret A. Walls, *The Outdoor Recreation Economy and Public Lands*, RESOURCES (Oct. 18, 2018), https://perma.cc/M9HA-2P6Q. Ironically, these efforts have been so successful that some states are now reversing course from heavy promotional campaigns. Nicole Blanchard, *As Visits Increase, Idaho Parks and Recreation Backs Off Marketing Efforts*, SPOKESMAN REV. (Mar. 8, 2020), https://perma.cc/B3PE-YB7C.

157 Sammy Roth, *The Story Behind that Patagonia Tag, and How the Trump Era Changed Outdoor Recreation*, L.A. TIMES (Sept. 19, 2020), https://perma.cc/SC3Y-LYR3.

158 OUTDOOR INDUS. ASS'N, *supra* note 152, at 3; *see also A Force for the Industry*, OUTDOOR INDUSTRY ASS'N., https://perma.cc/GL3Q-5LZ8 (last visited Nov. 22, 2020); *Mis-*

extends into an array of other industries, including transportation, real estate, construction, hotels, restaurants, retail shops, ski areas, guiding and outfitting services, as well as medical, legal and other professional services.[159] Many outdoor recreation participants are also active in conservation organizations that range from the Sierra Club and National Parks Conservation Association to the Theodore Roosevelt Conservation Partnership and Greater Yellowstone Coalition, as well as in sport-specific groups like the Backcountry Horsemen, Blue Ribbon Coalition, and International Mountain Biking Association. Moreover, an outdoor recreation-focused media—the National Geographic channel, *Outside* magazine, *Backpacker* magazine, *Powder* magazine, *Field and Stream* magazine, and the like—plays another important economic role, advertising products and services while also promoting adventure experiences and attractive venues. Although these extended entities and players are not always in agreement over public land recreation policies, they individually and collectively wield considerable influence with legislators and agency officials.[160]

The importance of outdoor recreation on the public lands now largely eclipses other traditional uses that have long occupied a priority policy position on the multiple use lands. Twenty years ago, after completing a detailed analysis of the relative economic value derived from the conventional resource uses, the authors concluded: "America's public lands have undergone a fundamental change. They are now dominated by just two non-consumptive uses—recreation and preservation."[161] Their work employed economic efficiency models to demonstrate that recreation and preservation had become far more valuable uses of the public lands than the traditional consumptive uses: timber, mining, grazing, and even oil and gas.[162] More recent data largely bears out this conclusion. With the exception of oil and gas, the economic outputs from outdoor recreation significantly exceed those derived from mining, timber, and grazing on national forest and BLM public lands. For fiscal year 2018, the Department of the Interior reports that recreation generated $58.1 billion in economic output and 452,000 jobs, compared to coal production at $11.5 billion and 36,000 jobs, hardrock mining at $12.7 billion and 45,700 jobs, and livestock grazing at $2.6 billion and 42,000 jobs.[163] That same year, however, oil

sion and History, CONSERVATION ALLIANCE, https://perma.cc/HF38-5T5A (last visited Nov. 22, 2020).

159 BEA, *supra* note 152; RIDDLE, *supra* note 154, at 5–6.

160 As one sign of the increasing political influence of the outdoor recreation industry, a Washington, D.C., lobbying firm recently announced creation of a practice group directed toward outdoor recreation clients. Timothy Cama, *Lobbying Firm Launches Outdoor Industry-Focused Practice*, E&E NEWS (Aug. 17, 2020), https://perma.cc/ZFR8-M8HE.

161 Laitos & Carr, *supra* note 4, at 143–44.

162 *Id.* at 146–47, 221–39.

163 DEP'T OF THE INTERIOR OFF. OF POL'Y ANALYSIS, U.S. DEPARTMENT OF THE INTERIOR ECONOMIC REPORT FY 2018, at 2–3 (2019), https://perma.cc/9K4U-3ENL; *see also* DEP'T OF THE INTERIOR OFF. OF POL'Y ANALYSIS, U.S. DEPARTMENT OF THE INTERIOR ECONOMIC

and gas activity on the BLM lands generated $139 billion in economic output and 607,000 jobs.[164] On the national forests, recreation generates roughly $13.7 billion in gross domestic product and around 200,000 jobs, compared to timber at $2.3 billion and 44,000 jobs, and minerals at 13.3 billion and 110,500 jobs.[165] By any estimate, recreation now occupies a central economic role on the public lands, though the relative importance of these resources varies by location.

It is difficult to see these interrelated economic and political pressures on the public lands abating anytime soon. The agencies are now regularly employing economic data to buoy their own political and budgetary fortunes, which means promoting the role of recreation on their respective lands. The diverse assortment of industries, states, and communities invested in the recreation economy likewise find it in their bottom-line interest to promote recreational activities and opportunities, sometimes without significant regard for the impacts associated with the growing number of participants on the landscape. In recent months, the COVID-19 global pandemic has discouraged people from venturing abroad; rather, they are vacationing close to home and heading outside where it is relatively safe, putting additional short-term pressures on the public lands. Recognizing these trends and responding to a strong bipartisan consensus, Congress recently passed the Great American Outdoors Act,[166] which provides substantial additional funding to enhance recreational opportunities on the public lands. Although the legislation should help the agencies address the current outdoor recreation demands, it will also undoubtedly foster additional demands on them as well as the landscape. All of which begs the question: Is the existing legal structure adequate to meet these escalating demands and related pressures?

IV. THE LEGAL FRAMEWORK GOVERNING RECREATION

The law governing recreation on the public lands remains nascent, leaving the agencies with limited congressional guidance in this era of booming outdoor activity. Although Congress has explicitly endorsed

REPORT FY 2015, at v–vii (2016), https://perma.cc/PF8V-8N78 (reporting similar comparative figures).

164 U.S. DEPARTMENT OF THE INTERIOR ECONOMIC REPORT FY 2015, *supra* note 163, at 2. Notably, the Trump administration has pursued an "energy dominance" agenda, resulting in a significant uptick in oil and gas activity on the public lands. Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (March 28, 2017); *The Value of U.S. Energy Dominance*, WHITE HOUSE (July 29, 2020), https://perma.cc/Z38U-CVM4.

165 U.S. DEP'T OF AGRIC., FOREST SERV., NATIONAL FOREST SYSTEM LAND MANAGEMENT PLANNING: FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT APPENDICES, at M-3 (app. M) (2012), https://perma.cc/F9C7-TS2M. The recreation figures include wildlife- and non-wildlife-related recreation, and the minerals figures include oil and gas as well as hard rock mining.

166 Great American Outdoors Act, Pub. L. 116-152, 134 Stat. 682 (2020) (to be codified at 54 U.S.C. §§ 200401–200402). *See infra* notes 414–415 and accompanying text.

recreation in organic legislation as a permissible use on all federal public lands and set aside wilderness and other designated areas where recreation takes high priority, it has left the responsible agencies with little direction to resolve conflicts between recreation and other uses or resources as well as between different recreational uses outside the protected lands. Of course, the agencies must adhere to the various environmental statutes, such as NEPA and the Endangered Species Act,[167] which overlay all of their resource management decision processes. Presidential actions have both expanded recreational opportunities and provided important guidance for managing motorized activities. Agency regulations and planning documents also establish some standards and limitations governing recreational activity. Not surprisingly, the courts have increasingly been brought into this legal vacuum to resolve a growing number of recreation controversies. Within this general framework, the legal boundaries governing recreation policies and decisions are emerging piecemeal and often only after intense conflict has surfaced.

A. National Parks

The century-old National Parks Organic Act governs management of the national parks.[168] In 1916, Congress directed the newly created National Park Service "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."[169] A 1978 amendment reaffirmed this original mandate, instructing the Park Service to maintain the system's "high public value and integrity" so as not to "derogat[e] the values and purposes for which [it was] established."[170] Early on, Interior Secretary Franklin Lane interpreted the Organic Act's "enjoyment" language to embrace recreation: "the recreational use of the national parks should be encouraged in every practicable way"; then elaborated that "all outdoor sports which may be maintained consistently with the observation of safeguards thrown around the national parks by law will be heartily endorsed and aided whenever possible."[171] This cautionary statement acknowledging the need to reconcile recreational activities with the Organic Act's conservation and non-impairment mandates is now official policy. In its *Management Policies*, the Park Service interprets the amended Organic Act to require that "when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation

167 NEPA, 42 U.S.C. §§ 4321–4370h (2018); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2018).

168 National Park Service Organic Act, 54 U.S.C. § 100101–104901 (2012).

169 *Id.* § 100101(a).

170 *Id.* § 100101(b)(2).

171 *Secretary Lane's Letter*, *supra* note 21, at 50.

is to be predominant."[172] The *Policies* further state that "the Park Service must leave park resources and values unimpaired unless a particular law . . . specifically provides otherwise," describing this as "the cornerstone of the Organic Act" and the agency's "primary responsibility."[173] Although the *Management Policies* are not legally binding,[174] the courts have confirmed this interpretation of the Organic Act's dual mandate, holding that conservation takes priority over public enjoyment, including recreational activities that might impair park resources.[175]

Over the years, as Congress added new designations to the Park Service's portfolio, such as National Recreation Areas and historical sites, the agency perceived that it should manage these areas differently than the original national parks. During the 1960s, the Park Service divided the growing system into three categories—natural, recreational, and historical—and established different management standards governing each of them, including for permitted recreational activities.[176] Congress, however, swiftly disapproved of treating the various national park units differently. In 1970 amendments to the Organic Act, and again in the 1978 Redwood Amendment, Congress explicitly affirmed that the various national park units constituted a single unified system that must be managed consistent with the Organic Act.[177] This meant that the Park Service's conservation obligation trumped its public enjoyment mandate, even when an area—like the Lake Mead National Recreation Area—was designated for recreational purposes. But as Congress has also made clear, it retains the power to override this conservation-first standard in individual park enabling statutes, which take precedence over the Organic Act's requirements.[178]

Under this general statutory framework, the Park Service addresses recreation through regulations, its planning processes, and additional policy guidance. Park Service regulations cover only a few aspects of recreation, such as ORV travel,[179] snowmobiling, camping,

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[172] NAT'L PARK SERV., MANAGEMENT POLICIES 11 (2006) [hereinafter NPS MANAGEMENT POLICIES].

[173] *Id.*

[174] Wilderness Soc'y v. Norton, 434 F.3d 584, 595 (D.C. Cir. 2006); River Runners for Wilderness v. Martin, 593 F.3d 1064, 1070–73 (9th Cir. 2010).

[175] *See infra* notes 193–197 and accompanying text.

[176] Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1449 (9th Cir. 1996).

[177] National Park Service Organic Act, 54 U.S.C. § 100101(b) (2012). *See Bicycle Trails Council of Marin*, 82 F.3d at 1449–50 (describing the amendment process and purpose).

[178] 54 U.S.C. § 100101(b)(2). *See* Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 DEN. U. L. REV. 779, 779–80 (1997) (explaining Congress's penchant to impose management standards and requirements in individual park establishing statutes that take precedence over NPS's Organic Act responsibilities).

[179] 36 C.F.R. § 4.10 (2019). Notably, off road vehicle routes and areas may be designated only in national recreation areas, national seashores, national lakeshores, and national preserves—not in national parks. *Id.* § 4.10(b).

horseback travel, fishing, bicycling, and skateboarding.[180] For the most part, the regulations give park superintendents broad permitting authority,[181] as well as the authority to impose specific limitations on recreational and other activities appropriate for their individual parks, which is ordinarily done in the Superintendent's compendium.[182] Each park must also adopt a general management plan that addresses development plans, visitor transportation patterns, and visitor carrying capacity.[183] The general management plans are often supplemented with more specific plans governing such matters as wilderness use, wild and scenic river management, travel management, and the like. Each of these plans must be developed in accord with NEPA,[184] which requires a detailed analysis of anticipated environmental impacts and opportunities for public involvement.[185]

More specific guidance governing recreation is found in the agency's *Management Policies*, which state: "Recreational activities . . . that would impair a park's resources, values, or purposes cannot be allowed."[186] The *Management Policies* establish a process for park managers to employ in determining whether an existing or proposed recreational activity will cause an "unacceptable impact," which then would be a disallowed inappropriate use.[187] The Park Service encourages those uses that "are inspirational, educational, or healthful, and otherwise appropriate for the park environment; and will foster an understanding of and appreciation for park resources and values."[188] Park superintendents are required to "identify visitor carrying capacities for managing public use" and to develop visitor use management plans that are consistent with the carrying capacity determination and include "measurable management objectives."[189] Although the *Management Policies* contemplate that the Park Service will primarily promote visitor enjoyment through its own educational and interpretive programs, they also permit guides, outfitters, and other private sector entities to operate within parks consistent with these guidelines.[190] And they provide that "to the extent practicable, . . .

180 *See id.* pt. 2 for these specific provisions.

181 *Id.* § 1.6.

182 *Superintendent's Compendium*, NAT'L PARK SERV., https://perma.cc/4LB7-ZKXK (last updated Sep. 8, 2020).

183 54 U.S.C. § 100502 (2012) (requiring general management plans for each System unit).

184 *See infra* notes 373–376 and accompanying text.

185 40 C.F.R. pt. 1502, pt. 1503 (2019); *see Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (explaining that NEPA requires a detailed statement of environmental impacts and guarantees the public a role in agency decision-making processes).

186 NPS MANAGEMENT POLICIES, *supra* note 172, at 98. When assessing whether to permit a new recreational activity, park officials must determine that it is "appropriate and not cause unacceptable impacts." *Id.* at 101.

187 *Id.* at 98–99.

188 *Id.* at 99.

189 *Id.* at 100–01.

190 *Id.* at 99–100.

visitors [will have] ample opportunity for inspiration, appreciation, and enjoyment through their own personalized experiences."[191] Further, the *Management Policies* contain specific requirements governing backcountry use, river use, fishing, motorized equipment, packstock, hunting, trapping, parachuting, off road vehicle use, snowmobiles, and personal watercraft.[192] These relatively detailed standards and requirements governing recreational activities across the national park system probably represent the most detailed standards among the land management agencies.

Judicial decisions provide additional guidance regarding appropriate recreational activity within the national park setting. The courts have consistently interpreted the amended Organic Act to give resource conservation priority over visitor enjoyment when park resources might be impaired. In *National Rifle Association v. Potter*,[193] the court held: "In the Organic Act, Congress speaks of but a single purpose, namely, conservation."[194] Another court read the Act the same way: "resource protection [is] the overarching concern."[195] Yet another agreed: "the fundamental purpose of the national park system is to conserve park resources and values."[196] Drawing upon this interpretation, the courts have repeatedly sustained the Park Service's authority to prohibit or regulate such recreational activities as hunting, trapping, commercial fishing, mountain biking, snowmobiling, ORV travel, and base jumping.[197]

In *Southern Utah Wilderness Alliance v. National Park Service*,[198] for example, the court upheld the Park Service's authority to close portions of a dirt road to ORVs due to adverse impacts on a desert stream.[199] Similarly, the courts have sustained the Park Service's authority to regulate various recreational activities to avoid or minimize conflict between different types of users. In *Bicycle Trails of Marin v. Babbitt*,[200] the court found that the Park Service rationally limited mountain bike trail routes in the Golden Gate National Recreation Area due to conflicts between bikers, hikers, and horseback riders.[201] This same view prevailed in litigation over the Park Service's Grand Canyon river management plan, which upheld the agency's allocation of scarce

191 *Id.* at 100.
192 *Id.* at 102–04.
193 628 F. Supp. 903, 909 (D.D.C. 1986).
194 *Id.* at 909.
195 *Bicycle Trails Council of Marin*, 82 F.3d 1445, 1453 (9th Cir. 1996).
196 Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 192 (D.D.C. 2008).
197 United States v. Albers, 226 F.3d 989, 991–92 (9th Cir. 2000); United States v. Oxx, 127 F.3d 1277, 1278, 1280 (10th Cir. 1997).
198 387 F. Supp. 2d 1178 (D. Utah 2005).
199 *Id.* at 1199.
200 82 F.3d 1445 (9th Cir. 1996).
201 *Id.* at 1468.

rafting permits between motorized and non-motorized rafting groups.[202] Another case sustained Yellowstone National Park's decision to phase out snowmobiling in the park due to its adverse impacts on park resources and other visitors,[203] though the park eventually relented in the face of stiff opposition and established strict snowmobile use regulations.

The Park Service's recreation management challenges extend beyond the national park boundary line. Industrial activities, such as active mines, timber cutting, or oil and gas wells, on the periphery of a park, not only mar the scenery and quietude but can undermine the solitude-seeking, contemplative recreational experience many park visitors seek.[204] These types of activities can also degrade national park resources, as occurred at Redwood National Park fifty years ago when upstream logging on private lands devastated the shared watershed, leading Congress to fund a buyout of the offending timber company's lands.[205] More recently, mining activities adjacent to Yellowstone and Grand Canyon were forestalled by secretarial withdrawal orders designed to preserve the natural setting.[206] Litigation has also been deployed in an effort to block oil and gas leasing on BLM lands nearby to Arches and Canyonlands national parks in Utah.[207] These efforts to

[202] River Runners for Wilderness v. Martin, 593 F.3d 1064 (9th Cir. 2010). In reaching its decision deferring to the Park Service's rafting permit allocation scheme, the court found the agency reasonably concluded that the sound of motorized rafts did not "impair" the park's natural soundscape, *id.* at 1083–84, and that motorized rafting trips were "necessary and appropriate for public use and enjoyment" as required by the National Park Service Concessions Management and Improvement Act, 16 U.S.C. §5951(b). *Id.* at 1080. Rather than viewing the conflict as between commercial and non-commercial private rafters, the court viewed the matter as involving those visitors that required professional assistance to raft the river and those who did not require these services. *Id.* at 1082.

[203] Fund for Animals v. Norton, 294 F. Supp. 2d 92 (D.D.C. 2003). *But see* Int'l Snowmobile Mfrs. Ass'n v. Norton, 304 F. Supp. 2d 1278, 1287–88, 1294 (D. Wyo. 2004) (enjoining implementation of the park's phase-out decision due to its economic impact on nearby communities and businesses). *See generally* KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 76–81 (describing the Yellowstone snowmobile controversy).

