Maryland Law Review

Volume 82 | Issue 2 Article 3

Public Land Management's Future Place: Envisioning a Paradigm Shift

Sam Kalen

Follow this and additional works at: https://digitalcommons.law.umaryland.edu/mlr

 Part of the Law Commons

Recommended Citation
Sam Kalen, *Public Land Management's Future Place: Envisioning a Paradigm Shift*, 82 Md. L. Rev. 240 ()
Available at: https://digitalcommons.law.umaryland.edu/mlr/vol82/iss2/3

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

PUBLIC LAND MANAGEMENT'S FUTURE PLACE: ENVISIONING A PARADIGM SHIFT

SAM KALEN*

The recent sesquicentennial of Yellowstone National Park, the nation's first and prototypical national park, marked an opportune moment for examining the management of the nation's public lands. Public lands are confronting a myriad of challenges, whether from climate change and the efficacy of using the nation's lands for fossil fuel development or renewable resources, or from how best to manage them for recreational use and preserve their pristine character and habitat for wildlife and other resources. Meanwhile, the Biden Administration is promoting its 30/30 campaign while exploring targeted changes to oil, gas, and coal development on public lands. Calls for reforming pointed areas of public land management seem endless and escalating. Most critics today focus attention on fixing some identifiable failure of public land management planning. Planning, after all, operates as the engine driving the modern administration of public lands. Some public land aficionados champion planning reform by accentuating the urgency of folding into the decision-making process Tribal Nations and Indigenous peoples, whose land may have been wrested from them to create the public land. Others lament how our planning processes, while moving toward landscape-level planning, have yet to move forward enough in response to modern ecological principles and challenges. Still others float specific reform proposals, often promoting a fix for a single type of public land.

I suggest these critics, while raising legitimate concerns, are ignoring a much larger problem, not yet captured by today's commentary. Our public land laws remain tethered to an antiquated past. This Article reviews how public land planning has become dominant, and that in turn has allowed public land managers too much discretion to allow uses that may be inimical

© 2023 Sam Kalen.

* William T. Schwartz Distinguished Professor, Associate Dean, University of Wyoming College of Law; Visiting Professor, University of Colorado School of Law, Fall 2021; Visiting Professor, Washington University School of Law, Spring 2022. The author would like to thank Karrigan Bork, Rebecca Bratspies, Brigham Daniels, Robert L. Fischman, Robert Glicksman, Kalyani Robbins, Melissa K. Scanlan, Sarah Schindler, Mark Squillace, Shelley Welton, and Sonya Ziaja. I also would like to thank all the students in Public Lands and Foundations of Natural Resources classes at the University of Colorado for responding to my class questions related to this Article. Finally, I want to express my appreciation to the staff of the law review for all their hard work and diligence.

to the sustainability of identifiable landscapes. In sum, we have lost an enforceable vision for guiding planning decisions on the use of public lands, whether they are Park Service, Forest Service, Fish and Wildlife Service, or Bureau of Land Management administered lands. I review how this occurred and offer a novel path forward, suggesting a paradigm shift. That shift would elevate the importance of encoding an enforceable vision for our public lands capable of circumscribing potentially problematic decisions, while also crafting a new management paradigm that respects the importance of place.

INTRODUCTION

The nation's first national park, the "land of burning ground," the "land of vapors," the "place of hot water," or today what we call Yellowstone National Park (or "Yellowstone") reached its sesquicentennial in 2022.[1] It is so much more than just our first park. Yellowstone and its surrounding region, after all, exemplify some of the modern challenges confronting public land management. Places like Yellowstone emerged as recreation sites for

1. BRUCE T. GOURLEY, HISTORIC YELLOWSTONE NATIONAL PARK: THE STORIES BEHIND THE WORLD'S FIRST NATIONAL PARK 26 (2022).

travelers seeking a retreat from the bustling urban, industrial life.[2] And now today, visitorship in national parks is overwhelming the National Park Service (the "Service").[3] In the summer of 2021, some parks instituted a reservation system just for hiking—with folks often waiting for days or longer until they could enjoy the park experience.[4] The levels are so high that Secretary of the Interior Deb Haaland has employed innovative strategies to entice would-be visitors to enjoy lesser-known public lands.[5] Of course,

2. Sam Kalen, *Rekindling Yellowstone's Early History: 150 Years Later*, 22 WYO. L. REV. 217, 218 (2022).

3. Rob Hotakainen, *Smokies, Yellowstone, Big Bend See Attendance Highs: 3 National Parks Set Attendance Records in 2021, Early Figures Show*, GREENWIRE (Jan. 24, 2022, 1:46 PM), https://subscriber.politicopro.com/article/eenews/2022/01/24/smokies-yellowstone-big-bend-see-attendance-highs-ee-00001263. Prior to the COVID-19 pandemic in 2018, visitorship in parks declined somewhat, but attendance nevertheless was the third-highest recorded since 1904. Rob Hotakainen, *Park Attendance Dropped in 2018*, GREENWIRE (Mar. 5, 2019, 1:08 PM), https://subscriber.politicopro.com/article/eenews/2019/03/05/park-attendance-dropped-in-2018-031860. Previously, 2016 was a record-breaking year for national parks. Corbin Hiar, *It's Official—A Record-Breaking Year for Park Visits*, E&E NEWS (Feb. 17, 2016, 4:17 PM), https://subscriber.politicopro.com/article/eenews/2016/02/17/its-official-a-record-breaking-year-for-park-visits-080698. Visitation in 2020 during the pandemic declined by around 90 million visitors from the prior year. Rob Hotakainen, *NPS Attendance Rose 25% in '21 but Trails Pre-Pandemic Years*, E&E NEWS PM (Feb. 16, 2022, 4:18 PM), https://subscriber.politicopro.com/article/eenews/2022/02/16/nps-attendance-rose-25-in-21-but-trails-pre-pandemic-years-00009525; Rob Hotakainen, *National Park Attendance Took a Big Hit in 2020*, E&E NEWS PM (Feb. 25, 2021, 4:20 PM), https://subscriber.politicopro.com/article/eenews/2021/02/25/national-park-attendance-took-a-big-hit-in-2020-004952. And when the nation emerged from COVID-19, many expected that 2021 would shatter earlier records. Rob Hotakainen, *Yellowstone's 2nd COVID Summer: 'Maybe the Busiest Year'*, GREENWIRE (Mar. 22, 2021, 1:41 PM), https://subscriber.politicopro.com/article/eenews/2021/03/22/yellowstones-2nd-covid-summer-maybe-the-busiest-year-004028; *Yellowstone Sets Tourism Record for May*, GREENWIRE (June 14, 2021, 1:31 PM), https://subscriber.politicopro.com/article/eenews/2021/06/14/yellowstone-sets-tourism-record-for-may-000778.

4. *See* Michael Doyle, *Timed Entry Permit System Back at Rocky Mountain, Other Parks*, GREENWIRE (Jan. 14, 2022, 1:39 PM), https://subscriber.politicopro.com/article/eenews/2022/01/14/timed-entry-permit-system-back-at-rocky-mountain-other-parks-285233; Rob Hotakainen, *Ticket to Paradise? Crowded National Parks Try Reservations, Fees*, GREENWIRE (Oct. 4, 2021, 12:59 PM) [hereinafter Hotakainen, *Ticket to Paradise*], https://subscriber.politicopro.com/article/eenews/2021/10/04/ticket-to-paradise-crowded-national-parks-try-reservations-fees-281492; *see also Utah's Arches to Require Timed Tickets as Visitation Swells*, GREENWIRE (Dec. 13, 2021, 1:46 PM), https://subscriber.politicopro.com/article/eenews/2021/12/13/utahs-arches-to-require-timed-tickets-as-visitation-swells-284223; *Iconic Sheer Trail at Zion National Park to Require Permits*, GREENWIRE (Dec. 6, 2021, 1:35 PM), https://subscriber.politicopro.com/article/eenews/2021/12/06/iconic-sheer-trail-at-zion-national-park-to-require-permits-283942.

5. Jennifer Yachnin, *Interior Official: Outdoor Law Can Help Fix NPS Overcrowding*, E&E NEWS PM (Aug. 4, 2021, 4:20 PM) [hereinafter Yachnin, *Interior Official*], https://subscriber.politicopro.com/article/eenews/2021/08/04/interior-official-outdoor-law-can-help-fix-nps-overcrowding-279243. The Trump Administration, for different reasons, opened additional refuge lands to hunting and fishing, which likely drove more visitors to those areas. *See*

Bureau of Land Management ("BLM") lands are also experiencing ecological threats as increasing recreational opportunities threaten sensitive landscapes.[6] But curtailing visitor opportunities *too much* seems taboo.[7] The Secretary's office praised the Great American Outdoors Act for funneling additional maintenance dollars into the parks, all for the benefit of the "visitor experience."[8] Maine's Senator Angus King suggests that one solution would be to expand the Park Service, creating more recreational opportunities.[9] Some parks escaped or skirted the crowding conundrum, such as the Grand Canyon with its shuttle service,[10] or Denali National Park with its travel management plan limiting vehicular traffic and carefully planned concessionaire bus operations.[11]

Michael Doyle, *FWS Opens Record Number of Refuges for Hunting and Fishing*, GREENWIRE (Aug. 30, 2019, 1:05 PM), https://subscriber.politicopro.com/article/eenews/2019/08/30/fws-opens-record-number-of-refuges-for-hunting-and-fishing-025092.

6. *See* Scott Streater, *Groups to BLM: Stop Pushing Visitors to Pristine Lands*, E&E NEWS PM (Sept. 21, 2021, 4:14 PM), https://subscriber.politicopro.com/article/eenews/2021/09/21/groups-to-blm-stop-pushing-visitors-to-pristine-lands-280877. Even following President Trump's decision to shrink the Grand Staircase-Escalante National Monument and Bears Ears National Monument, BLM had to address the effects of increased human activity on those lands. *See* Jennifer Yachnin, *Interior Hints at Visitor Boom to Shrunken Utah Sites*, E&E NEWS PM (Feb. 6, 2020, 4:23 PM), https://subscriber.politicopro.com/article/eenews/2020/02/06/interior-hints-at-visitor-boom-to-shrunken-utah-sites-019247.

7. Balancing outdoor recreation with conservation, for instance, is complicated. *See* Jennifer Yachnin, *Recreation and Conservation? Biden Program Aims to Do Both*, GREENWIRE (Jan. 21, 2022, 1:37 PM), https://subscriber.politicopro.com/article/eenews/2022/01/21/recreation-and-conservation-biden-program-aims-to-do-both-285461. The Service wants to encourage park visitorship and thus increase a constituency for their protection, but if too many visitors, such as with the use of offroad vehicles, enjoy the parks, resources could be threatened. *E.g.*, Cape Hatteras Access Pres. All. v. Jewell, 28 F. Supp. 3d 537, 552–53 (E.D.N.C. 2014) (rejecting a challenge to a limitation on off-road access into national seashore).

8. Yachnin, *Interior Official*, *supra* note 5.

9. Rob Hotakainen, *More National Parks? Summer of Overcrowding Could Spur Push*, GREENWIRE (Sept. 7, 2021, 1:43 PM), https://subscriber.politicopro.com/article/eenews/2021/09/07/more-national-parks-summer-of-overcrowding-could-spur-push-280230. Senator King and others also have proposed a pilot program that would allow park visitors the ability to obtain real time data about crowd levels at the parks ("Waze for Parks"). *See* Rob Hotakainen, *Parks Too Crowded for You? Maybe Time for 'Waze for Parks'*, E&E NEWS PM (Feb. 2, 2022, 4:36 PM), https://subscriber.politicopro.com/article/eenews/2022/02/02/parks-too-crowded-for-you-maybe-time-for-waze-for-parks-ee-00004812.