[204] Robert B. Keiter, *On Protecting the National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 355, 356, 358, 369–70 (1985); Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 ECOLOGY L.Q. 207, 208, 211, 257 (1987).

[205] KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 207–09.

[206] John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116–9, § 1204, 133 Stat. 580, 653 (2019); Public Land Order No. 7875; Emigration Crevice Mineral Withdrawal; Montana, 83 Fed. Reg. 51,701 (Bureau of Land Mgmt., U.S. Dep't of the Interior, Oct. 12, 2018) (providing notice of a twenty-year withdrawal initiated by Secretary of the Interior Ryan Zinke); Notice of Application for Withdrawal and Notification of Public Meeting; Montana, 81 Fed. Reg. 83,867 (Bureau of Land Mgmt., U.S. Dep't of the Interior, Nov. 22, 2016) (providing notice of a two-year temporary withdrawal).

[207] *See* Friends of Cedar Mesa v. U.S. Dep't of the Interior, No. 4:19-CV-00013-DN-PK, 2020 WL 999836 (D. Utah Mar. 2, 2020) (finding the Friends of Cedar Mesa's claims moot because the BLM had suspended the leases to perform additional environmental analysis); Juliet Eilperin & Darryl Fears, *Oil and Gas Companies Want to Drill Within a Half Mile of Utah's Best Known National Parks*, WASH. POST (Mar. 18, 2020),

protect public lands with conservation and recreational values situated adjacent to national parks highlight the need for the responsible agencies to coordinate their resource management strategies to better disperse the different uses, and thus reduce the level of conflict.

B. National Wildlife Refuges

The legal framework governing the national wildlife refuge system provides rather detailed standards for assessing appropriate recreational activity on refuges. In 1962, Congress adopted the Refuge Recreation Act,[208] establishing a "compatibility" standard linked to the primary purpose of individual refuges to determine whether to permit a particular recreational activity.[209] The FWS interpreted this language to prioritize hunting and fishing activities, acknowledging the role hunters and anglers were playing in the system's growth. The act also allowed for "appropriate incidental or secondary [public recreation] use[s]" so long as consistent with the refuge's primary purpose.[210] Subsequent organic legislation—the 1966 National Wildlife Refuge System Administration Act (as amended in 1997)—redefined the "compatible use" standard to apply to "wildlife-dependent recreational use" as well as other uses "that will not materially interfere with or detract from . . . the purposes of the refuge."[211] Congress denoted "wildlife-dependent recreation" a "priority general public use[],"[212] and defined the term to mean "a use . . . involving hunting, fishing, wildlife observation and photography, or environmental education and interpretation"—now referred to as "the big six" permitted uses.[213] The 1997 amendments also established a new comprehensive conservation planning requirement,[214] which included identifying "opportunities for compatible wildlife-dependent recreation[]."[215] The amendments further clarified that the primary purpose of the refuge system was "for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats . . . for the benefit of present and future generations . . . ."[216] Moreover, they incorporated a new

https://perma.cc/BDX3-2S9F (reporting that the BLM granted oil and gas leases within half a mile of Canyonlands and a mile and a half of Arches).

208 Refuge Recreation Act, 16 U.S.C. §§ 460k–460k-4 (2018).

209 *Id.* § 460k.

210 *Id.*

211 National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668ee(1) (2018) (amending the National Wildlife Refuge System Administration Act of 1966).

212 *Id.* § 668dd(a)(3)(C).

213 *Id.* § 668ee(2). *See* Robert L. Fischman, *From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies*, 26 STAN. ENV'T L.J. 77, 100 (2007) (noting the 1997 amendments repeatedly emphasize the "big six" wildlife-dependent recreation refuge uses) [hereinafter Fischman, *From Words to Action*].

214 16 U.S.C. § 668dd(e).

215 *Id.* § 668dd(e)(2)(F).

216 *Id.* § 668dd(a)(2).

"biological integrity, diversity, and environmental health" mandate governing refuge planning and management that overlays recreational use determinations.[217] These statutory provisions represent the most specific legislative guidance governing recreational activity that Congress has yet provided for the public land management agencies.

The FWS has amplified these refuge management provisions through regulations and detailed policies. The agency's recreational use regulations are rather general, mostly parroting the language in the relevant statutory provisions,[218] but they empower individual refuges to issue special regulations specifying allowed recreational uses, seasonal and timing limitations, and area closures.[219] Specific guidance is found in the FWS's *Policy Manual* interpreting the agency's legislative mandates.[220] The *Manual's* "compatibility" policy first requires refuge managers, in assessing a proposed recreational use, to determine whether it is "appropriate."[221] Recreational uses that are either "wildlife dependent" or otherwise fulfill a refuge's purpose are automatically deemed "appropriate," but are still assessed for "compatibility" through a step-down planning process that can impose limits on where and when these activities can occur.[222] Not surprisingly, hunting and fishing appear to be favored "wildlife dependent recreational uses,"[223] while almost all the other "big six" activities receive less detailed treatment in the policies.[224] Other proposed uses are evaluated under a set of ten criteria, which include whether the use meets federal and local legal requirements, is consistent with refuge goals, contributes to public understanding of the refuge's resources, represents a new use, can be managed within the refuge's current and future budget, or would impair

217 *Id.* § 668dd(a)(4)(B). *See* Robert L. Fischman & Vicky J. Meretsky, *Managing Biological Integrity, Diversity, and Environmental Health in the National Wildlife Refuges: An Introduction to the Symposium*, 44 NAT. RESOURCES J. 931, 932–33 (2004) (introducing the symposium journal issue addressing the biological integrity, diversity, and environmental health mandate).

218 50 C.F.R. pts. 25–26 (2019). *See also* 50 C.F.R. § 27.31 (limiting vehicle travel and use in the refuge system to designated routes).

219 50 C.F.R. § 26.33.

220 *Service Manual Chapters*, U.S. FISH & WILDLIFE SERV., https://perma.cc/6QWH-P8G5 (last updated Oct. 26, 2020) [hereinafter *FWS Manual*]. Courts, however, have ruled that the FWS's Manual is not legally enforceable because it was not subject to the formal rulemaking process. McGrail & Rowley v. Babbitt, 986 F. Supp. 1386, 1393–94 (S.D. Fla. 1997), *aff'd sub nom*, McGrail & Rowley, Inc. v. U.S. Dep't of Interior, 228 F.3d 646 (11th Cir. 2000); Livingson v. United States, No. 2:15-CV-00564-DCN, 2016 WL 1274013, at *3–*7 (D.S.C. Mar. 31, 2016). *See also* Fischman, *From Words to Action*, *supra* note 213, at 129–31 (outlining the arguments for viewing the FWS's Manual provisions as binding).

221 *FWS Manual*, *supra* note 220, at pt. 603 FW1 § 1.8.

222 *Id.* § 1.11, pt. 603 FW2 §§ 2.11, 2.12(A)(11).

223 *See* Dep't of the Interior, U.S. Fish and Wildlife Serv., 2020-2021 Station-Specific Hunting and Sport Fishing Regulations, 85 Fed. Reg. 54,076 (Aug. 31, 2020) (codified at 50 C.F.R. pts. 32, 36 & 71) (new regulations opening eight national wildlife refuges to hunting and fishing for the first time and opening or expanding hunting and fishing opportunities at 89 other refuges).

224 Fischman, *From Words to Action*, *supra* note 213, at 108–12.

existing wildlife-dependent recreational uses.[225] Despite some shortcomings,[226] the *Policy Manual's* detailed requirements for assessing recreational uses on the refuges offers a potential model the other land management agencies might consider as they confront their own appropriate recreational use issues.

Litigation over recreation management and policy on the national wildlife refuges is limited. A few cases have addressed the FWS's authority over farming or livestock grazing on the refuges—activities generally incompatible with the refuge system's conservation and recreation purposes.[227] In each case, after examining the "compatibility" review standard, the court disallowed these activities on refuge lands. In *Niobrara River Ranch, L.L.C. v. Huber*,[228] the court upheld the agency's authority to deny a special use permit to a new commercial canoe outfitter in order to first study the need to reduce river use for environmental and overcrowding purposes.[229] Other cases have likewise upheld the FWS's permitting authority over commercial outfitting activities that are inconsistent with a refuge's purpose.[230] In a criminal prosecution, the court concluded that ORVs were prohibited in refuges even in the absence of an ORV plan.[231] Another case overturned the FWS's issuance of a special use permit to enhance the salmon population in a refuge wilderness area, ruling that it constituted a forbidden commercial use under the Wilderness Act.[232] A challenge to the National Elk Refuge's supplemental winter feeding program, which attracts large numbers of visitors to the refuge, was rejected because the

225 *FWS Manual*, *supra* note 220, at pt. 603 FW1 § 1.1 (A)(3)(e)–(j).

226 Fischman, *From Words to Action*, *supra* note 213, at 115–17.

227 *See* Wilderness Soc'y v. Babbitt, 5 F.3d 383 (9th Cir. 1993) (overturning FWS decision to allow grazing within a refuge where damage was apparent); Stevens Cty. v. United States Dep't of Interior, 507 F. Supp. 2d 1127, 1132–35 (E.D. Wash. 2007) (sustaining agency decision finding livestock grazing incompatible with refuge purpose); Del. Audubon Soc'y, Inc. v. Sec'y of Interior, 612 F. Supp. 2d 442, 446–47 (D. Del. 2009) (finding the agency failed to make a compatibility determination before permitting farming on the refuge). *Cf.* Fund for Animals v. Hall, 777 F. Supp. 2d 92, 94–96 (D.D.C. 2011) (sustaining, against a NEPA cumulative effects claim, the FWS's decision to expand hunting across numerous refuges, noting the agency properly found hunting was not incompatible with other recreational uses of the refuges).

228 373 F.3d 881, 884 (8th Cir. 2004) (sustaining the FWS's authority to impose a temporary moratorium on new river recreational uses pending completion of the refuge's conservation plan).

229 *Id.* at 885.

230 McGrail & Rowley v. Babbitt, 986 F. Supp. 1386, 1392 (S.D. Fla. 1997), *aff'd sub nom*, McGrail & Rowley, Inc. v. U.S. Dep't of Interior, 228 F.3d 646 (11th Cir. 2000); *Livingson*, 2016 WL 1274013, at *3–*4 (D.S.C. Mar. 31, 2016).

231 United States v. Sams, 45 F. Supp. 3d 524, 525–26 (E.D.N.C. 2014).

232 Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 360 F.3d 1374 (9th Cir. 2004). *See also* Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv., 629 F.3d 1024, 1036–37 (9th Cir. 2010) (finding a Wilderness Act violation when the FWS installed water structures in a refuge wilderness area to sustain dwindling big horn sheep population, because it failed to determine that structures were "necessary" to conserve the animals).

program met statutory conservation purposes.[233] Moreover, courts have sustained the FWS's authority to regulate incompatible activities outside refuge boundaries to protect refuge resources.[234] In sum, the decisions indicate that the FWS enjoys substantial managerial discretion so long as its compatibility or commercial use determinations reasonably advance refuge conservation and recreational use purposes.

C. National Forest System

Congress has given the Forest Service much less guidance regarding recreation on its lands. Although the Forest Service endorsed and promoted recreation in the national forests early on,[235] Congress initially directed the agency to manage the forests for just two purposes: timber production and watershed protection.[236] That changed in 1960, when Congress, at the Forest Service's behest, adopted the Multiple-Use Sustained-Yield (MUSY) Act,[237] which expressly included "outdoor recreation" as one of six sanctioned forest uses.[238] The MUSY Act contained no further elaboration about recreation but did define "multiple use" as "harmonious and coordinated management," taking account of "changing needs and conditions," as well as "the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return."[239] The courts have interpreted this language to "breathe discretion at every pore,"[240] refusing to extract meaningful standards governing the agency's resource management responsibilities. The National Forest Management Act of 1976 (NFMA) simply reiterated the MUSY Act's litany of acceptable uses,[241] though it did instruct the agency to take recreational and aesthetic concerns into account when assessing the

233 Defs. of Wildlife v. Salazar, 651 F.3d 112, 116–17 (D.C. Cir. 2011). Though upholding the feeding program, the court expressly noted the FWS's assurance that it would phase out this controversial program within 15 years. *Id.* at 114–15.

234 *McGrail & Rowley*, 986 F. Supp. at 1392 (upholding the FWS's authority to regulate commercial activities on state waters that threaten the designated purpose of the federal refuge); *Livingson*, 2016 WL 1274013, at *3–*4 (reaching the same conclusion). *But see* Ctr. for Biological Diversity v. U. S. Fish & Wildlife Serv., 900 F. Supp. 2d 1151, 1160 (D. Nev. 2012) (ruling that the FWS's compatibility determination authority does not extend to groundwater pumping occurring outside a refuge).

235 *See supra* notes 81–87 and accompanying text.

236 16 U.S.C. § 475 (2018).

237 *Id.* §§ 528–31.

238 *Id.* § 528. This section separately acknowledges "mineral resources" as an appropriate use on the national forests. *See also id.* § 529 (acknowledging "wilderness" as an acceptable use).

239 *Id.* § 531(a). The MUSY Act also instructed the agency to manage "without impairment of the productivity of the land." *Id.* §§ 531(a), (b).

240 Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979) (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975)). *See also* McMichael v. United States, 355 F.2d 283 (9th Cir. 1965) (sustaining Forest Service's decision prohibiting motorcycles and other motorized uses in a designated primitive area).

241 16 U.S.C. § 1604(e)(1) (2018).

visual impact of proposed timber projects.[242] In 1986, Congress established general rules governing the agency's issuance of ski area permits,[243] by then a major recreational use in the national forests.

Given what amounts to a statutory void, the Forest Service has adopted regulations and policies that provide more specific guidance for managing recreation on the national forests. The agency's recreation-related regulations are not extensive. They address travel management on the forests by regulating motor vehicle use (including snowmobiles) by designating and then monitoring open and closed roads, trails, or areas.[244] They require special use permits for commercial recreational activities on forests, including ski area and guiding permits, and for large groups seeking to recreate on the forest lands.[245] In wilderness areas, the regulations prohibit certain activities, such as ORV or snowmobile use;[246] provide for recreation fee collection;[247] and greatly limit the use of vehicles, bicycles, and aircraft.[248]

The separate NFMA planning regulations state that recreational opportunities must be provided as part of the agency's economic and social sustainability obligations, defining "sustainable recreation . . . [as] including recreation settings, opportunities, and access; and scenic character. Recreation opportunities may include non-motorized, motorized, developed, and dispersed recreation on land, water, and in the air."[249] The term "recreation setting" is defined in reference to the Forest Service's longstanding "recreation opportunity spectrum" policy, which establishes six categories of recreational activity: "primitive, semi-primitive non-motorized, semi-primitive motorized, roaded natural, rural, and urban."[250] The planning regulations also require the agency to monitor visitor use and satisfaction along with environmental conditions,[251] and provide for amendments to address "adverse effects" arising from the plan.[252] Most importantly, the Forest Service has used its regulatory authority to protect 63 million roadless acres—roughly one third of the national forest system—from timber harvesting and road construction,[253] effectively creating significant space for non-motorized types of recreational activity. Simply put, the regulations

242 *Id.* § 1604(g)(3)(F)(v).

243 National Forest Ski Area Permit Act of 1986, 16 U.S.C. § 497(b) (2018).

244 36 C.F.R. pt. 212 (2019).

245 *Id.* § 251.51. This regulation also empowers the Forest Service to set terms and conditions governing issuance of any special use permit, including for ski areas. *Id.* § 251.56.

246 *Id.* §§ 261.13–14.

247 *Id.* § 261.17.

248 *Id.* § 261.18.

249 *Id.* § 219.10(b). *See also id.* § 219.19 (defining "recreation opportunity").

250 *Id.* § 219.19. *See* Wilkinson & Anderson, *supra* note 81, at 325–27 (describing the Forest Service's "recreation opportunity spectrum").

251 36 C.F.R. § 219.12.

252 *Id.* § 219.13.

253 *Id.* § 294.10; U.S. DEP'T OF AGRIC., U.S. FOREST SERV., FOREST SERVICE ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT VOLUME 1, at 3-204–05 (2000).

enable the Forest Service to manage recreational uses in terms of types and places, while leaving these decisions largely a matter of managerial discretion.

The more detailed *Forest Service Manual* further elaborates on how agency officials should address their mounting recreational challenges.[254] The *Manual* explains that recreation is integrated into the forest planning process, including in terms of the broader landscape.[255] It exhorts the agency to reach diverse classes of visitors, promote broad public participation, consider "niche" roles within individual forests, employ "place-based information," and utilize the National Visitor Use Monitoring system to estimate visitation.[256] It also defines key terminology, including "recreation experience," and "recreation opportunity."[257] It further describes the distinctive characteristics found in each of the six "recreation opportunity spectrum" categories,[258] thus giving forest planners and managers clearer directions for identifying and allocating portions of each forest to these categories. Other provisions address wilderness management, developed recreation sites, private sector uses (including ski areas), trail, river, and scenery management.[259] In short, the *Manual* gives forest managers extensive instructions about how to apportion and manage different types of recreational opportunities and experiences in the forests.

The courts have generally sustained Forest Service decisions regulating recreational activity, so long as the agency also complies with NEPA and other governing laws. Several cases have upheld the agency's permitting authority and required commercial enterprises providing recreational services to secure and comply with special-use permits.[260] The courts have also sustained the Forest Service's authority to limit the number of commercial permits available to control overcrowding in popular recreation areas.[261] In *Citizens' Committee to Save Our Canyons v. Krueger*,[262] the Tenth Circuit upheld the Forest Service's decision to

[254] The *Forest Service Manual*, however, is not legally binding on the agency; rather, the agency can use it for guidance, and courts are not obligated to enforce it against the agency. W. Radio Serv. Co. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996), *cert. denied*, 519 U.S. 822 (1996).