10. *See South Rim Shuttle Bus Routes: Winter 2022–23*, U.S. NAT'L PARK SERV.: GRAND CANYON NAT'L PARK (Dec. 11, 2022), https://www.nps.gov/grca/planyourvisit/shuttle-buses.htm (describing shuttle service).

11. *See generally* DENALI NAT'L PARK & PRES., NPS 184/107317, DENALI PARK ROAD: FINAL VEHICLE MANAGEMENT PLAN AND ENVIRONMENTAL IMPACT STATEMENT (July 2012), https://www.nps.gov/dena/learn/management/upload/DENA_FINAL_VMP_Document-low_res-in-progress-v5.pdf.

Notably, these are not novel problems. The nation's first reserves were established to entice travelers. And that they did. Developing and maintaining roads and securing funding for roads to accommodate vehicular traffic attracted most of the attention by those administering the public lands in the early years. Forest visitorship, after all, tripled just between 1917 and 1924.[12] Forest Service policy permitted the construction of hotels, roads, ranches, stores, and other business enterprises "wherever the demand for them appears to warrant the granting of a permit for their construction and maintenance."[13] Today, most park visitors, for instance, remain in or near their vehicle, with only the hardy or adventurous willing to venture into the backcountry or embark on an extended hike.[14] And just like at the genesis of the Park Service, roads and vehicles once again demand attention.[15] That became evident when the historic flooding in Yellowstone during the summer of 2022 ravished the road along the northern entrance—raising concerns about the placement of the road as climate change alters our past hydrological assumptions.[16]

The cacophony of issues in Yellowstone and elsewhere extends well beyond just visitation numbers. The fight over snowmobiles in Yellowstone is now legendary.[17] So too are the skirmishes surrounding the management of grizzlies,[18] or the debate surrounding the reintroduction and status of the

12. CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 132 (1992).

13. U.S. DEP'T OF INTERIOR, FOREST RESERVE MANUAL FOR THE INFORMATION AND USE OF FOREST OFFICERS 7 (1902).

14. *See* NAT'L PARK SERV., INTEGRATED RESOURCE MANAGEMENT APPLICATIONS PORTAL: SUMMARY OF VISITOR USE BY MONTH AND YEAR (2021), https://irma.nps.gov/STATS/SSRSReports/Park%20Specific%20Reports/Summary%20of%20Visitor%20Use%20By%20Month%20and%20Year%20(1979%20-%20Last%20Calendar%20Year)?Park=YELL (for example, at Yellowstone there are few backcountry campers).

15. Hotakainen, *Ticket to Paradise*, *supra* note 4.

16. *See Flood Recovery and Operations*, U.S. NAT'L PARK SERV.: YELLOWSTONE NAT'L PARK (Nov. 21, 2022), https://www.nps.gov/yell/planyourvisit/flood-recovery.htm (flood recovery operations).

17. *See generally* MICHAEL J. YOCHIM, YELLOWSTONE AND THE SNOWMOBILE: LOCKING HORNS OVER NATIONAL PARK USE (2009).

18. *E.g.*, Crow Indian Tribe v. United States, 965 F.3d 662, 670–73 (9th Cir. 2020); *see also* Michael Doyle, *Wyo. Urges End to Yellowstone-Area Grizzly Bear Protections*, GREENWIRE (Jan. 12, 2022, 1:30 PM), https://subscriber.politicopro.com/article/eenews/2022/01/12/wyo-urges-end-to-yellowstone-area-grizzly-bear-protections-285108; Michael Doyle, *Enviros Sue to Stop Killing of Yellowstone Grizzlies*, GREENWIRE (Mar. 31, 2020, 1:14 PM), https://subscriber.politicopro.com/article/eenews/2020/03/31/enviros-sue-to-stop-killing-of-yellowstone-grizzlies-017166; Tom Kenworthy, *Yellowstone Grizzly Lumbers to Center of Wildlife Debate*, WASH. POST, Dec. 12, 1998, at A3; Scott Streater, *Trump Admin Delists Yellowstone-Area Grizzlies*, E&E NEWS (June 22, 2017, 4:13 PM), https://subscriber.politicopro.com/article/eenews/2017/06/22/trump-admin-delists-yellowstone-area-grizzlies-057367.

wolves,[19] or the seemingly endless challenge of managing the bison[20] and the National Elk Refuge.[21] Equally challenging issues confound public lands throughout the country, whether on allowing the use of Outdoor Recreation Vehicles ("ORVs"),[22] e-bikes,[23] banning the use of plastic water bottles,[24]

19. *See generally* HANK FISCHER, WOLF WARS: THE REMARKABLE INSIDE STORY OF THE RESTORATION OF WOLVES TO YELLOWSTONE (1995); THOMAS MCNAMEE, THE RETURN OF THE WOLF TO YELLOWSTONE (1997); THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 309–376 (Robert B. Keiter & Mark S. Boyce eds., 1991) (chapters on wolves); JUSTIN FARRELL, THE BATTLE FOR YELLOWSTONE: MORALITY AND THE SACRED ROOTS OF ENVIRONMENTAL CONFLICT 168–216 (2015); Rob Hotakainen, *Interior Asked to Block Killing of Yellowstone Gray Wolves*, E&E NEWS PM (Jan. 7, 2022, 4:09 PM), https://subscriber.politicopro.com/article/eenews/2022/01/07/interior-asked-to-block-killing-of-yellowstone-gray-wolves-284950.

20. *See* Neighbors Against Bison Slaughter v. Nat'l Park Serv., No. 21-35144, 2022 WL 1315302 (9th Cir. May 3, 2022); Cottonwood Env't L. Ctr. v. Bernhardt, 796 F. App'x 368 (9th Cir. 2019) (involving challenge to bison management plan); Michael Doyle, *Judge Orders Do-Over on Yellowstone Bison Protections*, GREENWIRE (Jan. 13, 2022, 1:25 PM), https://subscriber.politicopro.com/article/eenews/2022/01/13/judge-orders-do-over-on-yellowstone-bison-protections-285171; Maya Earls, *Yellowstone Bison Need New Endangered Species Listing Review*, BLOOMBERG L. (Jan. 13, 2022, 12:35 PM), https://news.bloombergtax.com/environment-and-energy/yellowstone-bison-need-new-endangered-species-listing-review; Jennifer Yachnin, *Interior Returns National Bison Range to Mont. Tribes*, GREENWIRE (June 23, 2021, 1:32 PM), https://subscriber.politicopro.com/article/eenews/2021/06/23/interior-returns-national-bison-range-to-mont-tribes-000436.

21. *See infra* note 337 and accompanying text.

22. President Nixon's 1972 Executive Order addressed the necessity of establishing protective policies for ORV use on public lands, Exec. Order No. 11,644, 37 Fed. Reg. 2877 (Feb. 9, 1972), amended by President Carter in Exec. Order No. 11,989, 42 Fed. Reg. 26,959 (May 24, 1977). *See generally* Conservation L. Found. of New England, Inc. v. Clark, 590 F. Supp. 1467 (D. Mass. 1984), *aff'd*, 864 F.2d 954 (1st Cir. 1989) (challenging off-road vehicle plan for Cape Cod National Seashore); Nat'l Wildlife Fed'n v. Morton, 393 F. Supp. 1286 (D.D.C. 1975) (challenging off-road vehicle use on BLM lands). ORV management remains controversial. *See* Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217 (9th Cir. 2011) (attempting to require BLM to prohibit off-road vehicles in Oregon's Little Canyon Mountain area). The Trump Administration reversed a local policy that would have allowed ORVs on public roads inside national parks. Jennifer Yachnin, *NPS Puts Brakes on Off-Highway Vehicles in Utah*, GREENWIRE (Oct. 28, 2019, 12:55 PM), https://subscriber.politicopro.com/article/eenews/2019/10/28/nps-puts-brakes-on-off-highway-vehicles-in-utah-022923.

23. *See* National Park Service, General Provisions; Electric Bicycles, 85 Fed. Reg. 69,175 (Nov. 2, 2020) (to be codified at 36 C.F.R. pts. 1 & 4); Increasing Recreational Opportunities through the Use of Electric Bikes, Secretarial Order No. 3376 (Aug. 29, 2019); Rob Hotakainen, *Outdoor Groups Launch Legal Campaign Against E-Bikes*, GREENWIRE (Oct. 24, 2019, 1:33 PM), https://subscriber.politicopro.com/article/eenews/2019/10/24/outdoor-groups-launch-legal-campaign-against-e-bikes-023038.

24. *See Plastic Free Parks*, PUB. EMPS. FOR ENV'T RESP., https://peer.org/areas-of-work/public-lands/plastic-free-parks/ (last visited Dec. 11, 2022); James Marshall, *Interior Says Yes to Plastic Bottles, No to Urban Parks*, E&E DAILY (Feb. 28, 2020, 7:07 AM), https://subscriber.politicopro.com/article/eenews/2020/02/28/interior-says-yes-to-plastic-bottles-no-to-urban-parks-018420.

allowing mining,[25] limiting fossil fuel development,[26] managing wild horses,[27] or addressing under-representation by marginalized, low income, or Indigenous communities,[28] just to name a few.[29]

These stressors on public lands are intensifying as the world approaches adapting to possibly a 4°C change in temperature.[30] The National Parks Conservation Association warns that "[c]limate change is the greatest threat the national parks have ever faced."[31] Yellowstone, for instance, recently witnessed record temperatures.[32] Hotter temperatures, droughts, and fires all contribute not only to direct impacts on public land resources but also to the availability of those resources for use. Lower water levels in the Colorado basin impact water-related recreational activities.[33] In April 2021, the NPS alerted visitors to changes to Lake Mead's ramps and boat access points and

25. *E.g.*, Michael Doyle & James Marshall, *Feds Propose Protections for Nev. Wildflower at Lithium Site*, E&E NEWS (June 3, 2021, 1:32 PM), https://subscriber.politicopro.com/article/eenews/2021/06/03/feds-propose-protections-for-nev-wildflower-at-lithium-site-001110.

26. *See* U.S. DEP'T OF INTERIOR, REPORT ON THE FEDERAL OIL AND GAS LEASING PROGRAM: PREPARED IN RESPONSE TO EXECUTIVE ORDER 14008 (Nov. 2021), https://www.doi.gov/sites/doi.gov/files/report-on-the-federal-oil-and-gas-leasing-program-doi-eo-14008.pdf [hereinafter OIL AND GAS LEASING PROGRAM REPORT].

27. Scott Streater, *BLM Calls Wild Horses 'Existential Threat' to Public Lands*, E&E NEWS PM (Feb. 26, 2020, 4:15 PM), https://subscriber.politicopro.com/article/eenews/2020/02/26/blm-calls-wild-horses-existential-threat-to-public-lands-018512.

28. *See* Michael Doyle, *National Park Service Wants More Info on Visitors*, GREENWIRE (Aug. 26, 2021, 1:59 PM), https://subscriber.politicopro.com/article/eenews/2021/08/26/national-park-service-wants-more-info-on-visitors-280023; Jennifer Yachnin, *Interior Seeks Input on Who Lacks Public Lands Access*, E&E NEWS PM (Oct. 18, 2021, 5:11 PM), https://subscriber.politicopro.com/article/eenews/2021/10/18/interior-seeks-input-on-who-lacks-public-lands-access-282083.