[255] U.S. FOREST SERV., FOREST SERVICE MANUAL 2300: RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT, ch. 2310 (2020).

[256] *Id.* at 2310.3.

[257] *Id.* at 2310.5. The *Manual* also defines the related terms "recreation access" and "recreation benefits." *Id.*

[258] *Id.*

[259] *Id.* at 2310.2.

[260] *See, e.g.*, United States v. Hells Canyon Guide Serv., Inc., 660 F.2d 735 (9th Cir. 1981); United States v. Peterson, 897 F. Supp. 499 (D. Colo. 1995).

[261] Great Am. Houseboat Co. v. United States, 780 F.2d 741, 750 (9th Cir. 1986).

[262] 513 F.3d 1169 (10th Cir. 2008). *But see* Greater Yellowstone Coal. v. Timchak, No. CV–06–04–E–BLW, 2006 WL 3386731, at *8 (D. Idaho Nov. 21, 2006) (finding that the Forest Service's issuance of a heli-skiing permit for the Palisades Wilderness Study Area violated the 1984 Wyoming Wilderness Act); Robert B. Keiter, *The Greater Yellowstone Ecosystem Revisited: Law, Science, and the Pursuit of Ecosystem Management in an Iconic*

issue a helicopter skiing company an operating permit despite objections from other backcountry users, finding the agency had adequately evaluated the safety concerns and noise impacts.[263] In *Silverton Snowmobile Club v. U.S. Forest Service*,[264] the Tenth Circuit similarly sustained the agency's decision, which this time closed certain snowmobile trails and limited grooming on others in order to reduce conflicts between wintertime users and to safeguard wildlife habitat.[265] An earlier Ninth Circuit case upheld the Forest Service's decision to close a relatively natural area to motorized use in order to eliminate an escalating conflict between hikers and motorbike riders.[266] More recently, a Minnesota federal court found that the Forest Service's travel plan was "consistent with" the existing forest plan, rejecting arguments that new ORV routes violated resource management standards established in the plan.[267] When issuing special use permits, however, the Forest Service must comply with other laws, like NEPA and the Wilderness Act, which it failed to do when granting commercial packstock outfitters permits to operate in two California national forest wilderness areas.[268] The Forest Service also must comply with its own rules governing recreation management, which it also failed to do when allowing snowmobiles extensive access to national forest trails while disregarding the growing number of non-motorized winter forest users who would be disturbed by the sights and sounds of snowmobiling.[269]

The Forest Service has stumbled more often in court when confronting motorized recreation on the national forests. Two presidential executive orders obligate the land management agencies to control ORV use. In 1972, President Nixon directed the responsible agencies to promulgate regulations effectively zoning their lands for ORV use to "minimize" natural resource and wildlife damage as well as

Landscape, 91 U. COLO. L. REV. 1, 132 (2020) [hereinafter Keiter, *The Greater Yellowstone Ecosystem Revisited*].

263 *Krueger*, 513 F.3d 1169, 1182 (10th Cir. 2008).

264 433 F.3d 772 (10th Cir. 2006) (rejecting NEPA challenges to the agency's decision process).

265 *Id.* at 786.

266 Nw. Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1470, 1481 (9th Cir. 1994); *see also* Sierra Trail Dogs Motorcycle & Recreation Club v. U.S. Forest Serv., No. 3:18-cv-00594-MMD-CLB, 2020 WL 3808895, at *7 (D. Nev. July 6, 2020) (rejecting NEPA challenge to Forest Service decision limiting annual motorcycle race to protect sage grouse).

267 Minn. Ctr. for Env't Advocacy v. U.S. Forest Serv., 914 F. Supp. 2d 957, 984 (D. Minn. 2012) (finding no violation of NFMA, 16 U.S.C. § 1604(i)); *see also* Lindberg v. U.S. Forest Serv., 132 F. Supp. 3d 1255, 1273–75 (D. Or. 2015) (finding no NFMA, § 1604(i) violation when Forest Service approved new welcome station and trail connections).

268 High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 640, 648–49 (9th Cir. 2004); *see also* Riverhawks v. Zepeda, 228 F. Supp. 2d 1173, 1176, 1190–91 (D. Or. 2002) (ruling that the Forest Service violated NEPA by employing a categorical exclusion to permit motorboat usage that threatened a turtle species found on this designated wild and scenic river).

269 Meister v. U.S. Dep't of Agric., 623 F.3d 363, 372, 376–77 (6th Cir. 2010). In addition, the court ruled that the Forest Service violated its rule requiring coordination with state recreation managers during its planning process. *Id.* at 374–75.

conflicts among users.[270] A second order, issued by President Carter in 1977, instructed the agencies to immediately close their lands to any ORV use causing "considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat or cultural or historic resources of particular areas or trails of the public lands."[271] When the Forest Service failed to include over-snow vehicles—snowmobiles—in its revised ORV rule, the court held that it was required to regulate this type of wintertime motorized use,[272] prompting the agency to promulgate a separate rule governing snowmobile use in the national forests.[273] In a challenge to the Beaverhead-Deerlodge National Forest's winter travel plan,[274] the Ninth Circuit ruled that the agency violated its "minimization" rule, which requires forest officials, when opening roads or trails to motorized use, to minimize environmental damage, harm to wildlife, and conflicts among recreationists.[275] Applying both the Nixon executive order and the agency rule, the court held:

> [M]ere "consideration" of the minimization criteria is not enough to comply with the [Travel Management Rule]. Rather, the Forest Service must apply the data it has compiled to show how it designed the areas open to snowmobile use "with the objective of minimizing" "damage to . . . forest resources," "harassment of wildlife," and "conflicts [with other] recreational uses."[276]

The court further ruled that the agency must apply these criteria to specific areas, not merely on a forest wide basis.[277] The Sixth Circuit reached a similar conclusion in *Meister v. U.S. Department of Agriculture*,[278] finding that the Huron-Manistee National Forest Plan failed to minimize conflicts between snowmobile users and those seeking

[270] Exec. Order No. 11,644, 3 C.F.R. 368 (1972).

[271] Exec. Order No. 11,989, 3 C.F.R. 120–21 (1978).

[272] Winter Wildlands All. v. U.S. Forest Serv., No. 1:11–CV–586–REB, 2013 WL 1319598, at *14 (D. Idaho Mar. 29, 2013).

[273] 36 C.F.R. §§ 212.80, 212.81 (2019). *See* Use by Over-Snow Vehicles (Travel Management Rule), 80 Fed. Reg. 4500, 4500, 4511 (Dep't of Agric., Forest Service Jan. 28, 2015).

[274] WildEarth Guardians v. Mont. Snowmobile Ass'n, 790 F.3d 920, 932 (9th Cir. 2015).

[275] 36 C.F.R. § 212.55(b). In addition, the responsible official must minimize potential impacts on neighboring federal lands and must consider the noise and emissions emanating from motor vehicles. *Id.*

[276] *Mont. Snowmobile Ass'n*, 790 F.3d at 932 (quoting 36 C.F.R. § 212.55(b)); *see also* Cent. Sierra Env't Res. Ctr. v. U.S. Forest Serv., 916 F. Supp. 2d 1078, 1098 (E.D. Cal. 2013) (similarly concluding that the Forest Service violated the rule's "minimization" criteria when adopting the Stanislaus National Forest Travel Management Plan).

[277] *Mont. Snowmobile Ass'n*, 790 F.3d at 930–32.

[278] 623 F.3d 363, 376–77 (6th Cir. 2010). *Cf.* WildEarth Guardians v. Weber, No. CV 19-56-M-DWM, 2020 WL 999687, at *4 (D. Mont. Mar. 8, 2020) (finding challenge to Flathead National Forest's revised forest plan maintaining previously opened snowmobile routes based on violation of the ORV Executive Orders and the Forest Service's minimization rule is open to judicial review).

a more primitive winter recreation experience.[279] But the Kaibab National Forest's decision allowing hunters limited ORV access to retrieve their fallen game fit within an exception to the agency's minimization rule.[280] The courts are plainly interpreting the Forest Service's detailed motor vehicle use rule to require that the agency fully consider localized impacts before opening national forest areas to ORVs, snowmobiles, and other motorized activities.

The presence of commercial ski areas on national forest lands has also generated controversy, largely related to the heavy environmental footprint such development has on the landscape. In the National Forest Ski Area Permit Act of 1986,[281] Congress has given the Forest Service broad discretion to issue, modify, and renew ski area permits for a term of forty years, subject to "such reasonable terms and conditions as the Secretary deems appropriate" and a permit fee based on fair market value.[282] The Forest Service addresses ski area management in its special-use regulations, which include term permit conditions, inspection rights, revocation authority, and more.[283] Here too the courts have accorded the agency broad permitting authority so long as it complies with NEPA and other statutes. In *Western Montana Community Partners, Inc. v. Austin*,[284] the court ruled that the Forest Service properly denied a ski area permit request because the proposal was inconsistent with visual and other limitations in existing forest plans.[285] Under the preemption doctrine, however, the courts have denied local communities the authority to block a ski area project based on their zoning ordinances.[286]

Several cases have raised NEPA challenges to Forest Service ski area expansion decisions with mixed results. In *Colorado Environmental Coalition v. Dombeck*,[287] the Tenth Circuit concluded that the Forest Service's environmental impact statement (EIS) evaluating expansion at the Vail ski area to better diversify skiing opportunities adequately addressed mitigation, cumulative effects, and alternatives in evaluating the project's wildlife and other impacts.[288] In

279 *Id.* at 376–77.

280 WildEarth Guardians v. Provencio, 272 F. Supp. 3d 1136, 1166–67 (D. Ariz. 2017).

281 16 U.S.C. § 497b (2018).

282 *Id.*

283 36 C.F.R. §§ 251.50–251.65 (2019). *See* Meadow Green-Wildcat Corp. v. Hathaway, 936 F.2d 601, 604–05 (1st Cir. 1991) (holding that Forest Service ski area term permits are interpreted as contracts, hence courts should not, under the *Chevron* doctrine, defer to the agency's interpretation of contract terms).

284 104 F. Supp. 3d 1076 (D. Mont. 2015).

285 *Id.* at 1088–90.

286 Santa Fe Ski Co. v. Bd. of Cty. Comm'rs of Santa Fe Cty., No. 01-0714 LH/LCS, 2004 WL 7337996, at *7 (D.N.M. Apr. 29, 2004).

287 185 F.3d 1162 (10th Cir. 1999).

288 *Dombeck*, 1162, 1174, 1176–77. *See also Methow Valley Citizens Council*, 490 U.S. 332, 358–59 (1989) (rejecting a NEPA challenge to a new ski area proposal, holding that the Forest Service adequately addressed mitigation and alternatives to the proposal).

Oregon Natural Resource Council Fund v. Goodman,[289] however, the Ninth Circuit ruled that the agency failed in its EIS to evaluate the ski area expansion project's impact on a documented wildlife corridor.[290] Although a NEPA challenge originally succeeded in slowing a ski area expansion project on Oregon's Mount Hood due to the Forest Service's failure to consider an off-site parking alternative,[291] the agency soon remedied the problem.[292] Native American religious right claims linked to tribal traditions and values have not succeeded in stopping ski area projects and operation plans.[293] But environmental groups succeeded in blocking a ski area project on Colorado's Wolf Creek Pass due to lack of adequate road access across national forest lands.[294] Moreover, because ski areas are privately operated, the Constitution's equal protection clause does not apply to a resort's decision prohibiting snowboarding while allowing alpine skiing.[295]

D. Bureau of Land Management Lands

The Federal Land Policy and Management Act (FLPMA), adopted by Congress in 1976 as the BLM's organic charter, contains brief references to recreation but little real guidance concerning its role on the agency's expansive landholdings. FLPMA instructs the BLM to manage its lands under multiple use and sustained-yield principles,[296] defining "multiple use" to include "recreation" as well as "wildlife and fish, and natural scenic, scientific and historical values,"[297] and also recognizing "outdoor recreation" as a "principal or major use."[298] FLPMA establishes an inventory and land use planning process that is the principal means for the BLM to apportion its lands among the various

289 505 F.3d 884, 892 (9th Cir. 2007).

290 In *Goodman*, the court also found that the agency violated the NFMA and provisions in its forest plan. *Id.* at 890.

291 Friends of Mt. Hood v. U.S. Forest Serv., No. CV 97–1787 KI, 2000 WL 1844731, at *12 (D. Or. Dec. 15, 2000).

292 Friends of Mt. Hood v. U.S. Forest Serv., No. CV 97–1787 KI, 2005 WL 2175886, at *7 (D. Or. Sept. 7, 2005).

293 *See, e.g.*, Hopi Tribe v. Snowbowl Resort Ltd. P'ship, 430 P.3d 362, 371 (Ariz. 2018); Navajo Nation v. U.S. Forest Serv., 535 F.3d 1058, 1080 (9th Cir. 2008); Wilson v. Block, 708 F.2d 735, 745, 747 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1984).

294 Colo. Wild v. U.S. Forest Serv., 523 F. Supp. 2d 1213, 1223 (D. Colo. 2007). A subsequent Forest Service land exchange decision was also found unlawful and enjoined. Rocky Mountain Wild v. Dallas, 2017 WL 6350384, No. 15-cv-01342-RPM, at *1, *18 (D. Colo. 2017).

295 Wasatch Equal. v. Alta Ski Lifts Co., 820 F.3d 381, 389–90 (10th Cir. 2016).

296 Wilderness Study Act of 1977, 43 U.S.C. § 1732(a) (2018).

297 *Id.* § 1702(c). FLPMA further defines the term "multiple use" to include "meet[ing] the present and future needs" as well as "changing needs and conditions," through "coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the . . . greatest economic return." *Id.*

298 *Id.* § 1702(*l*).

multiple uses, including recreation.[299] The statute also imposes an "unnecessary or undue degradation of the lands" management standard on the BLM,[300] representing a moderate constraint on the agency's resource management decisions.[301] One FLPMA provision governs management of the California Desert Conservation Area (CDCA),[302] which Congress found faced increased recreational use pressures due to the fast growing southern California population.[303] Congress thus instructed the BLM to prepare a long range CDCA management plan that included "outdoor recreation uses, including the use, where appropriate, of off-road recreational vehicles."[304] In addition, FLPMA directed the BLM to inventory its roadless lands for "wilderness" eligibility, and to manage these "wilderness study areas" under a rigorous non-impairment standard until Congress had reached a decision on wilderness designation.[305] FLPMA also vests the Secretary of the Interior with land exchange and withdrawal powers that can be used to acquire or protect lands with recreational value.[306] Otherwise, FLPMA provides the BLM with considerable flexibility in determining how to incorporate or prioritize recreation in its resource management decisions.

Like its sister agencies, the BLM has promulgated regulations and policies that address the role of recreation on its lands. The BLM recreation management regulations are relatively short and focused. The agency's motor vehicle regulations cover conventional vehicles as well as ORVs;[307] they instruct BLM officials to designate open, closed, and limited areas for motor vehicle use based upon potential environmental damage, wildlife harm, or user conflict concerns,[308] to close areas that experience "considerable adverse effects" from vehicle use,[309] and to engage the public through planning processes before designating open and closed areas.[310] The regulations empower BLM officials to close or to restrict access or uses in designated areas[311] but require a statement of reasons for such limitations and publication in

299 *Id.* §§ 1711, 1712.

300 *Id.* § 1732(b).

301 *Compare* Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 43 (D.D.C. 2003) (giving the statutory terms independent meaning), *with* Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 76 (D.C. Cir. 2011) (equating the statutory terms with "multiple use").

302 43 U.S.C. § 1781.

303 *Id.*

304 *Id.* § 1781(a), (d).

305 *Id.* § 1782(c).

306 *Id.* § 1714.

307 Off-Road Vehicles, 43 C.F.R. pt. 8340 (2019).

308 *Id.* § 8342.2.

309 *Id.* § 8341.2.

310 *Id.* § 8342.2.

311 *Id.* § 8364.1. The regulations also limit motorized use in wild and scenic river corridors and on national trails. *Id.* § 8350.

the Federal Register.[312] Other regulations govern conduct on BLM lands and at developed recreation sites, setting sanitation, noise, vehicle use, and similar standards.[313] The BLM rules, in sum, provide agency officials with sufficient authority to respond to recreation problems and offer limited guidance on when to take such action.

The *BLM Manual* and related *Handbooks* contain more detailed directions to field personnel for implementing recreation policy. The *BLM Manual* establishes planning and management policies for wilderness areas, national monuments, and other specially designated areas.[314] It endorses collaborative, multi-jurisdictional approaches to planning as well as the use of regional assessments, though it does not require such assessments.[315] Although the *Manual* covers most of the various resources that the agency manages, it does not specifically address recreation. However, the various *BLM Handbooks* further embellish the *Manual* provisions;[316] they contain extensive details on recreation planning and travel management, including the designation of motorized vehicle and ORV routes and management areas.[317] The recreation planning *Handbook*, for example, introduces the agency's "outcomes-focused management" concept, which instructs BLM managers to assess recreational opportunities in terms of immediate and long-term benefits to visitors.[318] It also calls for regional planning to coordinate recreational opportunities across the landscape and for monitoring of recreational uses to identify and remedy environmental or user-conflict problems.[319] Though not enforceable in court, the *BLM Manual* and *Handbooks* delve deeply into emergent recreation problems, offering guidance to help avoid problems through proactive planning and management.

Much of the litigation addressing recreation on the BLM's lands focuses on motorized use. An early case involved the California Desert Conservation Area (CDCA) and whether the BLM, faced with intensive ORV activity in a scenic, wildlife-rich canyon also used by other recreationists, failed to close the area in violation of the presidential ORV executive orders, its own regulations, and FLPMA.[320] The Ninth

312 *Id.* § 8364.1.

313 *Id.* §§ 8365.1, 8365.2.

314 DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., MANUAL TRANSMITTAL SHEET: LAND USE PLANNING 1601.01 (2000).

315 *Id.* at 1601.06. These provisions note that a regional assessment can "set context for RMPs."