29. The Bureau of Land Management, for instance, continues to fight the interminable battle over rights of way across lands in Utah. *See, e.g.*, Kane County, Utah v. United States, No. 2:08-cv-315, 2021 WL 4502814 (D. Utah Oct. 1, 2021); S. Utah Wilderness All. v. U.S. Bureau of Land Mgmt., No. 2:20-cv-00539, 2021 WL 4481871 (D. Utah Sept. 30, 2021). BLM too has had to face challenges to its decisions restricting snowmobile use. *See* Michael Doyle, *Panel Rejects Snowmobilers' Challenge to Colo. Resource Plan*, GREENWIRE (Sept. 27, 2019, 1:21 PM), https://subscriber.politicopro.com/article/eenews/2019/09/27/panel-rejects-snowmobilers-challenge-to-colo-resource-plan-024013.

30. *See generally* J.B. Ruhl & Robin Kundis Craig, *4 ℃*, 106 MINN. L. REV. 191 (2021).

31. *Climate Impacts: How the Climate Crisis Is Affecting National Parks*, NAT'L PARKS CONSERVATION ASS'N, https://www.npca.org/reports/climate-impacts (last visited Oct. 13, 2022).

32. Karen J. Heeter, Maegen L. Rochner & Grant L. Harley, *Summer Air Temperature for the Greater Yellowstone Ecoregion (770–2019 CE) Over 1,250 Years*, 48 GEOPHYSICAL RSCH. LETTERS, Apr. 2021, https://doi.org/10.1029/2020GL092269; Chelsea Harvey, *Warming in Yellowstone Most Intense in 1,250 Years*, CLIMATEWIRE (May 24, 2021, 6:52 AM), https://subscriber.politicopro.com/article/eenews/2021/05/24/warming-in-yellowstone-most-intense-in-1-250-years-001488.

33. *See Lowering Lake Levels*, U.S. NAT'L PARK SERV.: LAKE MEAD NAT'L RECREATION AREA (Dec. 13, 2022), https://www.nps.gov/lake/learn/nature/lowering-lake-levels.htm (evaluating the impact of declining water levels at Lake Mead).

launches, when the lake shrank to its then lowest level during the drought.[34] Disturbingly, the eponymous Joshua Tree National Park could soon lose Joshua trees to rising temperatures.[35] The Park Service openly laments that climate change "will affect everyone's experience of our national parks."[36] And while many parks have participated in the Climate Friendly Parks Program[37] and developed climate action plans,[38] these plans seem unlikely to satisfy the desire of an increasing population to enjoy the outdoors as hotter weather pushes would-be travelers to look for areas of respite. More people and more cars populating public lands will generate more trash, more pollution, and more noise, and will risk damaging the ecological value of the public lands.

Managing the nation's public lands and resources in the Anthropocene,[39] in a society tethered to principles of participatory democracy and yet highly politicized and governed by ill-fitting federal statutory programs, is not only a daunting task—it seems almost doomed. Living in the Anthropocene demands that science dictate land management decisions. Science, though, means deploying principles of landscape-level management, addressing the problem of habitat fragmentation and ever shifting habitat and migration corridors for species; it further requires appreciating the importance of continual monitoring and adaptation as ecosystems shift—or possibly lurch; and finally, it counsels acting or reacting

34. *Historically Low Lake Mead Water Levels May Bring Changes to Several Boating Access Locations*, U.S. NAT'L PARK SERV.: LAKE MEAD NAT'L RECREATION AREA (Sept. 23, 2021), https://www.nps.gov/lake/learn/news/historically-low-lake-mead-water-levels-may-bring-changes-to-several-boating-access-locations.htm; *see also Historically Low Lake Powell Water Levels May Bring Changes to Several Boating Access Locations*, U.S. NAT'L PARK SERV.: GLEN CANYON NAT'L RECREATION AREA (Apr. 19, 2021), https://www.nps.gov/glca/learn/news/20210419.htm (April 2021 release for Lake Powell). The stories of the megadrought affecting Lake Mead were widespread during 2022, with the level dropping to its lowest ever since the construction of Hoover Dam. *E.g.*, Emily Mae Czachor, *Lake Mead's Water Level Has Never Been Lower. Here's What that Means.*, CBS NEWS (Sept. 4, 2022, 9:25 AM), https://www.cbsnews.com/news/lake-mead-water-level-historic-low-drought-heres-what-that-means/.

35. *Climate Change in National Parks*, U.S. NAT'L PARK SERV.: GOLDEN GATE NAT'L RECREATION AREA (Oct. 16, 2020), https://www.nps.gov/goga/learn/nature/climate-change-and-national-parks.htm.

36. *Climate Change*, U.S. NAT'L PARK SERV.: YELLOWSTONE NAT'L PARK (Sept. 25, 2020), https://www.nps.gov/yell/learn/nature/climate-change.htm.

37. *See Climate Friendly Parks Program*, U.S. NAT'L PARK SERV. (Feb. 3, 2015), https://www.nps.gov/articles/cfp.htm. For a description of how climate change is affecting parks, see, for example, STEVEN HOSTETLER ET AL., GREATER YELLOWSTONE CLIMATE ASSESSMENT: PAST, PRESENT, AND FUTURE CLIMATE CHANGE IN GREATER YELLOWSTONE WATERSHEDS (2021), https://scholarworks.montana.edu/xmlui/handle/1/16361.

38. *See Climate Friendly Parks Program*, *supra* note 37.

39. Anthropocene is the period when human activity predominantly influences our environment and climate. *See* JEREMY DAVIS, THE BIRTH OF THE ANTHROPOCENE (2018).

before it is too late.[40] Eliciting public engagement and garnering public support, elemental aspects of participatory democracy, are baked into the Administrative Procedure Act ("APA"),[41] the implementation of the National Environmental Policy Act ("NEPA"),[42] and our public land management statutes. Yet, in differing circumstances this might either support or hinder swift action when conditions demand urgency—for example, notably today's thirst for renewable energy infrastructure to displace fossil fuels.

The sesquicentennial celebration of Yellowstone, our nation's prototypal national park,[43] therefore, is a propitious moment to reflect on the future of public land management. Public land aficionados routinely champion the case for reform.[44] And federal land managing agencies have inched toward modernizing federal land management planning. But the reforming voices inside and outside the government generally remain circumscribed by tailored agendas, whether advocating for greater landscape level planning, adaptation and resiliency, utilization of ecosystem services, or enhanced co-management arrangements with Tribal Nations and Indigenous peoples.[45] Meanwhile, the Biden Administration is spending considerable agency capital on environmental justice, tribal collaboration, oil and gas activities,[46] and promoting the urgency of its 30/30 campaign to protect thirty percent of our lands by 2030.[47] Of course, progress in each of those areas is absolutely necessary. It simply is not enough. Focusing too narrowly on any one area or areas ignores a structural weakness in our public land management paradigm that warrants attention first.

That structural weakness is that we are tethered too much to the past. The past leaves us today with a patchwork of agencies and statutes, with different governing language and missions, and operating under a post-World War II emphasis on process and planning.[48] Today, federal land management

40. *See infra* notes 228–231 and accompanying text.

41. 5 U.S.C. §§ 551–559.

42. 42 U.S.C. §§ 4321–4370.

43. Rob Hotakainen, *Yellowstone Gears Up to Mark Its 150th Anniversary*, GREENWIRE (Jan. 13, 2022, 1:27 PM), https://subscriber.politicopro.com/article/eenews/2022/01/13/yellowstone-gears-up-to-mark-its-150th-anniversary-285172.

44. *See infra* notes 301–305 and accompanying text.

45. *See infra* Section II.A.

46. *See, e.g.*, OIL AND GAS LEASING PROGRAM REPORT, *supra* note 26.

47. *See* Exec. Order No. 14,008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021); U.S. DEP'T OF THE INTERIOR, CONSERVING AND RESTORING AMERICA THE BEAUTIFUL (2021), https://www.doi.gov/sites/doi.gov/files/report-conserving-and-restoring-america-the-beautiful-2021.pdf; *see also* Request for Information on NOAA Actions to Advance the Goals and Recommendations in the Report on Conserving and Restoring America the Beautiful, Including Conserving at Least 30 Percent of U.S. Lands and Waters By 2030, 86 Fed. Reg. 59,996 (Oct. 29, 2021) (example of one agency's request for comments on the 30/30 campaign).

48. *See* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 348 (2019) (describing how "[a]dministrative law is shot through with arguably counterproductive procedural rules").

agencies enjoy considerable discretion when making choices. Although they administer public lands pursuant to a host of operative statutes, those statutes and the vision Congress embedded in them are far from sufficient to dictate management decisions. Instead, our modern administrative law framework subsumes any visionary restraint on management decisions. That framework, in turn, is wedded to two concerns: First, that agencies engage in planning and follow their planning processes and proscriptions; and second, that in doing so agencies adhere to the tenets of participatory democracy and its inherent tie, once again, to a process. When legal scholars shied away from higher law principles and instead grounded post-WWII constitutional thought in "neutral principles,"[49] the neutral principle and governing paradigm would be legal process and the corollary principle of participatory democracy. That now means asking whether the managing agency followed the operative process: Did it allow for timely and meaningful public engagement; did it comply with the APA and not act arbitrarily or capriciously, abuse its discretion, or act without record support;[50] or did it comply with NEPA and the Endangered Species Act ("ESA")?[51] Fixing planning, therefore, requires that it become unmoored from the lack of vision or its adherence to simply process and planning.[52]

This Article illustrates why some fix is necessary and suggests some guiding criteria for moving forward, including how it might be done. My objective is not to convince anyone of what "forward" looks like, only that we can no longer accept being stationary. To that end, Part I of the Article explores the operative paradigm for modern public land management. Although place often influences the incipient status of federally owned lands and may even signal how Congress originally envisioned that they would be managed, federal land management decisions are exceedingly discretionary.[53] Neither an enabling act, if there is one, nor an agency's organic act generally prescribes management decisions; rather, federal land management planning governs today's management decisions.[54] And rarely does any enforceable vision for the management of public lands constrain

49. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

50. Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 33–34 (1983).

51. 16 U.S.C. §§ 1531–1544.

52. Whether this is a wicked problem or simply a routine structural problem is worth considering, but not here. *But cf.* Robin Kundis Craig, *Resilience Theory and Wicked Problems*, 73 VAND. L. REV. 1733, 1741 (2020) ("[S]ocial planning problems constitute wicked problems because they are not amenable to relatively simple engineering solutions grounded in Newtonian physics.").

53. *See infra* Sections I.A–B.

54. *See infra* Sections I.B–D.

management planning decisions.[55] This is troublesome, not only because it tilts toward allowing possibly too much discretion for decisions that could be inimical to the preservation of public lands but also because federal land management planning is fundamentally broken, as discussed in Part II. Part III, therefore, explains why the operative public land management paradigm is ill-suited to carry us too much further into the twenty-first century. And why something ought to be done about it.

Finally, Part IV discusses the role of *place* in the future of public land management, appreciating how places are unique and that managing them necessarily involves engaging with acutely affected or interested communities.[56] Here, I propose that we ought to engage in paradigm shifting thinking centered around two points.[57] First, we ought to develop a vision for managing all public lands. The notion that we must have some of our public lands available for resource "use" to promote economic growth is antiquated. Perhaps some "use" is warranted, but it ought to be governed by a newly crafted vision rather than something conceived fifty years or more ago. Second, if we can develop an overriding vision, possibly building off the Biden Administration's 30/30 (America the Beautiful) program,[58] we should consider fashioning a management structure that affords place, and its people, a prominent role in managing that landscape. And that may include enlarging the management table to include Tribal Nations, and possibly others. Both points require identifying the appropriate process for moving forward, something well beyond the capacity of any single article. Our public lands, though, demand that we envision a new paradigm. How we get there is less important than progressing toward that goal.

I. MANAGING FEDERAL COMMON LANDS

Geography, people, and institutions transform places into unique landscapes. Geography—here I include geology, topography, resources, and climate—may forge a majestic place. It may attract or dissuade people from living in or visiting the place. People, in turn, may wish to mold a place into their vision for the landscape, using legal institutions, such as federal congressional designations and management guidelines, to accomplish that end. And legal institutions may promote or hinder some people's vision. Those institutions, however, are what we must first explore.

55. *See infra* Section I.E.
56. *See infra* Sections IV.A–B.
57. *See infra* Sections IV.C–D.
58. *See supra* note 47.

A. Drawing Boundaries Around Places

The modern world ascribes boundaries around land areas, making unique land areas into places that can be owned, as Simon Winchester so poetically describes in *Land*.[59] These places then become identifiable common land management units to be owned and administered according to some socially, politically, culturally, and economically motivated principles chosen by the owner. For many federal public lands, Congress makes the choice. National parks, for instance, must be established by Congress, and only Congress can even change park boundaries.[60] Only Congress can designate areas as wilderness,[61] and agencies must avoid allowing any impairment to areas Congress is considering for inclusion into the wilderness system.[62] Congress might be specific, as well, such as in identifying uses that might need to be abandoned.[63] The Federal Land Policy and Management Act of 1976 ("FLPMA")[64] too sought to curtail aspects of executive authority over public lands by limiting the power of the Secretary of the Interior to withdraw lands from the public domain,[65] as the current debate over a president's authority to redraw the boundaries of a prior president's designation of a national monument illustrates.[66] Congress' choices for many

59. SIMON WINCHESTER, LAND: HOW THE HUNGER FOR OWNERSHIP SHAPED THE MODERN WORLD 41 (2021).

60. *See* U.S. NAT'L PARK SERV., CRITERIA FOR NEW NATIONAL PARKS (2005), http://npshistory.com/brochures/criteria-parklands-2005.pdf.

61. Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964) (codified as amended in scattered sections of 16 U.S.C.). When designating wilderness, Congress might address the continued use or prohibition of specific uses or, under Section 4(d) of the Act, allow historic uses to continue. *E.g.*, John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, § 1202(b)(4), 133 Stat. 580, 651 (2019) (designating Río San Antonio Wilderness and allowing grazing).

62. *See generally* ANNE A. RIDDLE & KATIE HOOVER, CONG. RSCH SERV., RL31447, WILDERNESS: OVERVIEW, MANAGEMENT, AND STATISTICS (2022), https://sgp.fas.org/crs/misc/RL31447.pdf.

63. Congress, for instance, established the Point Reyes National Seashore in 1962, Point Reyes National Seashore Act, Pub. L. No. 87-657, 76 Stat. 538 (1962), and after the passage of the 1964 Wilderness Act, Congress, in 1976, established the Point Reyes Wilderness Act, identifying possible additional lands that could be included in the wilderness (the Drakes Estero) if the existing commercial oyster farm were removed. Act of Oct. 18, 1976, Pub. L. No. 94-544, 90 Stat. 2515. A subsequent appropriation act further addressed the commercial oyster farm, and when the Department of the Interior allowed the farm's special use permit to expire, the company unsuccessfully challenged that decision. Drakes Bay Oyster Co. v. Salazar, 921 F. Supp. 2d 972, 975–76 (N.D. Cal. 2013). A lawsuit pending as of this Article's publication challenges the decision to allow beef and dairy ranching to continue at both Point Reyes National Seashore and Golden Gate National Recreation Area, claiming that such activities violate, *inter alia*, the enabling acts. Res. Renewal Inst. v. Nat'l Park Serv., No. 3:22-cv-00145 (N.D. Cal. filed Jan. 10, 2022).

64. 43 U.S.C. §§ 1701–1787.

65. *Id.* § 1714.

66. *See, e.g.*, Mark Squillace et al., *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. ONLINE 55 (2017).

lands are expressed in enabling acts, or acts authorizing the acquisition of a certain tract of land, establishing the principles for administering that land, and often making choices about permissible or illegal activities allowed on that land. The 1864 Act ceded land to California for a reserve at Yosemite for the public enjoyment.[67] The 1872 Yellowstone Act provided that the land would be "dedicated and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people . . . ."[68] Some statutes emphasize the benefits to local communities, such as the creation of the Oregon and California ("O&C") lands in the Pacific Northwest.[69]

B. Discounting Enabling Acts

Although enabling acts establish the broad contours for administering particular tracts of public lands, enabling act legislation is effectively enveloped by the relevant land managing agency's broader statutory mandate, prescribed by agencies' organic acts, as amended.[70] Most relevant for the NPS, enabling acts offer few constraints on agency decision-making.[71] To begin with, Congress often writes enabling acts with sufficiently flexible language to allow an agency's decision (and interpretation) to be upheld in a *Chevron*[72] Step One analysis or to be afforded deference under *Chevron* Step

67. Yosemite Grant Act, ch. 184, 13 Stat. 325 (1864).

68. Act of March 1, 1872, ch. 24, 17 Stat. 32, 32.

69. Congress anticipated that O&C lands would be administered by following the principles of sustained yield, emphasizing the economic benefits to the local community. Act of Aug. 28, 1937, Pub. L. No. 75-405, § 1, 50 Stat. 874, 874 ("[F]or the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities . . . . Due consideration shall be given to established lumbering operations in subdividing such lands when necessary to protect the economic stability of dependent communities.").

70. For an historical examination of the use of the term "Organic Act" to refer to an agency's principally operative statute, see ROBERT L. FISCHMAN, THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW 65–76 (2003).

71. Specific legislative language is necessary for lands managed by the NPS, and while other lands, such as National Monuments, wilderness areas, and forest reserves might similarly have the counterpart of enabling acts, they are not as likely to precipitate questions about whether those establishment statutes or executive proclamations constrain agency decision-making. One notable exception is the challenge to President Obama's designation of the Cascade-Siskiyou National Monument inside of O&C lands as violating the O&C Act's language about ensuring sufficient timber supply. *See* Murphy Co. v. Trump, No. 1:17-cv-00285-CL, 2019 WL 2070419 (D. Or. Apr. 2, 2019), *appeal docketed*, No. 19-35921 (9th Cir. argued Aug. 30, 2022); *see also* Am. Forest Res. Council v. Hammond, 422 F. Supp. 3d 184, 193–94 (D.D.C. 2019) (finding that management plan restricting timber harvesting violated the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act), *appeal docketed*, No. 20-5008 (D.C. Cir. argued Nov. 16, 2022).

72. Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984). Though controversial, see Buffington v. McDonough, 143 S. Ct. 14 (2022) (Gorsuch, J., dissenting) (questioning *Chevron* deference in a denial of cert), *Chevron* teaches that courts should defer to a reasonable construction of a statute by an agency charged with administering that statute if the language of the statute is ambiguous.

Two.[73] Next, the NPS Organic Act serves as a further sword or shield, depending upon the facts, to sanction a decision that otherwise might be more problematic if the court only had to rely on the enabling act. *Chevron* Step One, for instance, became a tool for upholding a decision about hunting in a national recreation area.[74] Fund for Animals argued that New Jersey's decision to allow hunting black bears inside Delaware Water Gap National Recreation Area violated the Delaware Gap's enabling act.[75] The Act specifically mandated that hunting be authorized, if allowed by the state and not otherwise determined inappropriate in certain areas, with the further mandate that the Department of the Interior "shall issue appropriate regulations after consultation with appropriate officials of the States concerned."[76] The challengers argued that issuing regulations served as a pre-requisite for allowing hunting, an interpretation that the court rejected.[77] The court distinguished this case from a somewhat similar one by concluding that the mandate to issue regulations was only triggered *if* the Department believed some level of limitation was necessary.[78] While the court declined to reach the *Chevron* Step Two analysis, as urged by the government, it opted

73. *E.g.*, Edmonds Inst. v. Babbitt, 93 F. Supp. 2d 63, 69–70 (D.D.C. 2000) (challenging bioprospecting and deferring to Service's judgment about what constitutes "consumptive use"). If an enabling act requires an action long since not taken, challenging the failure to take that action, such as engaging in a wilderness review, might be time-barred, such as engaging in a wilderness review. *See* Wilderness Soc'y v. Norton, No. Civ. A.03-64, 2005 WL 3294006, at *8 (D.D.C. Jan. 10, 2005), *appeal dismissed in part, denied in part*, 434 F.3d 584 (D.C. Cir. 2006). Article III standing presents another obstacle, by either barring a party from raising an enabling act claim, or, when not barred, by simply having the claim rejected. In *Isle Royale Boaters Ass'n v. Norton*, 154 F. Supp. 2d 1098 (W.D. Mich. 2001), while the Boaters Association could not challenge a reduction in dock space under the enabling act, it could proceed by challenging it under the Isle Royale Wilderness Act and the Organic Act, only to succumb to the court's assessment that the action comported with the Organic Act's dual mandate. *Id.* at 1119–20. Other cases merely reject suggestions that language in an enabling act is dispositive. *See* Dunn-McCampbell Royalty Int., Inc. v. Nat'l Park Serv., 630 F.3d 431, 440 (5th Cir. 2011) (challenging restrictions on oil and gas activities in the Padre Island National Seashore); United States v. McLean, 547 F. Supp. 9, 13 (W.D.N.C. 1981) (claiming inclusion of land into the Great Smoky Mountains National Park violated enabling act). To be sure, the Court is whittling away at *Chevron*, but regardless of the *Chevron* doctrine's longevity, the deference to public land managers will likely remain.

74. *See infra* notes 75–79 and accompanying text.

75. Fund for Animals v. Mainella, 294 F. Supp. 2d 46 (D.D.C. 2003). The group also argued that the decision to allow hunting violated the NPS Organic Act, as well as NEPA and the Service's management policies. *Id.* at 50.

76. 16 U.S.C. § 460o-5.

77. *Fund for Animals*, 294 F. Supp. 2d at 50–51.

78. *Id.* at 51–52. In *Oregon Natural Resources Council v. Lyng*, 882 F.2d 1417 (9th Cir. 1989), the Ninth Circuit opined that the Forest Service violated the Hells Canyon National Recreation Area Act when it approved a timber sale without first promulgating regulations. *Id.* at 1428. Both the Hells Canyon Act and the Delaware Gap Act required regulations; the principal difference, though, ostensibly was that the Ninth Circuit concluded that the regulations were necessary to assess whether to allow the timber harvesting. *Id.* at 1427.

instead for convoluted reasoning to conclude that the language is unambiguous.[79]

But other cases do apply *Chevron* Step Two when upholding an agency's interpretation of an enabling act.[80] One case involved the deer control program for the Washington, D.C., environs, where the Interior Department adopted a management strategy that promoted lethal and non-lethal control methods for white tail deer in Rock Creek National Park.[81] The park's enabling act authorized regulations deemed "necessary or proper" and that would "provide for the preservation from injury or spoliation of all . . . animals . . . within said park, and their retention in their natural condition, as nearly as possible."[82] Though the court rebuffed the Service's odd suggestion that the enabling act's language did not apply, it then concluded that the Service's interpretation of the act as allowing some killing was "at the very least reasonable" under a *Chevron* Step Two analysis.[83] In another instance, the enabling acts for Pictured Rocks and Sleeping Bear national lakeshores only mentioned hunting and fishing, not trapping; while nothing in the legislative history addressed trapping, the plaintiffs argued that the hunting and fishing language reflected an intent to allow trapping.[84] *Chevron* deference prevailed.[85]

One of the few instances where enabling legislation arguably triumphed occurred when a conservation organization sought judicial review of the Interior Department's willingness to allow logging in Redwood National

79. *Fund for Animals*, 294 F. Supp. 2d at 52–53. Arguably, as in *Oregon Natural Resources Council*, the regulatory process (both acts used the word "shall") similarly should have been a required process for how the Department could assess the appropriateness of limitations.