316 For example, the BLM's *Planning for Recreation and Visitor Services Handbook* covers 142 pages, while the *Travel and Transportation Handbook* covers 148 pages; both handbooks contain detailed instructions as well as forms, examples, and checklists for agency personnel to use in implementing the agency's recreation policies.

317 DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., MANUAL TRANSMITTAL SHEET: TRAVEL AND TRANSPORTATION HANDBOOK H-8342, at 11–13 (2012).

318 DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., PLANNING FOR RECREATION AND VISITOR SERVICES H-8320, at I-1–6 (2014).

319 *Id.* at I-5, I-7.

320 Sierra Club v. Clark, 756 F.2d 686, 688 (9th Cir. 1985).

Circuit deferred to the agency, ruling that ORV use in the canyon, considered across the entire CDCA, was not causing "considerable adverse effects" and was therefore an "appropriate" use notwithstanding the evident local environmental damage and user conflicts.[321] The Supreme Court, in *Norton v. Southern Utah Wilderness Alliance*,[322] rejected a lawsuit seeking to compel the BLM to reduce accelerating ORV activity that was damaging designated wilderness study areas, reading the Administrative Procedures Act's[323] judicial review provision to prohibit such actions.[324]

Notwithstanding these precedents, the courts have subsequently interpreted and applied the BLM's ORV rules strictly. In *Southern Utah Wilderness Alliance v. Burke*,[325] the court ruled that the BLM failed to consider or apply its ORV "minimization" rule at the route-specific level when designating ORV routes in a 2.1 million–acre resource management plan.[326] The same result was obtained in *Center for Biological Diversity v. U.S. Bureau of Land Management*,[327] where the court held that the BLM did not properly apply the "minimization" criteria when designating ORV routes as open or closed in its Mojave Desert management plans.[328] But when an ORV group sought to overturn the BLM's decision limiting motorized access seasonally and to specific areas, the Tenth Circuit ruled that the agency had properly interpreted and applied its authority to avoid environmental damage.[329] In *Gardner v. Bureau of Land Management*,[330] however, the Ninth Circuit sustained the BLM's decision not to close an area to ORV use, relying on the Supreme Court's *Norton* decision and also deferring to the BLM's factual determinations regarding the absence of "considerable

[321] *Id.* at 689–91.

[322] 542 U.S. 55 (2004). *But see* S. Utah Wilderness All. v. Selma Sierra, 2008 WL 4643003, No. 2:08-CV-195-TC, at *1, *1 (D. Utah 2008) (finding grounds for judicial review under the Administrative Procedure Act based on plaintiff's petition to close canyon area to ORVs).

[323] Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2018).

[324] The relevant Administrative Procedure Act provision was 5 U.S.C. § 706(1), which grants federal courts the authority to "compel agency action unlawfully withheld or unreasonably delayed." In *Norton*, the Court concluded that the BLM was not required to take any "action" in response to complaints alleging extensive ORV damage, even though that damage was occurring in a wilderness study area. *Norton*, 542 U.S. 55, 57, 61, 67 (2004).

[325] 981 F. Supp. 2d 1099 (D. Utah 2013), *appeal dismissed*, 908 F.3d 630 (10th Cir. 2018).

[326] *Id.* at 1105.

[327] 746 F. Supp. 2d 1055 (N.D. Cal. 2009). *See also* Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., No. C 06–4884 SI, 2011 WL 337364, at *1, *10–*11 (N.D. Cal. Jan. 29, 2011) (detailing appropriate remedy).

[328] Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 746 F. Supp. 2d at 1060.

[329] Utah Shared Access All. v. Carpenter, 463 F.3d 1125, 1132, 1138 (10th Cir. 2006).

[330] 638 F.3d 1217 (9th Cir. 2011). *See also* Wilderness Soc'y v. Bureau of Land Mgmt., 526 F. App'x 790, at *1, *1–*2 (9th Cir. 2013) (upholding BLM's national monument management plan against claims that it failed to close roads to ORV use).

adverse effects."[331] Though the results in these cases are mixed, the courts are carefully scrutinizing whether the BLM is actively managing ORV activity on its lands.[332]

E. Wilderness and Other Protective Designations

Congress has overlaid portions of the public lands with various special designations, including wilderness area, wilderness study area, national recreation area, wild and scenic river, and the list continues to grow. In fact, approximately 150 million acres, or nearly forty percent, of the federal public lands in the continental United States have some form of protected status.[333] The Wilderness Act,[334] which extends to lands managed by each of the four land management agencies, plainly imposes the most protective standards found in current law. Where applicable, the act takes precedence over the responsible agency's other resource management obligations, requiring the agency not to "impair" the wilderness character of designated areas.[335] It defines "wilderness" as an area "untrammeled by man . . . retaining its primeval character and influence . . . managed so as to preserve its natural condition," and that "has outstanding opportunities for solitude or a primitive and unconfined type of recreation."[336]

Despite this stringent protective language, the act contains several exceptions bearing on recreation in wilderness areas. Roads, commercial enterprises, and motorized as well as mechanical means of transport—which includes mountain bikes—are prohibited in wilderness areas, unless "necessary to meet minimum requirements for the administration of the area," including health and safety emergency situations.[337] Commercial services are permitted "to the extent necessary for activities which are proper for realizing the recreational . . . purposes of the areas."[338] Congress can also include

331 *Gardner*, 638 F.3d at 1218.

332 Longstanding, complex litigation over the validity of alleged RS 2477 roads on public lands, primarily in Utah, is also relevant to ORV use and potential wilderness designation decisions on BLM lands, but is beyond the scope of this Article. *See* S. Utah Wilderness All. v. Bureau of Land Mgmt., 425 F.3d 735, 740–41 (2005); Kane County, Utah v. United States, 928 F.3d 877, 882, 884 (10th Cir. 2019), *rehearing en banc denied*, 950 F.3d 1223 (10th Cir. 2020).

333 Keiter, *Toward a National Conservation Network Act*, *supra* note 129, at 62–63, 138. These protected area figures include national parks, national wildlife refuges, wilderness areas, the BLM's National Landscape Conservation System lands, and national forest roadless area lands. If Alaska federal lands are included, then the percentage of protected federal acreage approaches fifty percent. *Id.*

334 16 U.S.C. §§ 1131–1136 (2018).

335 *Id.* §§ 1131(a), 1133(b).

336 *Id.* § 1131(c). In addition, the act provides that wilderness areas shall be devoted to "recreational, scenic, scientific, educational, conservation, and historical use." *Id.* § 1133(b).

337 *Id.* § 1133(c).

338 *Id.* § 1133(d)(5).

additional wilderness management exceptions in individual wilderness enabling acts.[339] The four land management agencies have each adopted specific wilderness management regulations, as well as manual or handbook policies further defining and limiting recreation and other activities in designated wilderness areas.[340]

Confronted with thorny new wilderness proposals, Congress has also employed a "wilderness study area" (WSA) designation to protect select potential wilderness areas until it makes a final determination about permanent protection.[341] On national forest lands, the legal standard governing WSA management is found in the designating legislation. The Montana Wilderness Study Act of 1977, for example, states: "the wilderness study areas designated by this act shall, until Congress determines otherwise be administered so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."[342] On BLM lands, the FLPMA establishes a blanket "non-impairment" standard that broadly constrains the agency's management of WSAs pending a final congressional decision.[343] Agency regulations and manuals provide additional WSA management guidance.[344] Because Congress has been at a seemingly interminable impasse over wilderness designation on both national forest and BLM lands,[345] litigation over various management decisions on potential wilderness lands—especially those involving ORVs and snowmobiles—has proliferated. In some instances, these court rulings have prompted the agencies to promulgate clarifying rules, as the Forest Service did in the aftermath of litigation over ORVs and snowmobile use in WSAs.[346]

The courts have read the Wilderness Act and its exceptions in a manner that strongly safeguards the natural setting and related solitude-oriented recreational experiences. Three seminal federal Circuit

339 *Id.* § 1133(b). *See* Kevin Proescholdt & George Nickas, *Keeping the Wild in Wilderness: Minimizing Non-Conforming Uses in the National Wilderness Preservation System*, PROCEEDINGS OF THE 2007 GEORGE WRIGHT SOCIETY CONF. 137, 138–40, https://perma.cc/A6FQ-RGQN.

340 *See, e.g.*, 36 C.F.R. pt. 293 (2019) (national forest wilderness management regulations); U.S. FOREST SERV., FOREST SERVICE MANUAL 2300: RECREATION, WILDERNESS, AND RELATED RESOURCE MANAGEMENT, ch. 2320 (2007).

341 However, where Congress has passed a statewide wilderness bill, as it did for most western states in 1984, it included "soft" release language in the legislation that relieved the Forest Service from managing the area to protect its wilderness character. *See, e.g.*, Wyoming Wilderness Act of 1984, Pub. L. 98-550, 98 Stat. 2807 (1984). The courts have ruled that this language does not relieve the Forest Service from considering the effect of a timber sale on the area's roadless character. Smith v. U.S. Forest Serv., 33 F.3d 1072, 1073 (9th Cir. 1994).

342 Montana Wilderness Study Act of 1977, Pub. L. 95–150 § 3(a), 91 Stat. 1243 (1977).

343 43 U.S.C. § 1782(c) (2018).

344 *See, e.g.*, FOREST SERV. MANUAL, *supra* note 340, at ch. 2320; NPS MANAGEMENT POLICIES, *supra* note 172, at ch. 6.

345 KEITER, KEEPING FAITH WITH NATURE, *supra* note 1, at 202–03.

346 *See Winter Wildlands All.*, No. 1:11–CV–586–REB, 2013 WL 1319598, at *1, *14 (D. Idaho Mar. 29, 2013) (requiring Forest Service to adopt regulation over snowmobiles).

Courts of Appeal decisions have set a high standard for wilderness management: one disallowed a minimally intrusive commercial fish stocking operation;[347] another precluded construction of water trough structures for desert big horn sheep,[348] though this would benefit the herd and hunters; and a third precluded motorized transport through a wilderness area.[349] Another important case limited the number of commercial packstock allowed to carry guests into a national forest wilderness area,[350] with the court issuing an unusually detailed injunction addressing the number of packstock permitted per guest, the amount of allowable firewood, and extensive reporting requirements.[351] The courts have also sustained agency decisions prioritizing the experience of wilderness solitude over more intensive recreational activities, as the Forest Service did when it limited whitewater boating through a designated wilderness area.[352] Similarly, the Eighth Circuit invoked the Wilderness Act's definition of "wilderness" to prohibit the use of motorized boat portages in the Boundary Waters Wilderness Canoe Area.[353] Moreover, the courts have read the Wilderness Act to obligate agencies to preserve a designated area's "wilderness character" even when the offending activity—noise from snowmobiles—emanates from outside the wilderness boundary.[354] Simply put, the courts have rigorously protected the wilderness character of these legislatively preserved areas,[355] including the particular types of recreational experiences available there.[356]

[347] Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051, 1062, 1066, 1069 (9th Cir. 2003) (en banc) (enforcing the Wilderness Act's prohibition commercial enterprises, 16 U.S.C. § 1133(c), despite the economic impact on the important local salmon fishing industry).

[348] Wilderness Watch v. U.S. Fish & Wildlife Serv., 629 F.3d 1024, 1036, 1039–40 (9th Cir. 2010) (enforcing the Wilderness Act's prohibition on structures, 16 U.S.C. § 1133(c)).

[349] Wilderness Watch v. Mainella, 375 F.3d 1085, 1096 (11th Cir. 2004) (enforcing the Wilderness Act's prohibition on motor vehicles, 16 U.S.C. § 1133(c)).

[350] *Blackwell*, 390 F.3d 630, 648 (9th Cir. 2004) (holding that the Forest Service was allowing outfitters to use more packstock than necessary to meet minimum requirements for administration of the wilderness area).

[351] High Sierra Hikers Ass'n v. Moore, 561 F. Supp. 2d 1107, 1117–19 (N.D. Cal. 2008).

[352] Am. Whitewater v. Tidwell, 959 F. Supp. 2d 839, 864–65 (D.S.C. 2013), *aff'd*, 770 F.3d 1108, 112–13 (4th Cir. 2014).

[353] Friends of Boundary Waters Wilderness v. Robertson, 978 F.2d 1484, 1487 (8th Cir. 1992). The court was persuaded that non-mechanical portages represented a "feasible" means of portaging that retained the area's wilderness character. To interpret the decisive term "feasible," which appeared in the Boundary Waters Canoe Wilderness Act, the court looked to the Wilderness Act to ascertain the purpose behind the two wilderness acts. *Id.*

[354] Izaak Walton League of Am., Inc. v. Kimbell, 516 F. Supp. 2d 982, 986, 989 (D. Minn. 2007). *See also* Izaak Walton League of Am., Inc. v. Tidwell, No. 06–3357 (JRT/LIB), 2015 WL 632140, at *10, *15 (D. Minn. Feb. 13, 2015) (agreeing that the Wilderness Act can reach activities occurring outside the boundary but finding the Forest Service reasonably addressed snowmobile noise impacts). *Cf.* Northwest Motorcycle Ass'n v. U.S. Dep't of Agric., 18 F.3d 1468, 1480 (9th Cir. 1994) (holding that the Forest Service could not rely solely on the wilderness designation to prohibit motorcycle use on adjacent forest lands).

[355] One court, however, found no Wilderness Act violation when the BLM allowed a small number of "grandfathered" grazing permittees to continue their motorized use of

The courts have also generally interpreted WSA legislation to limit new motorized and development activities inside such areas. In *Montana Wilderness Association v. McAllister*,[357] the Ninth Circuit ruled that maintaining "wilderness character depends in part on the availability of opportunities for solitude, [thus] the Service must 'provid[e] current users with opportunities for solitude comparable to those that existed in 1977.'"[358] The court thus ordered the Forest Service to curtail the ORV, motorcycle, and mountain bike activity that had built up in the designated WSA over the intervening years since its inception.[359] Although FLPMA imposes a rigorous non-impairment standard governing the BLM's management of its WSAs,[360] the U.S. Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance* limited enforcement of that mandate to instances of agency action.[361] But once the BLM has reached a management decision that might impair a WSA, the courts have proven willing to enforce that protective standard. In *Rocky Mountain Oil & Gas Association v. Watt*,[362] the Tenth Circuit prohibited the BLM from issuing new mining, oil and gas exploration, or grazing permits in designated WSAs because these actions would impair the area's wilderness character.[363] In *State of Utah v. Andrus*,[364] the court indicated that construction of permanent roads in a WSA would constitute an impairment to the designated area's

historical roads to access their livestock allotments inside a recently designated wilderness area. Or. Nat. Desert Ass'n v. Cain, 292 F. Supp. 3d 1119, 1130 (D. Or. 2018). *See also* Wilderness Watch, Inc. v. Creachbaum, 225 F. Supp. 3d 1192, 1199 (W.D. Wash. 2016), *aff'd*, No. 17–35117, 731 F. App'x 709, 710 (9th Cir. 2018) (permitting the National Park Service to repair historical structures inside a designated wilderness area).

356 *See supra* notes 350–354 and accompanying text.

357 666 F.3d 549 (9th Cir. 2011).

358 *Id.* at 557 (citation omitted, alteration in original). The 1977 date referenced in the court opinion is when Congress passed the Montana Wilderness Study Act, imposing the obligation to maintain the study area's wilderness character. *See also* Russell Country Sportsmen v. U.S. Forest Serv., 668 F.3d 1037, 1042 (9th Cir. 2011).

359 *Mont. Wilderness Ass'n*, 666 F.3d at 559. *See also* Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Service, 329 F.Supp.3d 1191 (D. Mont. 2018), *aff'd*, 833 F. App'x 89 (9th Cir. 2020) (upholding the Forest Service decision closing roads and trails in a designated WSA to OHVs, snowmobiles, and bicycles); *Timchak*, No. CV–06-04–E–BLW, 2006 WL 3386731, at *1, *6, *7 (D. Idaho Nov. 21, 2006) (ruling that the Forest Service violated the Wyoming Wilderness Act by allowing increased levels of heli-skiing in the Palisades Wilderness Study Area).

360 43 U.S.C. § 1782(c) (2018).

361 Norton v. S. Utah Wilderness All., 542 U.S. 55, 63–64 (2004). *Cf.* S. Utah Wilderness All. v. Sierra, No. 2:08–CV–195–TC, 2008 WL 4643003, at *1, *3 (D. Utah June 14, 2008) (finding rejection of petition to close sensitive area to motorized vehicles did not involve matters "committed to agency discretion" and hence was thus judicially reviewable under the Administrative Procedures Act, 5 U.S.C. § 702(a)(1)).

362 696 F.2d 734 (10th Cir. 1982).

363 *Id.* at 734, 750. *See also* Reeves v. United States, 54 Fed. Cl. 652, 669 (2002) (invoking the FLPMA non-impairment standard to sustain a BLM decision refusing to issue a mining permit for exploration in a WSA).

364 486 F. Supp. 995 (D. Utah 1979).

wilderness character.[365] Another case overturned the BLM's decision to permit new livestock fencing inside a WSA, citing the agency's obligation to maintain unimpaired the area's wilderness character.[366] As in the Wilderness Act cases, the courts are reading WSA legislation strictly to safeguard the natural character of these lands and the recreational experience available there.

Congress has also established other specially designated areas often dedicated, in whole or part, to recreational uses. The enabling statutes establishing national recreation areas and similar protective designations take precedence over the generic legislation that would otherwise govern management of these lands.[367] Several courts have interpreted these enabling acts to preserve particular recreational experiences or opportunities. In a case involving the Hells Canyon National Recreation Area, the court read the enabling statute to require the Forest Service to develop specific regulations for the area to accomplish its predominantly recreational purposes.[368] In a case challenging the Forest Service's management of the Chattooga River under the Wild and Scenic River Act, the court sustained the agency's decision closing part of the river to whitewater boating to enable hikers and anglers to enjoy it during the summer months, finding that these activities merited protection as part of the river's "outstanding remarkable values."[369] In another case, the court construed the Steens Mountain Cooperative Management and Protection Act to require the BLM to prepare a comprehensive transportation plan for the area that addresses individual routes.[370] Another Steens Mountain case found the BLM violated the enabling act when it permitted motorized access into designated WSAs for a juniper thinning project.[371] In short, the courts recognize that the presence (or absence) of motorized vehicles and other

365 *Id.* at 1011. *See also* Sierra Club v. Hodel, 848 F.2d 1068, 1085–88 (10th Cir. 1988) (holding the FLPMA non-impairment standard applied to road construction in WSAs but finding the road at issue represented a valid existing right subject to review under FLPMA's less rigorous "unnecessary or undue degradation" management standard).