80. *See infra* notes 81–85 and accompanying text.

81. Grunewald v. Jarvis, 776 F.3d 893 (D.C. Cir. 2015).

82. Act of Sept. 27, 1890, ch. 1001, 26 Stat. 492, 495.

83. *Grunewald*, 776 F.3d at 900–03. The language about "necessary or proper" and "as nearly as possible" would, according to the court, embrace some killing "to prevent serious harms to other natural resources." *Id.* at 900. Consequently, enabling legislation like that for Grand Teton National Park, which allows for controlled elk reduction when "necessary for the purpose of proper management and protection of the elk," often only serves to ensure that the agency does not act arbitrarily or capriciously. Mayo v. Jarvis, 177 F. Supp. 3d 91, 104 (D.D.C. 2016) (quoting 16 U.S.C. § 673c(a)), *modified by*, 203 F. Supp. 3d 31, 34 (D.D.C. 2016) (rejecting challenge by wildlife photographers to elk reduction program's impact on grizzly bears). For a review of various enabling acts and their treatment of hunting, see *National Rifle Ass'n of America v. Potter*, 628 F. Supp. 903 (D.D.C. 1986).

84. Mich. United Conservation Clubs v. Lujan, 949 F.2d 202, 205 (6th Cir. 1991).

85. *Id.* at 206, 210–11; *see also* Mo. Trappers Ass'n v. Hodel, No. S 86-0193C(D), 1987 WL 119731, at *2 (E.D. Mo. May 21, 1987) (holding that trapping is a subset of hunting and not prohibited under the Ozark National Scenic Riverways legislation). When analyzing whether bioprospecting conflicted with the Yellowstone National Park Organic Act, the court quickly dispatched the argument by noting that the NPS's decision to allow the activity "is consistent with the" enabling act authority. Edmonds Inst. v. Babbitt, 93 F. Supp. 2d 63, 69 (D.D.C. 2000).

Park.[86] The case involved a programmatic challenge to the Park Service's failure to protect the park from the effects of continued logging on surrounding lands.[87] Sierra Club argued that the Service had "a judicially-enforceable duty to exercise certain powers granted" by the Redwood National Park Act and the Organic Act "to prevent or to mitigate such actual or potential damage."[88] The court agreed that the Service has a "general fiduciary obligation[]" to protect the park, and that the Redwood National Park Act further required that the Service "preserve significant examples of the primeval coastal redwood (Sequio sempervirens) forests and the streams and seashores with which they are associated for purposes of public inspiration, enjoyment, and scientific study."[89] While the court acknowledged that decisions on how best to protect the park resided with the "judgment of the Secretary," it did not preclude the court's ability to review the Secretary's failure to take action.[90] Ultimately, the court concluded that the language in the Redwood Act "impose[d] a legal duty on the Secretary to utilize the specific powers given to him whenever reasonably necessary for the protection of the park and that any discretion vested in the Secretary . . . is subordinate to his paramount legal duty . . . to protect the park."[91] The difficulty with putting too much stock in this case is that the court's analysis predates developments in administrative law, and it seems unlikely that this analysis would survive today.[92]

Enabling act language for lands managed by the National Park Service, moreover, yields to the NPS' broad discretion under the Organic Act.[93] In the dispute over elk and vegetation management in Rocky Mountain National Park, the enabling act's language for the park about hunting and killing became subservient to the Organic Act's admonition to protect the park.[94] Similarly, when analyzing the backcountry management plan for Canyonlands National Park, the United States Court of Appeals for the Tenth

86. Sierra Club v. Dep't of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974).

87. *Id.* at 92.

88. *Id.* at 93.

89. *Id.* (quoting 16 U.S.C. § 79a).

90. *Id.* at 95.

91. *Id.* at 95–96.

92. *See infra* note 194 and accompanying text.

93. Robert Fischman explores the dynamic between the organic act and enabling legislation in Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and Its Relationship to Pollution Control Law*, 74 DENV. L. REV. 779, 781 (1997) ("Establishment legislation is an increasingly important but almost uniformly overlooked source of objectives for management of the national park system.").

94. WildEarth Guardians v. Nat'l Park Serv., 703 F.3d 1178, 1189–90 (10th Cir. 2013); WildEarth Guardians v. Nat'l Park Serv., 804 F. Supp. 2d 1150, 1158 (D. Colo. 2011) (stating that the enabling act prohibits hunting or killing but incorporates Organic Act's provision for culling animals for protecting park resources).

Circuit effectively read the park's enabling act and the Organic Act together and applied *Chevron* deference to approve a decision regarding motorized access on part of the Salt Creek Road.[95] This happened as well in a challenge to the removal of wild horses from the Ozark National Scenic Riverways, when the court seemingly skipped analyzing the enabling act and the Organic Act separately.[96] Strikingly, when Congress created the Cape Hatteras National Seashore in 1937, it sought to preserve the area as a primitive wilderness, adding, however, that some areas along the seashore might be compatible for water-based recreational uses.[97] The enabling act was correspondingly silent on ORV use, as such activities had yet to materialize except as transportation to the seashore.[98] Following a lawsuit that forced NPS to develop a regulation on ORV use on the seashore, the Cape Hatteras Access Preservation Alliance challenged the resulting regulation as too restrictive, violating the enabling act by discounting the importance of examining recreational uses.[99] The government responded that the seashore's enabling act "does not impose any restrictions on NPS's discretion to manage ORV use within the National Seashore, beyond the requirements of the Organic Act," and that the Organic Act's mandate for conservation supports a plan geared toward that objective.[100] The court concluded that resolution of the issue was "simple": The enabling act lacked any specific mandate about ORVs, and the Organic Act's conservation mandate is the "predominant

95. S. Utah Wilderness All. v. Dabney, 222 F.3d 819, 826–27 (10th Cir. 2000); *see also* San Juan County v. United States, No. 2:04-CV-0552BSJ, 2011 WL 2144762, at *13 (D. Utah May 27, 2011) (noting that Canyonlands enabling act referenced Organic Act). In the historic fight over snowmobiles in Yellowstone, the enabling act and Organic Act operated in tandem to allow one court to proceed from the premise that the NPS's conservation mandate controlled, with the only dispute being over "what the mandate requires." Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 191 (D.D.C. 2008).

96. Wilkins v. Lujan, 798 F. Supp. 557, 563–64 (E.D. Mo. 1992), *rev'd sub nom.*, Wilkins v. Sec'y of the Interior, 995 F.2d 850, 853 (8th Cir. 1993) (holding that lower court applied arbitrary and capricious standard inappropriately).

97. 16 U.S.C. § 459a-2.

98. ORV use expanded by the 1970s, prompting President Nixon to issue Exec. Order No. 11,644, Use of Off-Road Vehicles on the Public Lands, 3 C.F.R. § 368 (1973), later amended by President Carter, Exec. Order No. 11,989, Use of Motor Vehicles Off Forest Development Roads, 36 C.F.R. 367 (1978).

99. Cape Hatteras Access Pres. All. v. Jewell, 28 F. Supp. 3d 537, 544 (E.D.N.C. 2014).

100. Federal Defendants' Memorandum in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment at 3–4, *Cape Hatteras Access Pres. All.*, 28 F. Supp. 3d 537 (No. 2:13-cv-1-BO) (first citing WildEarth Guardians v. NPS, 703 F.3d 1178, 1188–90 (10th Cir. 2013); and then citing Grunewald v. Jarvis, 930 F. Supp. 2d 73, 84–86 (D.D.C. 2013)).

facet."[101] Finally, some enabling act language is expressly subservient to the Organic Act.[102]

Consequently, specific legislation establishing or protecting tracts of public lands often serves as merely an understudy for the principal performer—the agency's organic act and the corresponding obligation to develop and follow land management plans, and to not act arbitrarily or capriciously.

C. Rise of Uniform (Federalized) Planning

Land and river management planning is the quintessential component of today's public land laws. To be sure, the genesis of planning is dated. When George Perkins Marsh, arguably the intellectual driver for the early twentieth century conservation movement, proclaimed that public lands ought to remain in common ownership, he coupled his plea with an account of how protecting the Adirondacks was necessary for the health of nearby New York City.[103] If, as he warned, "man" is a "disturbing agent," then applying scientific (read: planning) principles into decisions would afford some defense against destruction.[104] This became a fundamental tenet of the progressive era, when scientific management—planning by technical experts—captured various aspects of society. Having a landscape architect like Frederick Law Olmstead involved in designing parks and also serving on the first commission for managing Yosemite, almost assured that planning would become an elemental aspect of managing common land resources, such as parks. Early twentieth century progressives extended Marsh's ideas to promote local planning through zoning.[105] Ben Minteer explained how Lewis Mumford, as a promoter of regional planning, "recognized the roots of the idea of using landscape in an active and creative fashion to serve social, political, and aesthetic ends, as well as the more specific notion of expanding the function of the public park . . . ."[106] To Mumford, preserving common public places would promote a social goal of providing urban dwellers with

101. *Cape Hatteras Access Pres. All.*, 28 F. Supp. 3d at 545.

102. Nat'l Parks Conservation Ass'n v. Norton, 324 F.3d 1229, 1232 (11th Cir. 2003) (unsuccessful challenge to the Service's decision to extend private leases in Biscayne National Park).

103. *See generally* GEORGE PERKINS MARSH, MAN AND NATURE; OR, PHYSICAL GEOGRAPHY AS MODIFIED BY HUMAN ACTION (1864).

104. *Id.* at 36. For an excellent summary of Marsh, see Robin Kundis Craig, *George Perkins Marsh: Anticipating the Anthropocene*, *in* PIONEERS OF ENVIRONMENTAL LAW 3 (Jan G. Laitos & John Copeland Nagle eds., 2020).

105. *See generally* James Metzenbaum, *The History of Zoning—"A Thumbnail Sketch"*, 9 W. RSRV. L. REV. 36 (1957).

106. BEN A. MINTEER, THE LANDSCAPE OF REFORM: CIVIC PRAGMATICISM AND ENVIRONMENTAL THOUGHT IN AMERICA 61 (2006).

places for social reflection.[107] Indeed, while Mumford was advocating for regional planning, the National Park Service by the late 1920s began preparing what it called "Master Plans" for guiding activities in the nation's parks.[108]

D. Building Planning into Management

The progressive era's embrace of actively managing for the "wise use" of resources to promote sustainability required forward looking management judgments: Judgments that necessitated some level of land use planning. Planning, therefore, eventually infused into the principal land managing agencies' administration under their organic acts. Until roughly the 1960s, public lands often became subservient to their classified principal use(s)—for what use(s) were they "chiefly" valuable? For homesteading, for instance, the Homestead Act allowed settlers moving west the opportunity to obtain title to public lands cheaply.[109] Public lands otherwise not reserved and containing a discovery of "valuable mineral deposits"[110] were available for disposition under the nineteenth century mining laws.[111] The Timber and Stone Act[112] and the Desert Land Act[113] each allowed for private disposition for particular uses as well. Even the later 1934 Taylor Grazing Act promoted grazing on lands "chiefly valuable for grazing."[114]

That would change following WWII. Though the Supreme Court in 1891 said that the federal government would serve as a guardian of the public lands, charged with ensuring that "none of the public domain is wasted or disposed of to a party not entitled to it,"[115] there were too many problems with public land management. The post-WWII era witnessed a shift from the progressive era tenet of scientific management free from political interference—one that focused on ostensibly objective technical expertise—to the realization that policies often reflect a menagerie of interests, and thus to an appreciation for multiple uses for public lands.[116] In 1964, Congress

107. *Id.* at 62–65, 73.

108. *See infra* note 120; *see also* ALFRED RUNTE, NATIONAL PARKS: THE AMERICAN EXPERIENCE 223 (3d ed. 1997).

109. Homestead Act, ch. 75, 12 Stat. 392 (1862).

110. 30 U.S.C. § 22.

111. *Id.* §§ 21, 22, 35, 72.

112. Timber and Stone Act, ch. 151, 20 Stat. 89 (1878).

113. Desert Land Act, ch. 107, 19 Stat. 377 (1877).

114. Taylor Grazing Act, Pub. L. No. 73-482, § 1, 48 Stat. 1269, 1269 (1934) (codified as amended at 43 U.S.C. § 315). Two years later, Congress again used "chiefly valuable" when referring to lands suitable as parks, parkways, and recreation. Park, Parkway, and Recreational Area Study Act, ch. 735, 49 Stat. 1894, 1894 (1936).

115. Knight v. U.S. Land Ass'n, 142 U.S. 161, 181 (1891).

116. ROBERT H. NELSON, PUBLIC LANDS AND PRIVATE RIGHTS: THE FAILURE OF SCIENTIFIC MANAGEMENT 228–31 (1995).

expressed a policy toward retention of public lands, unless disposal would "provide the maximum benefit for the general public."[117] Congress also deployed land management planning for identifying how best to balance potentially conflicting uses of the lands, while ensuring against the impairment to a land's values. Robert Nelson explains how the 1970s-era statutes blended elements of old-style progressivism, steeped in planning, with interest group liberalism that favored public involvement and participation.[118] Planning and its corollary of public participation would give land managers the ability to examine and address temporally and spatially interrelated and cumulative effects of activities on a landscape.

Planning, consequently, is not only now entrenched but dominant in land management. Even though the Park Service Organic Act, which in 1916 created the Service and provided that its purpose would be to allow for the enjoyment of the parks but not to the extent that any use would impair the park resource values,[119] lacked a planning mandate, the Park Service began preparing master plans in the late 1920s.[120] Congress amended the Act in the 1970s, passing the National Park System General Authorities Act[121] and the 1978 Redwoods National Park Expansion Act,[122] and so today the Park Service enjoys the statutory obligation to prepare general management plans.[123] When, in 1997, Congress established an organic act for the management of national wildlife refuges, it followed suit by requiring the

117. Act of Sept. 19, 1964, Pub. L. No. 88-606, § 1, 78 Stat. 982, 982. According to BLM historians, during this period BLM "began to transform itself from an agency primarily processing land and mineral applications into an agency actively planning for the nation's future needs." JAMES MUHN & HANSON R. STUART, OPPORTUNITY AND CHALLENGE: THE STORY OF BLM 106 (2d prtg. 1988).

118. NELSON, *supra* note 116, at 231–32. A principal recommendation of the 1960's Public Land Law Review Commission ("PLLC") was to retain an emphasis on the classification of lands—with dominant uses, such as for wilderness preservation, or timber. *Id.* at 217–18.

119. National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified as amended at 54 U.S.C. § 100101(a)).

120. The first master plan, in 1929, was for Mount Rainier National Park, and "[t]hroughout the 1930s, a series of master plans for parks and monuments followed." Anika Burgess, *The Early Master Plans for National Parks Are Almost as Beautiful as the Parks Themselves*, ATLAS OBSCURA (Sept. 7, 2017), https://www.atlasobscura.com/articles/national-park-master-plans-artwork. Planning for parks surfaced earlier when Mark Daniels was appointed in 1915 as the first park landscape engineer. RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY 21 (1997). Planning was also encouraged in the Park, Parkways, and Recreation Area Study Act, ch. 735, 49 Stat. 1894–95 (1936).

121. Pub. L. No. 91-383, 84 Stat. 825 (1970).

122. Pub. L. No. 95-250, § 101(a), 92 Stat. 163, 166 (1978).

123. 54 U.S.C. § 100502. Congress expected that these general management plans would be revised on a timely basis. *See* Res. Renewal Inst. v. Nat'l Park Serv., No. C 16-0688, 2016 WL 11673179, at *2, *4 (N.D. Cal. July 15, 2016).

development of comprehensive conservation plans for each refuge.[124] Similarly, the 1968 Wild and Scenic Rivers Act ("WSRA") directs the preservation of certain free flowing rivers for the "benefit and enjoyment of present and future generations."[125] To aid that directive, Congress in 1986 amended the Act to require the development of river plans.[126]

Planning functions as the touchstone for managing forest and BLM lands as well. BLM manages its lands pursuant to the FLPMA,[127] which directs the executive branch to manage public lands "in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air, and atmospheric, water resource, and archeological values."[128] And it provides that the management of public lands be based on "multiple use and sustained yield."[129] Multiple use is defined as:

> [T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people . . . a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources.[130]

124. National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (codified at 16 U.S.C. § 668dd(e)). Previously, the Interior Department administered refuges under the specific order or legislation governing its creation. In 1962, Congress passed the Refuge Recreation Act, 16 U.S.C. § 460k, directing the Service to administer refuges according to their primary objectives, with appropriate uses later enlarged by the 1966 National Wildlife Refuge Administration Act, and then clarified by President Clinton's 1996 Executive Order that elevated the importance of preservation of refuge lands—albeit with a hierarchy of uses subservient to preservation. Exec. Order No. 12,996, Management and General Public Use of the National Wildlife Refuge System, 61 Fed. Reg. 13,647 (Mar. 25, 1996). The 1997 Refuge Administration Act then folded in the obligation for a comprehensive plan that would inform whether a particular use of a refuge is compatible with the purpose for the refuge. *See* Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 65 Fed. Reg. 62,458 (Oct. 18, 2000) (to be codified at 50 C.F.R. pts. 25–26, 29); *see generally* FISCHMAN, *supra* note 70.

125. 16 U.S.C. § 1271 (explaining that waterways that "possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations"). Protected systems must be administered to "protect and enhance" the values animating its inclusion in the WSR system. *Id.* § 1281(a).

126. *Id.* § 1274(d). *See generally* Michael C. Blumm & Max M. Yoklic, *The Wild and Scenic Rivers Act at 50: Overlooked Watershed Protection*, 9 MICH. J. ENV'T & ADMIN. L. 1, 42 (2019).

127. 43 U.S.C. §§ 1701–1787. BLM's earlier plans were management framework plans, ostensibly first developed in 1969, five years after the Multiple Use and Classification Act. Paul J. Culhane & H. Paul Friesema, *Land Use Planning for the Public Lands*, 19 NAT. RES. J. 43, 63 (1979).

128. W. Watersheds Project v. Kraayenbrink, 632 F.3d 472, 499 (9th Cir. 2011) (quoting 43 U.S.C. § 1701(a)(8) (2006)).

129. 43 U.S.C. §§ 1701(a)(7), 1732(a).

130. *Id.* § 1702(c).

Sustained yield is defined as achieving and maintaining "in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[131] The FLMPA further requires that BLM inventory and then plan to satisfy this multiple use and sustained yield mandate.[132] Section 202 of the FLPMA outlines BLM's planning obligations, where it is directed to employ its mandates for multiple use and sustained yield, use an interdisciplinary approach, rely on available resource inventories and identify and protect those areas of critical environmental concern.[133] Through the planning process and the development of resource management plans ("RMPs"), moreover, BLM can—and in some cases must—protect against certain uses of public lands: Roadless areas with wilderness characteristics, for instance, must be protected against having their suitability for inclusion into the wilderness system impaired until Congress decides what to do with those lands.[134] BLM also must protect against "unnecessary or undue degradation" ("UUD") of its managed public lands.[135] These planning obligations further require that BLM afford the public an opportunity to be involved in the development of RMPs.[136]

The 1897 Forest Service Organic Administration Act delegates authority to the Agricultural Secretary to adopt regulations for the use and occupancy of national forests to "preserve" them "from destruction."[137] In 1960, Congress added the mandate that the Forest Service ("FS") manage these lands under the principles of multiple use and sustained yield.[138] The 1976 National Forest Management Act ("NFMA") further requires that the

131. *Id.* § 1702(h).

132. *Id.* § 1711(a); *see* Or. Natural Desert Ass'n v. Shuford, No. 06-242-AA, 2007 WL 1695162, at *5 (D. Or. June 8, 2007).

133. *See* 43 U.S.C. §§ 1711(a), 1712(a), 1712(e)(1), 1712(c)(3).

134. *Id.* §§ 1782(a), (c).

135. *Id.* at § 1732(b).

136. *Id.* at § 1712(f) ("The Secretary shall allow an opportunity for public involvement and by regulation shall establish procedures, including public hearings where appropriate, to give Federal, State, and local governments and the public, adequate notice and opportunity to comment upon and participate in the formulation of plans and programs relating to the management of the public lands.").

137. Forest Service Organic Administration Act, ch. 2, 30 Stat. 11, 35 (1897); 16 U.S.C. § 551. The Forest Service is not limited to regulating uses identified by Congress in the Organic Act. *See* Forest Serv. Emps. for Env't Ethics v. U.S. Forest Serv., 341 F. Supp. 3d 1217, 1228 (W.D. Wash. 2018) ("[S]ection 551 of the Organic Act unambiguously grants the Forest Service authority to permit uses of forest land that have not been specifically identified by Congress."). The Court in *United States v. Grimaud*, 220 U.S. 506 (1911), after all, held that the Forest Service could require a special permit for grazing, even though the statute did not specifically address grazing, only "occupancy and use." *Id.* at 521–23.

138. Act of June 12, 1960, Pub. L. No. 86-517, 74 Stat. 215 (codified as amended at 16 U.S.C. §§ 528–531).

agency must "provide for multiple use and sustained yield of the products and services" obtained from units of the National Forest System, which includes "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness."[139] "Under NFMA, forest land management occurs on two levels: (1) the forest level, and (2) the individual project level."[140] The Act further requires that the Forest Service "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area."[141] A land and resource management plan ("LRMP"), produced with public participation,[142] provides the agency with a programmatic outline of how it intends to manage future site-specific decisions within a prescribed management area.[143] Unlike for the BLM, the Forest Service relies on detailed regulations governing the development of its forest plans.[144]

E. The Good, the Bad, the Ugly

All these federal planning statutes afford agencies a wide berth. If an agency complies with its governing regulations, NEPA, the ESA, and the APA, the agency's specific governing statutes rarely constrain the agency's choice.[145] Though Congress charged the NPS with protecting against impairment of park values, the Service exercises "broad discretion" when making choices about park management.[146] This, in part, is because the 1916

139. National Forest Management Act of 1976, Pub. L. No. 94-588, § 6(e)(1), 90 Stat. 2949, 2952 (codified at 16 U.S.C. § 1604(e)(1)). Prior to the NFMA, the Forest and Rangeland Renewable Resources Planning Act of 1974 presaged the emphasis on planning for the FS. Act of Aug. 17, 1974, Pub. L. No. 93-378, 88 Stat. 476 (codified as amended at 16 U.S.C. §§ 1601–10). For the seminal article on the NFMA, see Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1 (1985). Paul Culhane and H. Paul Friesema explain how for both the FS and BLM, "the general concept of planning and many of the procedural specifics were so well developed before 1976 that it is fair to say that [NFMA] legislatively ratified ongoing Forest Service practices." Culhane & Friesema, *supra* note 127, at 52.