366 W. Watersheds Project v. Rosenkrance, 736 F. Supp. 2d 1276, 1283 (D. Idaho 2010).

367 *See, e.g.*, 54 U.S.C. § 100101(b)(2) (2012).

368 Or. Nat. Resources Council v. Lyng, 882 F.2d 1417,1420 (9th Cir. 1989).

369 Am. Whitewater v. Tidwell, 770 F.3d 1108, 1117, 1119 (11th Cir. 2014), *aff'g* 959 F. Supp. 2d 839 (D.S.C. 2013).

370 Or. Nat. Desert Ass'n v. Shuford, No. 06–242–AA, 2007 WL 1695162, at *16–17 (D. Or. June 8, 2007), *aff'd sub nom* Or. Nat. Desert Ass'n v. McDaniel, Nos. 08–35942, 08–36041, 405 F. App'x 197 (9th Cir. 2010). *See also* Or. Nat. Desert Ass'n v. Rose, 921 F.3d 1185, 1191 (9th Cir. 2019) (finding the BLM violated NEPA by not adequately assessing baseline conditions before deciding, in its Travel Management Plan, to open roads within the Steens Mountain Area; the court chose not to consider plaintiffs' challenge to the BLM's Recreation Management Plan).

371 Or. Nat. Desert Ass'n v. Bureau of Land Mgmt., 143 F. Supp. 3d 1064, 1071 (D. Or. 2015).

recreational activities can have a profound impact on the type of recreational experience available in specially designated areas.[372]

F. NEPA, Wildlife, and Tort Law

Several comprehensive laws—principally NEPA and the Endangered Species Act (ESA)—have played a prominent role in resolving recreation-related controversies on the public lands. In fact, NEPA claims appear routinely in litigation challenging agency decisions impacting recreational activities and opportunities. Under NEPA, federal agencies are required to prepare an environmental analysis before taking any action with a significant impact on the human environment,[373] an obligation that the courts review under the "hard look" doctrine.[374] The act's purposes, according to the Supreme Court, are to ensure agencies carefully consider the environmental implications of their decisions and provide the public an opportunity to participate in the decision making process.[375] Key questions regularly arising in NEPA litigation are whether the agency should have prepared a detailed Environmental Impact Statement (EIS) rather than a less rigorous Environmental Assessment (EA), whether the analysis was sufficient, whether adequate alternatives were examined, whether the agency responded to contrary information, whether cumulative effects were addressed, and whether the public was properly involved in the process.[376] Each of these issues (and more) have been raised in NEPA litigation addressing recreation management decisions.

Several cases illustrate how the courts have interpreted and applied NEPA in recreation-related controversies.[377] The Ninth Circuit, in one case, overturned the BLM's separate travel and recreation management plans for the Steens Mountain Area on NEPA grounds, because the agency failed to establish and analyze baseline conditions regarding the presence and use of roads,[378] a ruling that tells the agencies they must carefully examine motorized use in specially

372 *But see* Biodiversity Conservation All. v. U.S. Forest Serv., 765 F.3d 1264, 1265–66 (10th Cir. 2014) (finding no NEPA violation when the Forest Service allowed motorcycle use to continue on a five-mile trail in a national forest inventoried roadless area); Umpqua Watersheds v. U.S. Forest Serv., 725 F. Supp. 2d 1232, 1239–40 (D. Or. 2010) (finding no violation of the Oregon Dunes National Recreation Area management plan when the Forest Service approved a new paved trail for motorized use).

373 42 U.S.C. 4332(2)(C) (2018).

374 Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Marsh v. Or. Nat. Res. Council, 490 U.S. 360, 373–74 (1989).

375 *Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

376 COGGINS ET AL., *supra* note 127, at 240–63.

377 In most of these cases, which primarily involved challenges to agency decisions opening roads or motorized access, the NEPA claim was joined with other claims, most often that the Forest Service or BLM also violated Executive Orders 11,644 and 11,989 limiting ORV use on the public lands or the agency regulations implementing these orders. *See infra* notes 378–384 and accompanying text.

378 Or. Nat. Desert Ass'n v. Rose, 921 F.3d 1185, 1190 (9th Cir. 2019).

designated areas with a recreational emphasis. In another case, the Ninth Circuit ruled that the EIS accompanying the BLM's Resource Management Plan for southeastern Oregon was deficient, because it failed to analyze the wilderness values attached to the area's lands with wilderness characteristics, and failed to consider an adequate range of alternatives before deciding not to close any roads to ORV use.[379] The court was clearly concerned about the effect motorized vehicle use had in the planning area: "In addition to the physical impact of motorized vehicles on natural features of land, such vehicles transform remote areas into motorized recreation zones, substantially altering the outdoor recreation experiences of ORV users and non-users alike."[380] In a challenge to the Beaverhead-Deerlodge National Forest's Winter Travel Management Plan, the court found the accompanying EIS deficient for failing to incorporate and disclose the best available science on the impact snowmobiles had on the forest's winter-stressed wildlife.[381] In another NEPA challenge to a national forest travel management plan, the court ruled that the Forest Service did not address the cumulative effect of "micro roads" on recommended wilderness areas as well as inventoried roadless areas and also failed to respond to site-specific comments on the draft EIS.[382] Other recreation-related NEPA cases have reached similar results,[383] though the courts have, not surprisingly, also rejected NEPA claims and sustained agency recreation decisions.[384]

[379] Or. Nat. Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114, 1142–43, 1145 (9th Cir. 2008), *amended and superseded on denial of reh'g* Or. Nat. Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092 (9th Cir. 2010).

[380] *Id.* at 1144.

[381] *Mont. Snowmobile Ass'n*, 790 F.3d 920, 927–28 (9th Cir. 2015). The court also ruled that the agency failed to properly address the "minimization" criteria governing motorized use in national forests as required by its rules.

[382] Idaho Conservation League v. Guzman, 766 F. Supp. 2d 1056, 1066, 1075 (D. Idaho 2011). In addition, the court found that the Forest Service violated its own "minimization" rule, which required it to minimize the adverse effects of roads.

[383] *See, e.g.*, *Meister*, 623 F.3d 363, 377–80 (6th Cir. 2010) (holding that the agency failed to consider viable alternatives); Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt., 746 F.Supp.2d 1055, 1086–90 (N.D. Cal. 2009) (ruling that the agency failed to consider adequate range of alternatives); Defs. of Wildlife v. Salazar, 877 F.Supp.2d 1271, 1300–02 (M.D. Fla. 2012) (finding that the agency failed to supplement EIS before reopening closed trails to ORVs); *Kempthorne*, 577 F. Supp. 2d 183, 209–10 (D.D.C. 2008) (holding that the agency's conclusion that the winter use plan did not impair soundscape, wildlife, or air quality in the park was arbitrary). *Cf.* Idaho Snowmobile Ass'n v. U.S. Forest Service, No. 1:19-CV-00195-DCN, 2021 WL 493412 (D. Idaho 2021) (ruling that the Forest Service failed to factually justify its decision to close snowmobile trails for wildlife protection purposes).

[384] *See, e.g.*, *Silverton Snowmobile Club*, 433 F.3d 772 (10th Cir. 2006) (finding for the agencies on all claims including that the agencies took a "hard look" at requisite environmental consequences, complied with the forest plan, and issued an appropriate EA); Nat. Res. Def. Council v. U.S. Forest Serv., 634 F. Supp. 2d 1045, 1057–68 (E.D. Cal. 2007) (rejecting an assortment of NEPA claims to sustain opening portion of forest to snowmobile use); Wilderness Soc'y v. U.S. Bureau of Land Mgmt., 822 F. Supp. 2d 933, 944 (D. Ariz. 2011) (BLM developed an adequate mitigation plan to address livestock and ORV impacts

The Endangered Species Act,[385] which extends federal protection to animals and plants verging on extinction, has played a prominent role in public land litigation but less frequently in controversies involving recreational activity. In a case where the Park Service closed portions of Voyageurs National Park to recreational snowmobiling in order to safeguard federally protected wolves, the Eighth Circuit concluded that the ESA and the Park Service's regulatory authority over park resources were sufficient to sustain the closure order.[386] In a challenge to the Park Service's decision opening portions of Big Cypress National Preserve to ORVs despite the potential impact on endangered Florida panthers, the court invalidated the FWS's revised biological opinion for not explaining why more ORV use would not promote more hunting of the panthers.[387] An ESA challenge to the Forest Service's travel management plan for two California national forests succeeded on the grounds that the agency did not fully consult with the FWS on the effect roads opened to motorized use would have on critical habitat for a protected frog.[388] Similarly, a Montana federal district court enjoined the Flathead National Forest's winter motorized use plan upon finding that the FWS's biological opinion did not account for the illegal snowmobile activity presently occurring in critical grizzly bear habitat.[389] In another Montana case, the district court invalidated the FWS's biological opinion because it did not address the impact new recreational trails would have on area grizzly bears.[390] However, the ESA claims failed in a case asserting that the BLM, when it opened portions of the CDCA to ORVs,

on two Arizona national monuments); *Minn. Ctr. for Env't Advocacy*, 914 F. Supp. 2d 957, 972–73 (D. Minn. 2012) (ruling an EA not an EIS was adequate and agency considered an adequate range of alternatives); Cent. Sierra Env't Res. Ctr. v. U.S. Forest Serv., 916 F. Supp. 2d 1078, 1090 (E.D. Cal. 2013) (rejecting arguments that the Forest Service failed to consider an adequate range of alternatives and failed to address the cumulative effects related to its travel management plan); Granat v. U.S. Dep't of Agric., 238 F. Supp. 3d 1242, 1251–54, 1257 (E.D. Cal. 2017) (rejecting motorized recreational group's NEPA claims that agency did not consider adequate range of alternative, adequately consult with local governments, or prepare cumulative effects statement on off-forest impacts); *Provencio*, 272 F. Supp. 3d 1136, 1156–60 (D. Ariz. 2017) (finding that the Forest Service properly prepared EAs rather than an EIS and adequately analyzed relevant data).

385 Endangered Species Act, 16 U.S.C. §§ 1531–1543 (2018).

386 Mausolf v. Babbitt, 125 F.3d 661, 663, 670 (8th Cir. 1997). *But see* Voyageurs Nat'l Park Ass'n v. Norton 381 F.3d 759, 766–67 (8th Cir. 2004) (sustaining a Park Service decision to open portions of the park to snowmobiling despite presence of ESA-protected wolves).

387 Defs. of Wildlife v. Salazar, 877 F. Supp. 2d 1271, 1306–07 (M.D. Fla. 2012). The court also found violations of NEPA, the National Parks Organic Act, and Executive Orders 11,644 and 11,989. *But see* Nat'l Parks Conservation Ass'n v. Dep't of the Interior, 46 F. Supp. 3d 1254, 1324–25 (M.D. Fla. 2014), *aff'd*, 835 F.3d 1377 (11th Cir. 2016) (dismissing ESA and other claims advanced in the case challenging Park Service's decision to open other portions of the Big Cypress National Preserve to ORVs).

388 Ctr. for Sierra Nevada Conservation v. U.S. Forest Serv., 832 F. Supp. 2d 1138, 1144 (E.D. Cal. 2011).

389 Swan View Coal. v. Barbouletos, No. CV 06–73–M–DWM, 2008 WL 5682094, at *1 (D. Mont. June 13, 2008).

390 Helena Hunters & Anglers Ass'n v. Marten, 470 F.Supp.3d 1151 (D. Mont. 2020).

was adversely modifying critical tortoise habitat.[391] The same result was reached in a Minnesota case, where the court ruled that the Forest Service was not obligated to formally consult with the FWS before permitting limited ORV use in critical lynx habitat.[392]

State wildlife law cannot be ignored in understanding federal recreation policy on the public lands. By tradition, the states manage hunting and fishing on federal lands except in the national parks and wildlife refuges unless Congress has decreed otherwise.[393] The national parks generally prohibit hunting, while the national wildlife refuges are typically open to federally regulated hunting.[394] National forests and BLM lands, including designated wilderness areas, are open to state-regulated hunting, including state licensing requirements and seasonal limitations.[395] A few federal statutes prohibit or limit the hunting of certain species, including federally protected endangered species and migratory birds.[396] Under FLPMA moreover, the relevant Secretary has the authority to close areas of the national forests or BLM lands to hunting and fishing "for reasons of public safety, administration, or compliance with provisions of applicable law."[397]

Conflicts have erupted between hunters and other recreationists over hunting activities occurring adjacent to non-hunting federal lands as well as over particular hunting techniques, such as bear baiting and hound hunting.[398] When the Forest Service or BLM customarily take no action regarding such state-allowed practices as bear baiting or predator control programs, the courts have dismissed NEPA claims and other lawsuits seeking to compel the agency to stop the practice, finding the absence of active federal involvement determinative.[399] But when the federal agency has banned a particular state-sanctioned hunting practice, like hound hunting, to benefit other recreationists, the courts

391 Ctr. for Biological Diversity v. Bureau of Land Mgmt., 746 F. Supp. 2d 1055, 1108–09 (N.D. Cal. 2009) (upholding the FWS's biological opinion no jeopardy finding and its incidental take statement). Although the court rejected the ESA claims, it found NEPA and FLPMA violations with the BLM's ORV plan.

392 *Minn. Ctr. for Env't Advocacy*, 914 F. Supp. 2d 957, 976, 977–79 (D. Minn. 2012). *See also* Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F. Supp. 384, 392 (D. Wyo. 1987) (sustaining the Park Service's decision to maintain campground in grizzly bear habitat).

393 *See* Martin Nie et al., *Fish and Wildlife Management on Federal Lands: Debunking State Supremacy*, 47 ENV'T L. 797, 806–11 (2017).

394 *Id.* at 915.

395 *Id.* at 914.

396 Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B) (2018); Migratory Bird Treaty Act, 16 U.S.C. § 703 (2018). In addition, the Lacey Act, 16 U.S.C. § 3372 (2018), prohibits the sale, purchase, or import of wildlife taken in violation of federal or state law.

397 Wilderness Study Act of 1977, 43 U.S.C. § 1732(b) (2018).

398 Fund for Animals v. Thomas, 932 F. Supp. 368, 369–71 (D.D.C. 1996); Alaska v. Andrus, 591 F.2d 537, 539 (9th Cir. 1979).

399 *See, e.g.*, Defs. of Wildlife v. Andrus, 627 F.2d 1238, 1239–40 (D.C. Cir. 1980); *Alaska v. Andrus*, 591 F.2d at 541–42; *Thomas*, 932 F. Supp. at 370–71; WildEarth Guardians v. U.S. Forest Serv., No. 4:14–cv–00488–REB, 2017 WL 1217099, at *1, *8 (D. Idaho Mar. 31, 2017); Maughan v. Vilsack, No. 4:14–CV–0007–EJL, 2014 WL 201702, at *1 (D. Idaho Jan. 17, 2014).

have sustained the prohibition so long as the agency complied with NEPA and other procedural requirements.[400] Relatedly, the Sixth Circuit has held that the Forest Service violated its own rules by failing to close a designated primitive recreation area to gun hunting in order to protect other recreation users from intrusive noise.[401] For the most part, though, the federal multiple use agencies have assumed a passive role regarding hunting activities on their lands, leaving that management responsibility to the states and thus avoiding any legal responsibility.

The Federal Tort Claims Act (FTCA)[402] also factors into federal recreation policy. By definition, outdoor recreation involves an element of risk that participants assume when they venture afield. Mountain climbing, open water swimming, hang gliding, and even auto touring can—and has—resulted in death and injury, occasionally prompting tort litigation against the land management agency administering the area where the accident occurred. If successful, such litigation can prompt changes in agency recreation policies, either disallowing certain types of activities or posting new warning signs.[403] Under the FTCA, the United States is liable for tort injuries caused by its employees "in accordance with the law of the place where the act or omission occurred."[404] The FTCA, however, includes a "discretionary function" exception that prohibits claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or employee of the Government, whether or not the discretion involved be abused."[405] In large measure, this exception has insulated the public land agencies from liability for recreation mishaps,

400 Hollingsworth v. Vilsack, 366 F. Supp. 3d 766, 771, 779, 784, 785 (W.D. La. 2018); La. Sportsmen All. v. Vilsack, 984 F. Supp. 2d 600, 603, 615 (W.D. La. 2013), *vacated on other grounds and remanded for dismissal without prejudice*, No. 13-31260, slip op. at 2 (5th Cir. 2014).

401 *Meister*, 623 F.3d 363, 379–80, *reh'g denied*, 629 F.3d 586 (6th Cir. 2010).

402 Federal Tort Claims Act, 28 U.S.C. §§ 1291, 1346, 1402, 2401–2402, 2411, 2412, 2671–2680 (2018).

403 *See, e.g.*, Summers v. United States, 905 F.2d 1212, 1215 (9th Cir. 1990) (concluding that the National Park Service was not immune from liability under the discretionary function exception to the FTCA related to the agency's placement of signs and "failure to warn of the potential danger of stepping on hot coals").

404 28 U.S.C. § 1346(b)(2) (2018). *See* Otteson v. United States, 622 F.2d 516, 517 (10th Cir. 1980) (holding that the U.S. Forest Service, like a private citizen, "is entitled to the protection of the Colorado sightseer statute"); KEVIN M. LEWIS, CONG. RESEARCH SERV., R45732, THE FEDERAL TORT CLAIMS ACT (FTCA): A LEGAL OVERVIEW 6 (2019).