140. All. for the Wild Rockies v. U.S. Forest Serv., 907 F.3d 1105, 1109 (9th Cir. 2018) (citing Native Ecosystems Council v. Weldon, 697 F.3d 1043, 1056 (9th Cir. 2012)).

141. 16 U.S.C. § 1604(g)(3)(B).

142. *See id.* § 1604(d).

143. *See, e.g.*, Ohio Forestry Ass'n., Inc. v. Sierra Club, 523 U.S. 726, 729 (1998); Citizens for Better Forestry v. U.S. Dep't of Agric., 341 F.3d 961, 966 (9th Cir. 2003).

144. *See generally* 36 C.F.R. § 219. For a discussion of the FS planning regulations, see Susan Jane M. Brown & Martin Nie, *Making Forest Planning Great Again? Early Implementation of the Forest Service's 2012 National Forest Planning Rule*, 33 NAT. RES. & ENV'T. 3 (2019); Martin Nie & Emily Schembra, *The Important Role of Standards in National Forest Planning, Law, and Management*, 44 ENV'T. L. REP. 10281 (2014); Murray Feldman & Hadassah Reimer, *Ecological Succession of National Forest Planning Regulations*, 33 NAT. RES. & ENV'T. 8 (2019).

145. The Court's decision in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), moreover, reflected the judiciary's antipathy toward allowing parties to challenge agency programmatic administration of programs without identifying and focusing on a specific agency decision.

146. Bicycle Trails Council of Marin v. Babbitt, 82 F.3d 1445, 1454 (9th Cir. 1996) (quoting Nat'l Wildlife Fed'n v. Nat'l Park Serv., 669 F. Supp. 384, 390 (D. Wyo. 1987)). In *Sturgeon v.*

Organic Act's ostensible dual mandate contains seemingly contradictory objectives: Promoting use, and ensuring against impairment caused by use. For the nascent Act's early years, the seesaw for managing the nation's parks tipped toward use,[147] while today it favors protecting against impairment.[148] When comparing the organic act mandates of the Forest Service and the NPS, Federico Cheever observed how those mandates are flexible enough to allow agencies to engraft their prevailing vision for how best to manage their lands.[149] And it allows others to do the same, often with conflicting notions of what ought to predominate.[150] This may have been beneficial during the early 1900s with leaders like Stephen Mather and Gifford Pinchot, Cheever posits, but these "[m]andates which once contributed to the rise of agency discretion now contribute to its decline."[151] Cheever goes even further and suggests that the mandates are so broad they are meaningless: that anything between use and preservation could be justified.[152] The NPS, therefore, can choose whether, where, when, or how many e-bikes can navigate the national parks.[153] It can work assiduously to identify just the right politically palatable number of snowmobiles to allow in Yellowstone,[154] or jet boats in Hells

Frost, 139 S. Ct. 1066, 1076 (2019), the Court reaffirmed this broad authority for lands within a park unit.

147. National Park Service Organic Act, Pub. L. No. 64-235, 39 Stat. 535 (1916) (codified at 54 U.S.C. § 100101(a)). Congress reaffirmed its language when it stated that park units "shall be consistent with and founded in the" dual mandate, to the common benefit of all the people of the United States. 54 U.S.C. § 100101(b)(2). The authorization of activities shall be construed, and the protection, management, and administration of the System units shall be conducted in light of the high public value and integrity of the System and shall not be exercised in derogation of the values and purposes for which the System units have been established. *Id.*; *see also* Act of Dec. 19, 2014, Pub. L. No. 113-287, 128 Stat. 3094, 3096 (codification of the law).

148. The 1960s Leopold Committee Report helped usher in a greater emphasis on protecting ecological values. *See* RUNTE, *supra* note 108, at 197–208. Preservation is elevated in the NPS's modern management policies. *See generally* NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, MANAGEMENT POLICIES (2006), https://www.nps.gov/subjects/policy/upload/MP_2006.pdf.

149. Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. L. REV. 625, 629 (1997).

150. *Id.*

151. *Id.* at 630.

152. *Id.* at 638–39.

153. Electric Bicycles, 85 Fed. Reg. 69175 (Nov. 2, 2020) (to be codified at 36 C.F.R. pts. 1, 4).

154. *See, e.g.*, Wyoming v. U.S. Dep't of Interior, 674 F.3d 1220 (10th Cir. 2012); Wyoming v. U.S. Dep't of Interior, 587 F.3d 1245 (10th Cir. 2009); Wyoming v. U.S. Dep't of Interior, No. 08-CV-0004-B, 2008 WL 11335156 (D. Wyo. Nov. 7, 2008), *vacated*, 587 F.3d 1245 (10th Cir. 2009); Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183 (D.D.C. 2008); Fund for Animals v. Norton, 390 F. Supp. 2d 12 (D.D.C. 2005).

Canyon,[155] or whether or where to allow hunting in parks,[156] or the balance of private trips versus commercial operators for trips down the Grand Canyon.[157]

A similar scenario plays out with cases involving the FS and the BLM. In a challenge to a FS travel management plan that limited motorized recreational use in the Bitterroot National Forest, the United States Court of Appeals for the Ninth Circuit began by announcing how its review "is deferential in light of the Service's expertise and discretion under the relevant statutes" and that it would be even more deferential when the issue involves "a high level of technical expertise."[158] The court repeated one of its old statements, that the Multiple-Use Sustained-Yield Act "breathes discretion at every pore."[159] The exercise of that discretion could even include political influence.[160] Notably, though, that discretion may be somewhat constrained when the FS ignores its detailed planning regulations. Forest Plans must maintain viable populations pursuant to the FS's mandate and interpreting regulations, which means that both the governing FS plan and specific

155. *Grazing Use of Grand Teton National Park and Management Plan for Hells Canyon National Recreation Area: Hearing on S. 308 and S. 360 Before the Subcomm. on Nat'l Parks, Historic Pres., and Recreation of the Comm. on Energy and Nat. Res.*, 105th Cong. 19 (1997) (statement of Carole Jean Finley, Co-owner, Hughes River Expeditions) (discussing jetboats in Hells Canyon).

156. Hunting is allowed only when the underlying statutory authority for a particular park so allows it. *See* 36 C.F.R. § 2.2(a)–(b); U.S. Dep't of the Interior, *Hunting and Fishing on National Parks and Fish and Wildlife Refuges* (Mar. 1, 2017), https://www.doi.gov/blog/hunting-and-fishing-national-parks-and-fish-and-wildlife-refuges.

157. An historic conflict between the concession outfitter and guides in the Grand Canyon and the private boaters running the river stymied efforts to develop a new management plan for that stretch of the Colorado River. *See, e.g.*, JEFF INGRAM, HIJACKING A RIVER: A POLITICAL HISTORY OF THE COLORADO RIVER IN THE GRAND CANYON (2003). The two sides eventually reached an agreement, which NPS endorsed. River Runners for Wilderness v. Martin, 593 F.3d 1064 (9th Cir. 2010).

158. Bitterroot Ridge Runners Snowmobile Club v. U.S. Forest Serv., 833 F. App'x. 89, 90 (9th Cir. 2020) (quoting Lands Council v. McNair, 537 F.3d 981, 993 (9th Cir. 2008) (en banc)).

159. *Id.* (quoting Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979)); *see also* Sierra Club v. Hardin, 325 F. Supp. 99, 123 (D. Alaska 1971) (within the agency's "sound discretion"). John Copeland Nagle and J.B. Ruhl aptly characterize the judicial approach toward the Multiple-Use Sustainable-Yield Act mandate as "directionless" and with "no meaningful legislative or judicial check." JOHN COPELAND NAGLE & J.B. RUHL, THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT 404 (2002). According to Jack Tuholske and Beth Brennan, the Act "remains on the books, though it is largely a statutory anachronism, supplanted by the more explicit and detailed dictates of the NFMA." Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 60 (1994).

160. *Bitterroot Ridge Runners Snowmobile Club*, 833 F. App'x at 91 (quoting Dep't of Com. v. New York, 139 S. Ct. 2551, 2573 (2019)).

activities must satisfy that mandate.[161] In *Idaho Sporting Congress, Inc. v. Rittenhouse*,[162] the FS violated that mandate, and the court enjoined a proposed timber sale.[163]

Though Congress similarly imposed substantive obligations to protect and enhance wild and scenic river values, "the WSRA requirements provide the agency with substantial discretion in its management of a Wild and Scenic River."[164] Michael Blumm and Max Yoklic echo that sentiment when they characterize agencies' discretion as being "enormous."[165] When, for instance, the Friends of the Clearwater claimed that the FS violated NEPA and the WSRA when finalizing a vegetative management program for the Idaho Panhandle National Forests, the court principally focused on NEPA after observing how the Service "has a 'great deal of discretion' in deciding how to achieve the broad policy goals of the WSRA."[166] Similarly, a court afforded the FS discretion when the Service allowed motorized use along portions of the Snake River.[167] In 1975, Congress created the Hells Canyon National Recreation Area ("HCNRA"), with roughly sixty-seven miles of the Snake River designated as either "wild" or "scenic" under the WSRA.[168]

161. Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 966 (9th Cir. 2002) ("If the Forest Plan's standard is invalid, or is not being met, then the timber sales that depend upon it to comply with the Forest Act are not in accordance with law and must be set aside.").

162. 305 F.3d 957 (9th Cir. 2002).

163. *Id.* at 966. FS regulations require a monitoring report, and the report at issue indicated that the FS plan needed amending to comply with the mandate, and thus the proposed activity and FS plan violated the Act and regulations. Little need for deference existed, because the FS monitoring report and its own scientists confirmed that the plan violated the mandate. *Id.* at 969.

NFMA, to be sure, does limit the agency's discretion on some timber harvesting practices. *See* Tuholske & Brennan, *supra* note 159, at 62–64, 66 (noting how NFMA contains requirements for diversity of plant and animal communities as well limits on even-aged management); *see also* Mahler v. U.S. Forest Serv., 927 F. Supp. 1559, 1567–69 (S.D. Ind. 1996) (effectively applying arbitrary and capricious review to whether a plan's decision to allow clearcutting and its approach toward even-aged timber management violated the NFMA). But when the *Monongahela* decision held that clearcutting was prohibited under the 1897 Act, discretion became infused back into the agency somewhat with the NFMA. *See* JOHN D. LESHY, OUR COMMON GROUND: A HISTORY OF AMERICA'S PUBLIC LANDS 504–05 (2022) (masterful overall history of our public lands and describing the history with clearcutting); W. Va. Div. Izaak Walton League v. Butz, 522 F.2d 945, 948 (4th Cir. 1975) (*Monongahela* decision).

164. Idaho Rivers United v. Probert, No. 3:16-cv-00102, 2016 WL 2757690, at *6 (D. Idaho May 12, 2016).

165. Michael C. Blumm & Max M. Yoklic, *The Wild and Scenic Rivers Act at 50: Overlooked Watershed Protection*, 9 MICH. J. ENV'T & ADMIN. L. 1, 56 (2019).