405 28 U.S.C. § 2680(a) (2018). *See* Berkovitz v. United States, 486 U.S. 531, 535–36 (1988) (outlining the limits of the discretionary function exception); United States v. Varig Airlines, 467 U.S. 797, 813–14 (1984) ("[The] discretionary function exception . . . was intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."). Based on Supreme Court precedent, courts have established a two-part test for application of the discretionary function exception: 1) whether the agency decision was discretionary or mandatory; and 2) whether the decision was grounded in social, economic, or political considerations. *See* Miller v. United States, 163 F.3d 591, 593 (9th Cir. 1998).

except where the agency is aware of a non-evident hazard and fails to warn visitors.[406] The courts have accordingly concluded that mountain climbing accidents and related rescue decisions are insulated under the discretionary function doctrine,[407] but agency officials have been held responsible for warning visitors of non-apparent hazards in popular areas.[408] Although the potential for liability is limited and payments do not come from the offending agency's budget,[409] agency officials cannot entirely ignore the threat of tort litigation or the costs associated with search and rescue efforts for injured recreationists.

G. Funding Legislation

Beyond this regulatory regime, federal laws related to funding for recreation on the public lands play an important role in meeting the challenges associated with the escalating demand for outdoor recreation opportunities. The Land and Water Conservation Fund Act of 1965 (LWCF Act)[410] has provided an important source of money,[411] derived from off-shore oil and gas leasing revenues, that has enabled the federal land management agencies to acquire more than 2.5 million acres for "outdoor recreation" purposes.[412] Although the act authorizes funding at the $900 million level, Congress's appropriations have rarely met this annual funding level due in part to perennial federal balanced budget concerns.[413] In July 2020, however, Congress adopted the Great American Outdoors Act,[414] permanently dedicating $900 million annually for the LWCF and guaranteeing $1.9 billion annually for five years to help address the agencies' well-documented nearly $20 billion

406 *See supra* note 403; *see infra* notes 407–408 and accompanying text.

407 Johnson v. U.S. Dep't of Interior, 949 F.2d 332, 337 (10th Cir. 1991). *See also* Estate of Harshman v. Jackson Hole Mountain Resort Corp., 379 F.3d 1161, 1162–63, 1166 (10th Cir. 2004).

408 Boyd v. U.S. *ex rel.* U.S. Army, Corps of Engineers, 881 F.2d 895, 896, 897–98 (10th Cir. 1989); Smith v. United States, 546 F.2d 872, 877 (10th Cir. 1976). *Cf.* Duke v. Dep't of Agric., 131 F.3d 1407, 1411–12 (10th Cir. 1997) (declining to extend the discretionary function exception because the record contained no evidence that the U. S. Forest Service's decision not to place warning signs or protect against danger in a known rockslide area was based on a political, social, or economic policy decision).

409 LEWIS, *supra* note 404, at 16–17; COGGINS ET AL., *supra* note 127, at 343.

410 54 U.S.C. §§ 100506, 100904, 200301–200310 (2012 & Supp. V 2018).

411 *Id.* § 200306(a)(4) (Supp. V 2018). Under the LWCF Act, available funding is split between the federal government and the states. *Id.* §§ 200305(a), 200306(a)(1).

412 COGGINS ET AL., *supra* note 127, at 402. Ironically, with the world facing the climate change crisis, these LWCF Act—funded conservation additions to the federal estate are being underwritten by fossil fuel leasing and royalty payments from an industry widely criticized for its carbon emissions contribution to a warming earth. Carl Segerstrom, *Is a Big Win for Conservation a Blow to Climate Action?*, HIGH COUNTRY NEWS (July 22, 2020), https://perma.cc/UF9G-S769.

413 COGGINS ET AL., *supra* note 127, at 839.

414 Great American Outdoors Act, Pub. L. No. 116-152, 134 Stat. 682 (2020) (to be codified at 54 U.S.C. §§ 200401–200402).

deferred maintenance expenses.[415] Although federal land purchases with LWCF Act funds have often generated political resistance from western states opposed to federal land ownership, the fact that half of these funds are available to the states for recreation-related acquisitions has helped dampen that resistance.[416] State acquisitions with these funds will further expand the overall recreation lands portfolio, including near urban areas and underserved communities, and will offer opportunities to better coordinate federal–state recreation planning.[417] Moreover, in 2018, Congress reauthorized the Federal Land Transaction Facilitation Act (FLTFA), providing another source of funds from the BLM's surplus land sales that the four public land agencies can use to purchase inholdings and other recreationally valuable lands.[418] During its previous ten years of existence, the FLTFA generated more than $113 million that was used for thirty-nine recreation and conservation projects, including one to secure fly fishing access and another to protect critical elk winter habitat.[419] These recent revenue-related laws should enable the agencies to expand, diversify, and consolidate the available recreation acreage in public hands.

Another source of funding support for recreation on the public lands comes from users, reflecting a "user pays" principle. Until recently, recreation was essentially free on the public lands with the principal exception of the national parks, which have long collected an entrance fee that, perversely, went directly to the general treasury and not to support the agency or recreation-related services.[420] That changed in 1996 when Congress, seeking revenue to address the agencies' constant budget shortfalls for recreation management and facilities, adopted an experimental fee demonstration program that enabled them to charge and retain a fee for playing on the public lands.[421] Notwithstanding

415 Hannah Downey, *The Great American Outdoors Act, Explained*, PERC (Aug. 4, 2020), https://perma.cc/P6PB-9NGL. The act establishes a National Parks and Public Lands Legacy Restoration Fund that is funded by revenues derived from energy development on federal lands and waters. Pub. L. No. 116-152, 134 Stat. 682 (2020) (to be codified at 54 U.S.C. § 200402). Under the act, the Park Service receives 70 percent of these funds annually, the Forest Service gets 15 percent, and the other agencies receive five percent. Pub. L. No. 116-152, 134 Stat. 682 (2020) (to be codified at 54 U.S.C. § 200402(e)).

416 Under the LWCF Act, however, the states must meet a 50 percent match requirement to receive federal assistance. 54 U.S.C. § 200305(c) (Supp. V 2018).

417 *LWCF Programs, Projects, and Grants*, LAND & WATER CONSERVATION FUND COALITION, https://perma.cc/V2HS-XMB7 (last visited Nov. 15, 2020).

418 Pub. L. No. 106-248, tit. II, § 202, 114 Stat. 613 (2000) (codified at 43 U.S.C. §§ 2301–2306).

419 *FLTFA: The Federal Land Transaction Facilitation Act*, CONSERVATION FUND, https://perma.cc/94XB-7CYE (last visited Nov. 12, 2020).

420 Brian Maffly, *National Parks Need Money – But Raising Entry Fees Could Backfire*, SALT LAKE TRIB. (Jan. 2, 2018), https://perma.cc/B52B-3SS3.

421 Department of the Interior and Related Agencies Appropriations Act, Pub. L. No. 107-63, 115 Stat. 466 (2001) (codified at 16 U.S.C. 460l–6c) (repealed 2014). Although primarily intended to generate revenue for public land recreation purposes, the fee demonstration legislation also responded to the longstanding critique that other public land users—loggers, ranchers, energy companies, and others—paid for their use of the public

opposition from some users who cited the long history of free recreational access to the public lands as well as double taxation concerns, and who feared additional commercialization of outdoor recreation, the program generated considerable funds that the agencies used to upgrade facilities and respond to visitation pressures on their lands.[422] In 2004, following litigation challenging the experimental program,[423] Congress enacted the Federal Lands Recreation Enhancement Act,[424] making the fee program permanent to ensure an ongoing source of revenue for the agencies to utilize in meeting the impacts associated with the outdoor recreation explosion.[425] Since then, the amounts generated for the land management agencies have steadily increased, exceeding $390 million in fiscal year 2017, most of which the receiving agency retained to support local recreation-related expenses.[426] Although these "user pays" fee laws have largely reversed the tradition of free recreation access on the public lands,[427] they fall well short of providing the agencies with the funding needed to meet current demands and improve the visitor experience on their respective lands.

V. MEETING THE RECREATION CHALLENGE

The era of free and unregulated access to the public lands for recreation purposes has ended. The tragedy of the commons has once again played out on the public domain, this time in the case of outdoor recreation. A disjointed legal framework governing outdoor recreation is

lands, while recreationists were essentially "free riders" who yet generated expenses for the managing agencies.

422 *See* U.S. GEN. ACCOUNTABILITY OFFICE, GAO/RCED-99-7, RECREATION FEES: DEMONSTRATION FEE PROGRAM SUCCESSFUL IN RAISING REVENUES BUT COULD BE IMPROVED 2 (1998); Kira Dale Pfisterer, *Foes of Forest Fees: Criticism of the Recreation Fee Demonstration Project at the Forest Service*, 22 J. LAND, RES., & ENV'T L. 309, 350 (2002).

423 United States v. Morow, 185 F. Supp. 2d 1135, 1136 (E.D. Cal. 2002); United States v. Maris, 987 F. Supp. 865, 866 (D. Or. 1997).

424 16 U.S.C. §§ 6801–6814 (2018).

425 *Digest of Federal Resources Laws of Interest to the U.S. Fish and Wildlife Service: Federal Lands Recreation Enhancement Act (REA)*, U.S. FISH & WILDLIFE SERV., https://perma.cc/5C77-AWRY (last visited Nov. 15, 2020).

426 CAROL HARDY VINCENT, CONG. RESEARCH SERV., FEDERAL LANDS RECREATION ENHANCEMENT ACT: OVERVIEW AND ISSUES (Oct. 31, 2018), https://perma.cc/Z6GX-NCBU.

427 Not surprisingly, the 2004 legislation has generated controversy and litigation, primarily over what type of activity in the national forests is covered by the statute's "standard amenity recreation fee" provision. *See* Adams v. U.S. Forest Serv., 671 F.3d 1138, 1146 (9th Cir. 2012) (prohibiting the Forest Service from charging for parking along a road and hiking in an undeveloped area); Alpern v. Ferebee, 949 F.3d 546, 552 (10th Cir. 2020) (giving the FLREA a broad interpretation and sustaining the Forest Service's authority to charge a fee for parking at a developed site). *See also* Steven J. Kirschner, *Can't See the Forest for the Fees: An Examination of Recreation Fee and Concession Policies on the National Forests*, 14 WYO. L. REV. 513 (2014) (questioning the Forest Service's increased use of concessioners for recreation management purposes and its expansive interpretation of its fee authority).

emerging, albeit in a halting fashion. Congress, the agencies, presidents, and the courts have all contributed to the law of outdoor recreation, as have the diverse constituencies engaged in our nation's premier outdoor playgrounds. But the legal framework governing recreation on the public lands remains incomplete and imperfect. In the face of mounting recreational and environmental pressures, there is an evident need for greater congressional guidance on the multiple use lands, additional special designations with a recreation focus, and further funding. Such changes would not only enable the agencies to more effectively confront existing recreation challenges but would also help them to address impending issues related to climate change, diverse new constituencies, and technology advances.

A. Assessing the Law of Recreation

This excursion through the law governing recreation on the public lands establishes some legal guideposts applicable to the growing conflicts over recreational activities. That said, the existing statutory law actually contains few explicit priorities or standards, which stands in stark contrast to the law governing timber, grazing, mining and the other public land resource uses. Rather, the relevant law applicable to recreational use is a piecemeal collection of statutes, regulations, executive orders, and policies. In part, it emerges from the special designations—national park, wildlife refuge, wilderness area, and the like—that Congress has bestowed on the public lands.[428] And it is derived from a mixture of organic laws and other statutes imposing environmental constraints on the agencies, as well as agency-developed regulations along with the guidance derived from policy manuals and handbooks. In this milieu, the courts are playing an important role. As recreational uses and conflicts have intensified, judges have drawn upon these diverse legal sources to help define an emergent law of outdoor recreation on the federal public lands. Some priorities and standards are clear, most notably when the management of legally protected lands or motorized activity is at issue.[429] Otherwise, the agencies have relatively broad discretion over recreational activity, so long as they follow legally mandated procedures when deciding whether, where, and when to allow these activities.

Congress has generally avoided making judgments about preferred recreational activities, except as it has set aside public lands for specific purposes. The organic legislation governing national parks, while encouraging "public enjoyment" of these special places, clearly prioritizes resource conservation, as reflected in Park Service policies and case law.[430] For the national wildlife refuges, Congress has spoken

428 *See* discussion *supra* Parts IV.A, B, E.
429 *See* discussion *supra* Parts IV.A, B, C, D, E.
430 *See supra* notes 168–175, 186–203 and accompanying text.

more specifically about recreational priorities, giving "wildlife-dependent recreation" precedence over other recreational activities, though only so long as consistent with the refuge system's conservation goals.[431] The Wilderness Act not only endorses recreation as a permissible use but also establishes stringent limitations that disallow any development or mechanical types of recreational activity in these areas.[432] Similar constraints attach to designated WSAs.[433] And Congress, when establishing new national recreation areas, national preserves, and other special designations, has generally provided some guidance regarding permissible recreational activities in the enabling legislation.[434] On the multiple use Forest Service and BLM public lands, however, Congress has provided little statutory guidance governing recreation, choosing instead to merely denote outdoor recreation as one among several permissible uses.[435] Faced with limited statutory direction and proliferating ORV use across the public lands, two presidents felt compelled to weigh in with executive orders setting some standards for controlling this intrusive and potentially harmful activity.[436]

Otherwise, the responsible land management agencies have utilized their considerable authority to develop their own recreation policies. These policies are reflected in agency regulations, manuals, and handbooks, and are generally implemented through each agency's planning processes. The agency regulations, for the most part, do not address the full array of recreational activities occurring on the public lands, except each agency has promulgated specific regulations for ORVs and other motorized activities.[437] The regulations do empower land managers to open or close areas to particular activities,[438] set permit requirements for commercial entities (including ski areas) offering recreation-related services,[439] and define planning obligations.[440] Under the so-called *Chevron* doctrine, absent clear congressional direction, the courts must defer to reasonable agency

431 *See supra* notes 208–213 and accompanying text.

432 *See supra* notes 334–340, 347–356 and accompanying text.

433 *See supra* notes 341–346, 357–366 and accompanying text.

434 *See supra* notes 367–372 and accompanying text. *See also* 16 U.S.C. § 698i (authorizing the Secretary of the Interior to limit motor vehicle use, hunting, fishing, and trapping in the Big Cypress National Preserve); 16 U.S.C. § 460kk(i), (n) (requiring that fragile resource areas in the Santa Monica Mountains National Recreation Area be administered on a low intensity basis); 16 U.S.C. § 459b-6(b)(1) (limiting development in the Cape Cod National Seashore to that accommodating camping, swimming, boating, sailing, hunting, and fishing activities).

435 *See supra* notes 236–243, 296–305 and accompanying text.

436 *See supra* notes 270–271 and accompanying text.

437 *See supra* notes 179, 218, 231, 244, 246, 249, 304, 307–312 and accompanying text.

438 *See supra* notes 219, 244, 308–312 and accompanying text. In addition, the Forest Service's roadless area rule closes 63 million acres to new road building or timber harvesting subject to a few exceptions. 36 C.F.R. pt. 294 (2019).

439 *See supra* notes 181, 243, 245, 281–283, 338 and accompanying text.

440 *See supra* notes 183–185, 214–216, 249–252, 299, 310 and accompanying text.

interpretations of the organic legislation embodied in regulations governing them—a principle that essentially expands the land management agencies' authority over recreation on their respective lands.[441] Although agency manuals and handbooks offer more detailed guidance for recreation decisions, these documents are not regarded as judicially enforceable and thus are not a binding check on agency discretion.[442] In addition, the agencies must comply with general administrative and environmental laws when making recreation decisions, which includes undertaking NEPA environmental analyses and consultation with the FWS if federally protected species might be jeopardized.[443] As long as the agencies meet these obligations, they enjoy substantial discretion that can be exercised to promote, either directly or indirectly, a particular recreation agenda, as the Forest Service effectively did by adopting its roadless area rule.[444]

Not surprisingly, the courts are playing an increasingly important role overseeing agency decisions that allow or prohibit particular types of recreational activity. In fact, litigation over appropriate recreational activity is proliferating, even after the Supreme Court's *Norton* decision,[445] which made it difficult for interested parties to compel land managers to confront recreation problems, whether in the form of user conflicts or environmental harm. The litigants in recreation-related controversies mostly represent an array of conservation and recreation groups, each pursuing their own interests.[446] Standing doctrine has not presented a serious hurdle for litigants, because it has not been difficult to demonstrate individual injury to those involved in or affected by particular recreational decisions or activities.[447] The defendant is inevitably the agency or agency official responsible for the challenged decision.[448] Interested parties have frequently been allowed to intervene in the litigation, for example: conservation groups when a lawsuit seeks to open access to motorized activity.[449] As we have seen, the legal claims

441 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 842–45 (1984).

442 *See supra* note 220; U.S. DEP'T OF JUSTICE, JUSTICE MANUAL 1-20.000, LIMITATION ON USE OF GUIDANCE DOCUMENTS IN LITIGATION, at 1-20.200 (2018).

443 *See supra* notes 373–392 and accompanying text.

444 36 C.F.R. pt. 294 (2019). *See also supra* note 253 and accompanying text.

445 542 U.S. 55 (2004). *See supra* note 324 and accompanying text.

446 *See supra* notes 268, 272, 384 and accompanying text. Note, for example, that the named plaintiffs in these cases include the Wilderness Society, WildEarth Guardians, Greater Yellowstone Coalition, High Sierra Hikers Association, Winter Wildlands Alliance, and Silverton Snowmobile Club.

447 *See, e.g.*, *Meister*, 623 F.3d 363, 369 (6th Cir. 2010) (holding an individual forest user had standing to challenge establishment of a gun-hunting zone in a forest plan); *Blackwell*, 390 F.3d 630, 639 (9th Cir. 2004) (affirming organization's standing to challenge Forest Service's decision granting special use permits to packstock operators).

448 *See, e.g.*, *Kempthorne*, 577 F. Supp. 2d 183 (D.D.C. 2008) (naming the Secretary of the Interior as defendant); *Minn. Ctr. for Env't Advocacy*, 914 F. Supp. 2d 957 (D. Minn. 2012); Or. Nat. Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092 (9th Cir. 2010).

449 *See, e.g.*, Russell Country Sportsmen v. U.S. Forest Serv., 668 F.3d 1037 (9th Cir. 2011) (allowing intervention by conservation groups in an action by ORV groups seeking

raised in these recreation cases have spanned a wide spectrum that includes the organic statutes, enabling legislation, NEPA, the Endangered Species Act, executive orders, and specific agency regulations. The relief granted has ranged from an order compelling the agency to prepare new regulations or a revised NEPA document to enjoining a particular recreational activity or endorsing a collaborative settlement effort.[450]

The litigation outcomes have varied, though a few generalizations are evident and are helping to define an evolving law of outdoor recreation. First, when the agencies have prioritized resource or environmental protection over particular recreational uses, they have generally prevailed.[451] Second, the courts have regularly upheld agency permitting decisions that allocate recreation resources and opportunities.[452] Third, in cases involving national parks, wilderness areas, and other protected lands, the courts have usually sustained agency decisions disallowing recreational activities that imperil the natural setting, or conversely, overturned agency decisions that threatened the natural setting.[453] Fourth, the courts have vigorously enforced the executive orders and regulations governing motorized activity on the multiple use public lands, generally requiring the agencies to limit when and where ORVs, snowmobiles, and the like are permitted.[454] Fifth, the courts have not hesitated to intervene in recreation user conflicts, particularly those involving motorized uses, and in doing so, have recognized that the natural soundscape is an

to open a closed area to motorized use); Int'l Snowmobile Mfrs. Ass'n v. Norton, 340 F. Supp. 2d 1249 (D. Wyo. 2004) (allowing intervention by Wyoming and various conservation groups in an action seeking to prohibit the Park Service from closing Yellowstone to recreational snowmobiling).

450 *See, e.g.*, *Winter Wildlands All.*, No. 1:11–CV–586–REB, 2013 WL 1319598, at *1, *14 (D. Idaho Mar. 29, 2013) (requiring Forest Service to adopt regulation governing snowmobiles); *Kimbell*, 516 F. Supp. 2d 982, 997 (D. Minn. 2007), *aff'd*, 558 F.3d 751 (8th Cir. 2008) (requiring preparation of an EIS); *Kempthorne*, 577 F. Supp. 2d 183, 192, 210 (D.D.C. 2008) (enjoining snowmobiling in national park); Or. Nat. Desert Ass'n v. Bureau of Land Mgmt., 143 F. Supp. 3d 1064, 1072 (D. Ore. 2015) (directing the parties to confer on settlement of the matter); S. Utah Wilderness All. v. U.S. Dep't of the Interior, No. 2:12cv257 DAK, 2017 WL 11516766, at *1, *1 (D. Utah May 17, 2017) (approving negotiated settlement agreement).

451 *See, e.g.*, *Utah Shared Access All.*, 463 F.3d 1125, 1136 (10th Cir. 2006) (rejecting ORV group challenge to BLM trail closure decision).

452 *See, e.g.*, Citizens' Comm. to Save Our Canyons v. Krueger, 513 F.3d 1169, 1182 (10th Cir. 2008) (sustaining Forest Service decision issuing permit to heli-skiing company). *See also supra* notes 260–267 and accompanying text.

453 *See, e.g.*, *Timchak*, No. CV–06-04–E–BLW, 2006 WL 3386731, at *6, *7 (D. Idaho Nov. 21, 2006) (overturning Forest Service issuance of permit to heli-skiing company that threatened national forest wilderness study area).

454 *See, e.g.*, S. Utah Wilderness All. v. Burke, 981 F. Supp. 2d 1099, 1105–06 (D. Utah 2013) (reversing BLM's ORV route designations for failing to apply minimization criteria), *appeal dismissed*, 908 F.3d 630 (10th Cir. 2018).

important recreational value.[455] Sixth, non-motorized recreation interests have significantly benefited from conservation-related litigation that does not directly involve recreational activity, because judicial decisions blocking new timber sales, mines, or oil leases leave those lands undeveloped and thus available and attractive for recreation uses.[456] As this litigation unfolds, the courts are creating what constitutes a common law of outdoor recreation.

This emerging legal framework does not encompass the full scope of potential federal authority over recreation on the public lands. Under the Constitution's property clause,[457] according to the Supreme Court, Congress enjoys "unlimited" power over public lands that derives from its sovereign and proprietary status,[458] which it can exercise to protect federal lands and resources from threatening activities. Congress has used its property power to delegate broad rulemaking authority to the land management agencies.[459] Either Congress or the agencies could conceivably invoke this authority to impose additional limitations on specific recreational activities, for example, by tightening restrictions on motorized forms of recreation or outlawing electric bikes in national parks or elsewhere. In a 1979 case interpreting the Constitution's Commerce Clause, the Supreme Court rejected the "state ownership" of wildlife theory,[460] opening the door for more extensive federal protection of wildlife on the public lands, which could be employed to impose federal fair chase limitations on bear baiting and other troublesome hunting activities.[461]

In several instances, the federal courts have upheld congressional and agency regulations that extend beyond the federal boundary line to

455 *See, e.g.*, *Kimbell*, 516 F. Supp. 2d at 997 (ordering the Forest Service to prepare an EIS to evaluate sound impacts emanating from a nearby trail), *aff'd*, 558 F.3d 751 (8th Cir. 2009). *See also* Jenny Morber, *How Can We Protect Silence?*, HIGH COUNTRY NEWS (July 13, 2020), https://perma.cc/Y5AB-WJ7M (describing the efforts of environmental groups, scientists, and grassroots activists working to protect the quiet of natural soundscapes).

456 *See, e.g.*, Resources Ltd. v. Robertson, 35 F.3d 1300, 1305, 1308 (9th Cir. 1994) (vacating the Forest Service's determination new road construction accessing timber sales in grizzly bear habitat would not jeopardize their continued existence); Ctr. for Biological Diversity v. Bureau of Land Mgmt., 937 F. Supp. 2d 1140, 1159 (N.D. Cal. 2013) (finding BLM's environmental analysis of oil and gas leasing inconsistent with NEPA); Sierra Club v. Bosworth, 352 F. Supp. 2d 909, 927–28 (D. Minn. 2005) (requiring Forest Service to prepare an EIS before approving a timber sale adjacent to a wilderness area).

457 U.S. CONST. art. IV, § 3.

458 Kleppe v. New Mexico, 426 U.S. 529, 539 (1976). *See also* Camfield v. United States, 167 U.S. 518, 525 (1897) (holding that "[t]he general Government doubtless has a power over its own property analogous to the police power of the several States, and the extent to which it may go in the exercise of such power is measured by the exigencies of the particular case").

459 *See, e.g.*, 54 U.S.C. § 100751(a) (Supp. IV 2017) (National Park Service rulemaking authority); 16 U.S.C. § 551 (2018) (Forest Service rulemaking authority).

460 Hughes v. Oklahoma, 441 U.S. 322, 327–36 (1979).

461 *See* Nie et al., *supra* note 393, at 835–36 (concluding that Congress has the authority to regulate wildlife on federal lands and to override contrary state wildlife regulations).

limit activities on adjacent state or private lands to protect nearby federal resources and values.[462] The Eighth Circuit, in *State of Minnesota by Alexander v. Block*,[463] sustained congressional legislation that limited motorboat and snowmobile use on state waters within a designated wilderness area, reasoning that such use would undermine wilderness values.[464] This precedent suggests that Congress (and perhaps even the Forest Service) has the authority—were either inclined to invoke it—to regulate development on privately owned lands at the base of national forest ski areas to protect at-risk wildlife or other environmental or recreation values. However, Congress and the agencies have rarely asserted themselves in this manner, sensitive to federal-state relations, property rights, and related political pressures, well aware that any such assertions of federal authority would meet political and legal resistance.

In fact, legal regulatory responses to the current outdoor recreation challenges are inescapably controversial, whether the issue involves a conflict between different recreation users, different federal agencies, or federal and state agencies. The Obama administration, as part of its America's Great Outdoors initiative,[465] established a Federal Interagency Council on Outdoor Recreation in an apparent effort to improve coordination over recreation matters within the responsible federal agencies.[466] The Council, however, has instead focused on promoting the economic benefits of recreation on the federal public lands.[467] Congress has sought to encourage coordination among governmental entities through organic legislation directing the individual land management agencies to coordinate their planning efforts with neighboring federal agencies as well as state, local, and tribal governments.[468] In response, the four land management agencies

462 Free Enterprise Canoe Renters Ass'n v. Watt, 549 F. Supp. 252, 263 (E.D. Mo. 1982), *aff'd*, 711 F.2d 852 (8th Cir. 1983); United States v. Brown, 552 F.2d 817, 822 (8th Cir. 1977), *cert. denied*, 431 U.S. 939, 949 (1977); United States v. Alford, 274 U.S. 264, 267 (1927).

463 660 F.2d 1240 (8th Cir. 1981), *cert. denied*, 455 U.S. 1007 (1982).

464 *See Kimbell*, 516 F. Supp. 2d 982, 997 (D. Minn. 2007), *aff'd*, 558 F.3d 751 (8th Cir. 2009) (citing *State of Minnesota by Alexander v. Block*, 660 F.2d 1240, 1251 (8th Cir. 1981) to hold that the Property Clause permits Congress to regulate beyond the boundary line).

465 Presidential Memo, A 21st Century Strategy for America's Great Outdoors, 75 Fed. Reg. 20,767 (Apr. 16, 2010); SALAZAR, *supra* note 109 and accompanying text.

466 *See also* Land and Water Conservation Fund Act, 54 U.S.C. §§ 200101, 200103 (Supp. II 2015) (endorsing outdoor recreation and authorizing—but not requiring—the Interior and Agriculture secretaries to prepare a comprehensive nationwide outdoor recreation plan and to promote coordinated federal and state recreation planning).

467 FED. INTERAGENCY COUNCIL ON OUTDOOR RECREATION, OUTDOOR RECREATION: JOBS AND INCOME 1 (2014), https://perma.cc/E8LS-N7KV; FED. RECREATION COUNCIL, OUTDOOR RECREATION THROUGH A FEDERAL INTERAGENCY LENS 4 (2016), https://perma.cc/4SS2-SZZJ.

468 *See, e.g.*, National Forest Management Act of 1976, 16 U.S.C. § 1604(a) (2018). *See, e.g.*, Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1712(c)(9) (2018); National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd(a)(4)(E),

have each promulgated relevant regulations and policies acknowledging their coordination obligations.[469] The NEPA regulations also promote coordination among the agencies when confronting environmentally significant decisions, which is typically accomplished by granting concerned neighbors cooperating agency status to help prepare any required environmental analysis.[470] At least one court has enforced coordination requirements to resolve a recreation-related controversy. In *Meister v. U.S. Department of Agriculture*,[471] the Sixth Circuit held that the Forest Service violated its own rules when it failed to coordinate with state officials to assess recreational demands and then allocate adjoining forest lands between the competing recreational uses.[472] The lesson from *Meister* is simple: By working together, the responsible agencies can conceive and implement better informed and more comprehensive plans, thus reducing the level of conflict between different types of recreational activity. Such an approach is also consistent with current ecosystem- or landscape-scale planning and management policies.[473]

Beyond occasional interagency coordination efforts, ad hoc collaborative initiatives have surfaced organically to address recreational and other conflicts involving public lands. Of diverse origins, these initiatives generally involve the affected participants and agencies joining together in a collaborative process or partnership arrangement to resolve identified concerns through front-end negotiation rather than back-end litigation.[474] An early example of recreation-related collaboration occurred in southern Utah's Moab area when BLM managers joined local government officials and mountain bike enthusiasts to establish the Sand Flats Recreation Management Area, complete with a local access fee collected by the county but then returned to the BLM and used for maintenance costs, with oversight by

(M), 668dd(e)(3) (2018). *See also* NPS MANAGEMENT POLICIES, *supra* note 172, at 13–14, 25, 38.

469 *See, e.g.*, 36 C.F.R. § 219.4 (2019); 43 C.F.R. § 1610.3–1 (2019).

470 40 C.F.R. § 1501.6 (2019).

471 623 F.3d 363 (6th Cir. 2010).

472 *Id.* at 374 (The court invoked Forest Service regulation requiring that forest planning, "shall be coordinated to the extent feasible with present and proposed recreation activities of local and State land use or outdoor recreation plans, particularly the State Comprehensive Outdoor Recreation Plan, and recreation opportunities already present and available on other public and private lands, with the aim of reducing duplication in meeting recreation demands") (quoting 36 C.F.R. § 219.21(e)).

473 *See* Keiter, *Toward a National Conservation Network Act*, *supra* note 129, at 90–93. *See also* Mark Squillace, *Rethinking Public Land Use Planning*, 43 HARV. ENV'T L. REV. 415, 439–44 (2019).

474 Matthew McKinney, *Whither Public Participation in Federal Land Management? Replicating Homegrown Innovations in Shared Problem Solving*, 48 ENV'T L. REP. 10015, 10017–18 (2018); Robert B. Keiter & Matthew McKinney, *Public Land and Resources Law in the American West: Time for Another Comprehensive Review?*, 49 ENV'T L. 1, 33–35 (2019); *see generally* ACROSS THE GREAT DIVIDE: EXPLORATIONS IN COLLABORATIVE CONSERVATION AND THE AMERICAN WEST (Philip Brick et al. eds., 2001) (a collection of writings examining collaborative conservation).

a local citizen's committee.[475] In 2007, the Montana High Divide Trails initiative brought together hikers, mountain bikers, backcountry horsemen, and conservationists to work with the Forest Service to establish a front country trail system linked to the nearby Continental Divide Trail.[476] In some instances, such collaborative efforts have generated successful legislative proposals designed to resolve intertwined conservation, recreation, and other issues, as in the case of the Idaho Boulder-White Clouds Wilderness bill, which addressed wilderness, motorized recreation, mountain biking, new trails, and community needs.[477] Occurring in the shadow of the law, the goal of such efforts is to bring the affected recreation community together along with other interested parties to fashion an acceptable land use proposal in a forum outside the courtroom where flexibility can help achieve consensus.

These collaborative initiatives have frequently involved recreation and conservation groups working together to advance shared interests,[478] but that is not always the case. Alliances have long existed between nature conservation and recreation advocacy groups, who have worked together to establish and protect national parks and wilderness areas that offer backcountry recreation experiences as well as safe haven for wildlife. These alliances often disregard other interested parties, however, namely ORV enthusiasts, mountain bikers, hunters, and others who frequently object to such protective designations where they may not be allowed. The rift between the mountain biking community and wilderness advocates—seemingly natural allies—is noteworthy; though mountain bikes are not motor-propelled, they are prohibited as mechanical devices in wilderness areas where many riders feel they should be permitted.[479] Conservationists and wilderness proponents respond that speed-obsessed riders startle and displace wildlife, that high tech bikes are incompatible with a self-reliant

475 Sarah Van de Wetering, *Doing It the Moab Way: A Public Land Partnership at Sand Flats (UT)*, 1 CHRON. OF COMMUNITY 5 (1996); Heather L. Keough & Dale J. Blahna, *Achieving Integrative, Collaborative Ecosystem Management*, 20 CONSERVATION BIOLOGY 1373, 1378 (2006); KEITER, KEEPING FAITH WITH NATURE, *supra* note 1, at 225–26.

476 McKinney, *supra* note 474, at 10022–23.

477 Sawtooth National Recreation Area and Jerry Peak Wilderness Additions Act, Pub. L. No. 114-46, § 101(b), 129 Stat. 476, 477 (2015); *see Simpson's Boulder White Clouds Bill Signed by President*, U.S. CONGRESSMAN MIKE SIMPSON, https://perma.cc/5B2T-X6KB (last visited Nov. 16, 2020) (briefly describing the bill's key provisions); *see also* Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, § 121(b), 132 Stat. 348, 661–62 (2018) (renaming area the Cecil D. Andrus-White Clouds Wilderness Area).

478 Entities known as "friends groups" represent another example of a typical alliance between the agencies and groups committed to supporting, through volunteer work and fund raising, the agency's conservation and recreation management efforts. *See, e.g.*, FRIENDS OF THE TONTO NATIONAL FOREST, https://perma.cc/KR92-VLHH (last visited Nov. 25, 2020); FRIENDS OF THE BRIDGER-TETON, https://perma.cc/P5V6-E32Y (last visited Nov. 25, 2020).

479 Heidi Ruckriegle, *Mountain Biking into the Wilderness*, 28 COLO. NAT. RESOURCES, ENERGY, & ENV'T L. REV. 147, 165 (2017).

wilderness experience, and that bike riders are often not interested in conservation.[480]

Such divisions within the recreation and conservation communities have sometimes undermined efforts to find common ground. In the case of the Beaverhead-Deerlodge National Forest, a collaborative effort focused on wilderness designation, timber management, and diverse recreational opportunities reached agreement on what became the proposed Forest Jobs and Recreation Act of 2009,[481] but the legislation failed to secure congressional passage due to schisms in the conservation and recreation communities.[482] A similar scenario is playing out over the Gallatin National Forest's revised forest plan, where various recreation and conservation groups joined together to put forth a partnership proposal, but have been unable to reach agreement with other conservationists on proposed wilderness and recreation designations.[483] As recreation and conservation assume ever more central positions on the public lands, relationships among these communities as well as within the recreation community will be crucial in determining whether such controversies can be addressed through collaborative negotiations or will end up in an adversarial forum.

B. Contemplating the Path Forward

Moving ahead, is the emerging law governing recreation on the public lands adequate to meet existing and future challenges as recreational activity continues to swell across the public landscape? Is the current mix of organic legislation, environmental statutes, executive orders, agency regulations, and mounting judicial decisions sufficient? Or should Congress provide more statutory guidance beyond the meager language found in the legislation establishing the different public land systems? While that language has sufficed for managing recreation in national parks, wilderness areas, wildlife refuges, and other specially designated public lands,[484] the utter absence of meaningful congressional direction on the multiple use lands is both striking and problematic in this new era of industrial-scale recreation.

With conflicts over resource management priorities, different recreational activities, and environmental concerns a regular occurrence on the multiple use public lands, it is worth considering new legislation—a Public Land Outdoor Recreation Act—for these national

480 *Id.*

481 S. 1470, 111th Cong. (2009).

482 Matthew Koehler, *In Depth: How Tester's Mandated Logging Bill Has Divided Conservationists*, SMOKEY WIRE: NATIONAL FOREST NEWS & VIEWS (Dec. 16, 2013), https://perma.cc/5WL8-KWFW.

483 Keiter, *The Greater Yellowstone Ecosystem Revisited*, *supra* note 262, at 132–34.

484 *See* discussion *supra* Part IV.A, B, E (describing the legal framework governing recreation in these areas).

forest and BLM lands.[485] Given the bipartisan support underpinning the Great American Outdoors Act and other recent recreation legislation,[486] as well as the powerful, diverse constituencies—conservation groups, hunters, anglers, the states, the outdoor industry, and others—that propelled these legislative successes, the political situation seems ripe for a further addition to the legal authorities governing recreation on the multiple use lands. That recreation is now such an important economic factor in many rural western communities could also help to secure political traction.[487]

A Public Lands Outdoor Recreation Act focused on the multiple use agencies would acknowledge the important role recreation is assuming across the public lands and clarify agency planning and management authority. Much like the Wilderness Act or Wild and Scenic Rivers Act, it would overlay these lands without changing who is responsible for managing them or displacing other legal authorities. It should require the preparation of recreation management plans and enumerate strategies the agencies might employ to oversee recreational activity, including permit systems, quotas, closures, access fees, zoning, public education, and the like.[488] To identify recreation opportunities and address conflicts, it should instruct the federal agencies to undertake comprehensive, landscape-scale planning efforts coordinated among themselves as well as with states, local communities, and tribes.[489] It also should endorse collaborative processes, partnerships, and pilot projects designed to bring the various recreation, conservation, and

485 The title of the proposed legislation is less important than what it accomplishes. It could as easily be titled the Outdoor Recreation Act for Multiple-Use Lands or the Multiple-Use Outdoor Recreation Act. It is not unusual for Congress to address both national forest and BLM lands in one act, as reflected in the FLPMA provisions that apply to both agencies. *See, e.g.*, FLPMA, 43 U.S.C. §§ 1713–1716, §§ 1751–1753 (2012). Although the proposed legislation focuses on the multiple use lands, it could also extend to the protected public lands—national parks, wildlife refuges, wilderness areas, and the like—with the proviso that it compliments but does not displace existing legislative mandates that govern recreational and other activities.

486 Austa Somvichian-Clausen, *The Great American Outdoors Act Passes with Bipartisan Support*, HILL (July 24, 2020), https://perma.cc/M4ZN-XVKC; *see supra* notes 151, 424–427 and accompanying text (describing the 2004 Federal Lands Recreation Enhancement Act and the Outdoor Recreation and Impact Act of 2016).

487 *News Release: Outdoor Recreation Satellite Account*, *supra* note 8.

488 Although existing regulations cover some of these management strategies, regulations are always subject to change or deletion by different presidential administrations, and the same is true for presidential executive orders. Land managers have often been reluctant to employ regulatory management strategies, fearing political and local backlash. A congressional statutory endorsement of such approaches should relieve some of these pressures.

489 On the role and value of landscape-scale planning, see *supra* note 473 and accompanying text. *See generally* NAT'L ACADS. OF SCI., ENG'G, & MED., A REVIEW OF LANDSCAPE CONSERVATION COOPERATIVES (2016) (examining the need for a landscape-scale approach to conservation); MATTHEW MCKINNEY ET AL., LARGE LANDSCAPE CONSERVATION: A STRATEGIC FRAMEWORK FOR POLICY AND ACTION (2010) (discussing large landscape conservation and recommending future improvements).

other constituencies together in an effort to forge consensus agreements.[490] An expansive landscape-scale approach to recreation management embracing multiple jurisdictions should make it easier to reach workable compromises on appropriate activities and locations.[491] It would also help to disperse recreational activities across the larger landscape, to distinguish between acceptable front country and backcountry recreation uses, and to resolve motorized versus non-motorized use controversies.

In addition, the proposed act should enumerate factors for the agencies to consider when making recreation planning and management decisions. These factors should include environmental concerns, wildlife habitat, relevant science, cumulative effects, potential conflicts among uses and between users, management difficulties, mitigation opportunities, infrastructure and staffing needs, economic implications, and similar concerns.[492] Further, it should recognize the important assistance partners and volunteers provide the agencies on recreation matters and establish a funding source to enhance these relationships as well as related collaborative and inclusion efforts. While such legislation would buttress agency authority over recreation, it probably should not be too prescriptive given the diverse terrain and valuable resources found on the multiple use public lands and the ever-changing nature of outdoor recreation activities.

There is also a concomitant need to expand and diversify outdoor recreation venues to help reduce crowding, congestion, and conflict problems. Congress should accordingly consider establishing new outdoor recreation venues by designating additional special areas set aside primarily for recreation purposes, including new national parks, wildlife refuges, and wilderness areas. The new designations should also encompass new national recreation areas, including some near urban

490 Because agency officials, protective of their own managerial discretion, have often proven reluctant to fully coordinate and collaborate with others, this is an area ripe for more congressional direction. *See* Keiter, *Toward a National Conservation Network Act*, *supra* note 129, at 129–31 (arguing the law "should direct the federal land management agencies to identify individual [protected area complexes] and then collectively manage them.").

491 For example, landscape-level planning would help to avoid the specter of BLM offering oil and gas leases in the Moab region, where recreation has assumed major economic and social importance. Brian Mafly, *Worried About the Effects on Recreation Economy, Moab, Grand County Urge Feds to Cancel Energy Lease Sale*, SALT LAKE TRIB. (July 10, 2020), https://perma.cc/MN5V-3HAN. Responding to local economic and conservation concerns, the BLM ultimately decided not to offer these leases near Moab for sale. Brian Mafly, *Feds Yank Oil and Gas Leases Near Arches, Canyonlands Parks from Upcoming Sale*, SALT LAKE TRIB. (Aug. 13, 2020), https://perma.cc/6UUH-FQ3L.

492 This proposed provision is intended to ensure that these factors are considered by agency officials when making recreation-related decisions; it does not prioritize one factor over another, recognizing the diverse settings, resources, and conditions that are found on the public lands. Consideration of these factors may be accomplished in the NEPA process, assuming that NEPA environmental review requirements attach to the decision. The provision is not intended to displace any applicable laws.

areas,[493] as well as additional national trails, a national mountain bike trail, more interconnecting trails, protected waterways, and other areas set aside for specific types of recreational activity. Congress plainly has the authority to make such designations and to specify allowable recreational activities on the designated lands, as it has done with the national wildlife refuges, where "wildlife-dependent" recreation is prioritized,[494] or with wilderness areas, where solitude and non-mechanical recreation prevails.[495] The agencies also have the authority to designate—or zone—their own lands for particular types of recreation, as reflected in the Forest Service's roadless area rule, the motorized use regulations, and various travel management plans.[496]

Such an approach, whether accomplished at the congressional or agency level, is consistent with the demonstrated need for diverse recreational opportunities, particularly as new demographic groups are introduced to the outdoors and as technology advances.[497] Done thoughtfully, it can also help reduce existing conflicts between incompatible recreational uses. Although the political obstacles confronting any such new designations are undeniable, the enormous popular interest in outdoor recreation could coalesce the constituencies necessary to move the political process, as manifested in the broad support that undergirded the recent land and water conservation funding legislation.[498]

Despite passage of the Great American Outdoors Act, funding issues remain that merit further attention. Money is essential to meet the costs involved in expanding and diversifying outdoor recreation opportunities, in providing and maintaining critical infrastructure, and in hiring and retaining necessary personnel. Although the Great American Outdoors Act addresses some of these concerns, it does not address all of them. The Act ensures full funding for the Land and Water Conservation Fund to purchase lands and easements for recreational purposes, and it partly addresses deferred maintenance and infrastructure concerns, though only for five years.[499] Also, it only covers half of the accumulated deferred maintenance costs,[500] ignores future

493 New urban parks or outdoor recreation areas could serve as a "stepping stone" that introduces urban dwellers and youth to nature, both encouraging and preparing them to visit more distant public lands and parks.

494 *See supra* notes 208–213 and accompanying text.

495 *See supra* notes 336–337 and accompanying text.

496 *See supra* notes 244, 253, 317, 444 and accompanying text.

497 Given the interest in engaging more diverse groups in outdoor recreation, some of these efforts should be directed toward lands located near urban areas, which has been a focus for expansion of the national park system. KEITER, TO CONSERVE UNIMPAIRED, *supra* note 16, at 255–57.

498 Somvichian-Clausen, *supra* note 486.

499 *Great American Outdoors Act*, AM. HIKING SOC'Y, https://perma.cc/P68Q-TXR4 (last visited Nov. 10, 2020).

500 *Id.* These agencies' lingering deferred maintenance needs could prompt renewed conflict with local communities, as occurred before passage of the Great American Outdoors Act. Louis Sahagun, *Fed Up with Forest Service Cuts, Mammoth Lakes and Other Towns*

maintenance costs, and limits the amount available for transportation-related projects.[501] It does not provide funds for more backcountry rangers or other personnel needed to educate visitors and to adequately oversee dispersed recreation activities, or for communities struggling to meet the costs associated with growing recreation demands, such as local infrastructure needs as well as search and rescue costs. Moreover, recent modifications to the recreation fee system fall short of the equitable "user pays" principle and do not generate sufficient revenue to offset management costs.[502]

Numerous entities are deriving considerable financial benefits from the outdoor recreation explosion—product manufacturers, retailers, hotels, various service industries, and even media outlets through advertising.[503] Few of these entities, however, pay a fair share of the costs that recreation imposes on the agencies and others. One solution would be additional fees or new taxes on recreation equipment sales and rentals, guiding businesses, lodging, and other services profiting from the growth in outdoor recreation.[504] Such approaches have worked to provide funds for the national wildlife refuges through a license fee and equipment sales tax and for the national parks through concessioner contracts.[505] Expanding funding responsibilities more broadly across the spectrum of recreation providers and beneficiaries would generate necessary revenue for the management agencies and inject a further element of fairness into this fast growing sector.

Other issues linked to public land recreation are also emerging, namely diversity and inclusion concerns, the role of technology in the backcountry, and climate change. By all accounts, few minority individuals are visiting the public lands for recreational or other purposes, and the same seems true for the younger generation whose attention is focused on the Internet, video games, and the like, not

Are Plotting a Recreation Takeover, L.A. TIMES (Nov. 8, 2019), https://perma.cc/26UB-YTFH.

501 *See* Great American Outdoors Act, Pub. L. 116-152, 134 Stat. 682 (2020) (to be codified at 54 U.S.C. § 200402(e)(2)(A) (2018)) (allowing agencies to expend only 35 percent of their fund allocation on transportation projects, which include "paved and unpaved roads, bridges, tunnels, and paved parking areas"); Downey, *supra* note 415.

502 This means that recreation on the public lands remains subsidized, not unlike other public land users. Indeed, subsidies are ubiquitous on the public lands, taking the form of no rental or royalty payments on hardrock mining, below cost timber sales, and modest livestock grazing fees. *See* COGGINS ET AL., *supra* note 127, at 539, 693, 752.

503 OUTDOOR INDUS. ASS'N, *supra* note 152.

504 *See* Tate Watkins, *How We Pay to Play: Funding Outdoor Recreation on Public Lands in the 21st Century*, PERC (May 28, 2019), https://perma.cc/64XT-VCEH (explaining the types of fees utilized to help fund national parks and other outdoor recreation venues). The "backpack tax" idea has been floated before, but the outdoor industry has strongly resisted it, arguing that it is already too heavily taxed by virtue of the tariffs it pays on imported goods. Philip Armour, *Tariffs Hurt American Outdoor Businesses and How!*, OUTDOOR INDUS. ASS'N (Aug. 8, 2019), https://perma.cc/FK9A-KZFP; Michael Vollman, *Is a 'Backpack Tax' the Best Approach to Sustaining Conservation Funding?*, MODERN CONSERVATIONIST (Mar. 5, 2019), https://perma.cc/4P4S-RKE6.

505 *See* Watkins, *supra* note 504.

outdoor activities.[506] Numerous efforts are afoot to entice these demographic groups outside onto the public lands, along with proposals addressing how to do so.[507] As these efforts unfold, additional recreational pressures will be placed on the public lands in the form of more visitors and different types of activities, potentially exacerbating current congestion and conflict problems. Technology likewise presents new challenges for public land managers and could significantly alter the recreational experience in natural settings. Drones, cellphones, and electric bicycles seem inherently incompatible with a wilderness experience removed from the trappings of civilization.[508] Overshadowing everything is climate change, which is inexorably altering the environment and hence impacting traditional recreation activities, whether in the form of shorter ski seasons, destructive wildfires, or drought conditions altering river flows for whitewater rafting.[509] The common theme attached to these impending, recreation-related issues is change and the need for the responsible agencies to recognize and address these changes in a manner that both preserves and expands the unique recreational opportunities available on the public lands. The proposals outlined above—including the Public Lands Outdoor Recreation Act suggestion with its more comprehensive planning requirements, collaboration provisions, and diverse management tools—would help the agencies to meet these looming challenges.

VI. CONCLUSION

The escalating number of people playing on the public lands, combined with the growing recreation economy, has not only elevated outdoor recreation within the federal land management agencies but also stirred mounting controversy on the landscape. The longstanding notion of the public lands as an unfettered, recreation commons is no

[506] *Nature and Diversity: Opening Outdoor Opportunities to People of Color*, STUDENT CONSERVATION ASS'N, https://perma.cc/L67H-VFB9 (last visited Nov. 11, 2020) [hereinafter STUDENT CONVERSATION ASS'N]; *U.S. Study Shows Widening Disconnect with Nature, and Potential Solutions*, YALE ENV'T 360 (Apr. 27, 2017), https://perma.cc/A65E-K2B8.

[507] Flores et al., *supra* note 147, at 270; STUDENT CONSERVATION ASS'N, *supra* note 506; *Hey Fourth Graders! See America's Natural Wonders and Historic Sites for Free*, EVERY KID OUTDOORS, https://perma.cc/WJJ3-25RH (last visited Nov. 11, 2020); Mark Naida, *Detroit Kids Need the Outdoors*, OUTDOOR ALLIANCE FOR KIDS (Aug. 30, 2018), https://perma.cc/PX6A-FR4P.

[508] Colleen Stinchcombe, *Keeping Drones Out of the Wild: Park Officials Grapple with Unmanned Aircraft in Natural Areas*, SIERRA CLUB (June 27, 2020), https://perma.cc/57JW-UAJY; Christopher Ketcham, *Wi-Fi in the Wilderness: The National Park Service is Racing to Expand Cellphone Service at Parks Nationwide. Do We Really Want a Connected Wild?*, SIERRA CLUB (June 25, 2020), https://perma.cc/D4DB-F2QL; *Here Are the Facts on E-bikes and Public Lands*, WILDERNESS SOC'Y (Aug. 21, 2019), https://perma.cc/JL89-DB6K.

[509] *See* John D. Leshy, *Federal Lands in the Twenty First Century*, 50 NAT. RESOURCES J. 111, 114–15 (2010) (explaining the wide range of effects climate change can have on the natural environment).

longer true—a fact confirmed by the increasingly important role the law is assuming in recreation management. Yet, outside the laws establishing the national parks, wildlife refuges, wilderness areas, and other special designations, Congress has provided little guidance governing recreational activity on the remaining multiple use lands. Instead, the law of outdoor recreation is being stitched together, a mixture of agency regulations, executive orders, general environmental laws, and an increasing number of court decisions, creating what amounts to an emergent common law of outdoor recreation. Although Congress has adopted important funding mechanisms for land acquisitions and infrastructure, most notably the Land and Water Conservation Act, the recent Great American Outdoors Act, and the user fee legislation, these laws do not address the growing controversies over whether, where, and when to permit particular recreational activities on the public lands. The time is at hand for Congress to consider filling that void with additional statutory detail as outlined in the proposed Public Lands Outdoor Recreation Act. Such an act would institutionalize outdoor recreation policy by both clarifying and expanding agency responsibilities and authorities, thus enabling officials to more effectively manage these valuable outdoor playgrounds. Failure to do so leaves the agencies with little guidance, which invites more piecemeal solutions and further judicial intervention.

The public lands still present an unparalleled recreation mecca open to the general public with minimal cost and oversight. Few places remain where one can explore pristine nature, climb a mountain, shred a single track, stalk wild game, ski unblemished powder, or cruise a lonely desert landscape. It is no longer possible, however, to do this everywhere without regard to environmental consequences or other users, even on the expansive public domain—a lesson we have learned repeatedly over time as we have overused one natural resource after another. Moving forward, the challenge is becoming less about the role of recreation in relation to other resource uses, but rather more about controlling recreational activity by thoughtful regulation and planning and by instilling a conservation ethic within the recreating public. Without careful planning, meaningful constraints, and public appreciation for the fragility of these remarkable outdoor venues, the resource itself, as well as the joys derived from a day well spent outside, are at risk. So too are the economic benefits attached to the growing recreation economy, benefits that are now inexorably replacing the extraction-based economies of yore and revitalizing resource-dependent communities. Another challenge, paradoxically, involves inviting a more diverse array of individuals and groups outdoors by welcoming them to the public lands and providing suitable recreational opportunities. But as public interest in recreation continues to grow and as climate change takes hold, it will be more important than ever to safeguard the landscape and to ensure responsible use of it. Meeting these challenges

while preserving the nation's extraordinary public land recreation heritage will likely take more rather than less law.