166. Friends of the Clearwater v. Higgins, 472 F. Supp. 3d 859, 873 (D. Idaho 2020) (quoting Norton v. S. Utah Wilderness All., 542 U.S. 55, 66 (2004)).

167. Hells Canyon All. v. U.S. Forest Serv., 227 F.3d 1170, 1179 (9th Cir. 2000).

168. Act of Dec. 31, 1975, Pub. L. 94-199, 89 Stat. 1117 (codified at 16 U.S.C. § 460gg to gg-13). Part of the recreation area includes a designated wilderness, and whichever is the more restrictive provisions between the Wilderness Act or the HCNRA apply in that designated wilderness. 16 U.S.C. § 460gg-1(b). The HCNRA directs the FS to issue regulations "as [it] deems necessary to accomplish the purposes of this subchapter," including provisions "for the control of

When the Hells Canyon Alliance challenged the FS's decision allowing a certain level of motorized use in the designated river as violating the WSRA, the court parsed the Act's language about protecting and enhancing the resources, and it concluded that the language did not "lead inexorably to the conclusion that permitting motorized use on both the wild and scenic portions of the river violates the statute."[169] The Service's determination of what uses "substantially interfere" with the values of the resource, according to the court, is entitled to "substantial deference."[170]

The Fish and Wildlife Service ("USFWS") enjoys discretion as well when administering wildlife refuges. The 1962 Refuge Recreation Act authorized the Secretary to permit recreational uses "when in his judgment public recreation can be an appropriate incidental or secondary use," provided that it would not be "inconsistent with other previously authorized Federal operations or with the primary objectives for which each particular area is established" and she is charged with "curtail[ing] public recreation use[s]" if necessary.[171] Regardless of this constraining language, one court commented how the Act "grants the Secretary similar [to the Fish and Wildlife Act] discretion to permit or restrict public use of refuge areas."[172] Even under the more recent 1997 National Wildlife Refuge System Improvement Act,[173] the cases generally focus more on compliance with requirements, such as issuing a written certification about compatibility, or

---

the use and number of motorized and nonmotorized river craft," recognizing motorized use within the recreation area. *Id.* § 460gg-7, 7(d). Until 1998, motorized use was unregulated and nonmotorized use was not. For the story surrounding this dispute, see MARNIE L. CRILEY, REGULATING JET BOAT USE ON THE WILD AND SCENIC SNAKE RIVER IN HELLS CANYON: AN EXAMINATION OF THE PUBLIC PARTICIPATION PROCESS AND AN ENVIRONMENTAL ORGANIZATION'S STRATEGY WITHIN THAT PROCESS (U. Mont., Graduate Student Theses, Dissertations, & Pro. Papers ed., 1996).

169. *Hells Canyon All.*, 227 F.3d at 1177.

170. *Id.* at 1178. Admittedly, deference to the FS has been less forthcoming when, for instance, it has uses that overtly seem to violate the prescription against permanent structures along designated wild corridors. Wilderness Watch v. U.S. Forest Serv., 143 F. Supp. 2d 1186, 1204 (D. Mont. 2000) (affording significance to the command that wild rivers remain "essentially primitive" and finding a NFMA violation as well because of the violation of the WSRA as well as the act designating the area as a wilderness).

171. Refuge Recreation Act, Pub. L. No. 87-714, § 1, 76 Stat. 653, 653 (1962) (codified as amended at 16 U.S.C. §§ 460k–460k-4). This Act was soon supplemented by the National Wildlife Refuge System Administration Act, Pub. L. No. 89-669, 80 Stat. 926 (codified at 16 U.S.C. § 668dd). By the 1990s, the need for reform and better planning became apparent. *See* Richard J. Fink, *The National Wildlife Refuges: Theory, Practice, and Prospect*, 18 HARV. ENV'T L. REV. 1, 134–35 (1994).

172. Sabine River Auth. v. U.S. Dep't of Interior, 745 F. Supp. 388, 404 (E.D. Tex. 1990). When the Service ostensibly acted arbitrarily in allowing the use of powerboats with unlimited horsepower in a refuge, a court did find that it violated the refuge's primary purpose and practicability standard. Defs. of Wildlife v. Andrus, 455 F. Supp. 446, 449 (D.D.C. 1978).

173. Pub. L. No. 105-57, 111 Stat. 1252 (1997).

on NEPA, than on compatibility itself.[174] To be sure, as Robert Fischman explains in *The National Wildlife Refuges*, the Improvement Act reflects a step forward in land management by identifying "designated uses" and "substantive management criteria."[175] One court observed that "Congress has provided more protection for refuges than other areas of land," and even rejected a combability determination.[176] Yet there is little to suggest that the USFWS's discretion will be constrained when issuing compatibility determinations.[177]

174. Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997, 50 C.F.R. §§ 25, 26, 29 (2000); U.S. FISH & WILDLIFE SERV., PART 603: COMPATIBILITY MANUAL OF NATIONAL WILDLIFE REFUGE SYSTEM USES (2000), https://www.fws.gov/policy/603fw2.pdf; *see* Town of Superior v. U.S. Fish and Wildlife Serv., 913 F. Supp. 2d 1087 (D. Colo. 2012); Ctr. for Food Safety v. Salazar, 898 F. Supp. 2d 130 (D.D.C. 2012); *see also* Ctr. for Food Safety v. Salazar, 900 F. Supp. 2d 1 (D.D.C. 2012); Del. Audubon Soc'y v. Sec'y of U.S. Dep't. of Interior, 612 F. Supp. 2d 442 (D. Del. 2009). Some refuges, because of split estates, allow oil and gas activities (similar to split estates in National Parks). *See* R. ELIOT CRAFTON, LAURA B. COMAY & MARC HUMPHRIES, CONG. RSCH. SERV., R45192, OIL AND GAS ACTIVITIES WITHIN THE NATIONAL WILDLIFE REFUGE SYSTEM (2018), https://sgp.fas.org/crs/misc/R45192.pdf. In *Alaska v. Bernhardt*, 500 F. Supp. 3d 889 (D. Alaska 2020), the court applied a typical arbitrary and capricious review to a challenge against restrictions on hunting and firearm discharges in the Skilak Wildlife Refuge.

175. FISCHMAN, *supra* note 70, at 206.

176. Nat'l Wildlife Refuge Ass'n v. Rural Utils. Serv., 580 F. Supp. 3d 588, 604 (W.D. Wis. 2022). Though acknowledging deference, the court added it would not accept the agency's judgment as a "final word when all factual findings [in the specific case] weigh against it." *Id.* at 606.

177. *E.g.*, Report and Recommendation at *26, Audubon Soc'y of Portland v. Zinke, No. 1:17-cv-00069-CL, 2019 WL 8371180 (D. Or. Nov. 18, 2019) (recommending rejecting challenge to compatibility determination allowing grazing); Audubon Soc'y of Portland v. Zinke, No. 1:17-cv-00069-CL, 2020 WL 1693677 (D. Or. Apr. 6, 2020), *aff'd sub nom.*, Audubon Soc'y of Portland v. Haaland, 40 F.4th 917 (9th Cir. 2022). Many compatibility determinations, moreover, are seemingly innocuous. *See* U.S. Fish and Wildlife Service, *Draft Compatibility Determination Available for Public Comment and Review*, DUMAS CLARION (Sept. 17, 2021, 12:26 PM), https://www.dumasclarion.com/comments-communities-local-news/draft-compatibility-determination-available-public-comment-and#sthash.QYvPH4af.fUFAQZ5g.dpbs (discussing the "Draft Compatibility Determination for Right-of-Way (ROW) to install fiber optic cable by the Arkansas Electric Cooperative Corporation (AECC) within Dale Bumpers White River National Refuge"); Jacob Gore, *National Elk Refuge Re-Authorizes Compatibility Determination for Multi-Use Pathway*, BUCKRAIL (Feb. 26, 2021), https://buckrail.com/national-elk-refuge-re-authorizes-compatibility-determination-for-multi-use-pathway/. Commercial fishing was found compatible with the Upper Mississippi River National Wildlife Refuge. U.S. FISH & WILDLIFE SERV., UPPER MISSISSIPPI RIVER NATIONAL WILDLIFE AND FISH REFUGE ESTABLISHED 1924 COMPATIBILITY DETERMINATION (2006), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1236&context=usfwspubs. Hunting is also compatible, just to illustrate a few. HACKMATACK NATIONAL WILDLIFE REFUGE: HUNTING AND FISHING REGULATIONS 2021–2022, U.S. FISH & WILDLIFE SERV. (Aug. 2021), https://www.fws.gov/sites/default/files/documents/Hackmatack_huntBrochure_21_Online.pdf. Environmentalists challenged the Trump Administration's effort to expand hunting in refuges. Sebastien Malo, *Lawsuit Takes Aim at Trump-Era Rule Expanding Hunting Grounds*, REUTERS (Nov. 29, 2021, 3:30 PM), https://www.reuters.com/legal/litigation/lawsuit-takes-aim-trump-era-rule-expanding-hunting-grounds-2021-11-29/; Rachel Frazin, *Trump Administration Faces Lawsuit Over Hunting Expansion at Nearly 150 Wildlife Refuges, Hatcheries*, HILL (Oct. 27, 2020, 9:00

Possibly the most visible dispute involving a refuge is the controversy surrounding a road through the Izembek National Wildlife Refuge;[178] if anything, it reflects how politics and discretion might drive decision-making. The residents of King Cove, Alaska, argued that they lacked a sufficient and reliable ability to ensure that they would have access to medical care through a community with an all-weather airport (Cold Bay) roughly eighteen miles away absent the construction of a road through the Izembek. In both the 1980s and mid-1990s, the Department of the Interior conducted analyses of a possible road project, both times rejecting the idea because of its adverse ecological effects.[179] Then, in 1998, Congress passed a special act funding the use of a hovercraft to connect the two communities,[180] but eventually using a hovercraft proved unreliable. Congress then responded again in 2009, this time directing the Interior Secretary to consider whether a possible land exchange and road construction project would be in the public interest.[181] In 2013, however, Secretary Jewell rejected a proposed land exchange that would have allowed the road project to proceed, citing adverse impacts to resources and a designated wilderness within the refuge. The Wilderness Society, for instance, warns that the road "would threaten the integrity of the refuge."[182] That decision was then challenged, with the government prevailing.[183] Though residents of King Cove appealed the case to the Ninth Circuit, when the Trump Administration engaged with the proposal, many widely expected that the new administration would favor the road.[184] And

AM), https://thehill.com/policy/energy-environment/522881-trump-administration-faces-lawsuit-over-hunting-expansion-at-nearly/. Expanding hunting opportunities continued into the Biden Administration. *U.S. Fish and Wildlife Expands Recreational Opportunities on Managed Lands and Waters*, BOATING INDUSTRY (Sept. 21, 2021), https://boatingindustry.com/news/2021/09/21/interior-expands-fishing-and-boating-on-u-s-fish-and-wildlife-managed-lands-and-waters/.

178. Congress established the Refuge in 1980, as part of the Alaska National Interest Lands Conservation Act. Pub. L. No. 96-487, 94 Stat. 2371, 2390–91 (1980).

179. Agdaagux Tribe of King Cove v. Jewell, 128 F. Supp. 3d 1176, 1201 (D. Alaska 2015), *appeal dismissed sub nom.*, Agdaagux Tribe of King Cove v. Zinke, No. 15-35875, 2017 WL 5198384 (9th Cir. Aug. 11, 2017).

180. Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 353, 112 Stat. 2681, 2681-302 to -303 (1998).

181. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991, 1177–83. Any such road would be limited to use of health and safety purposes, prohibiting commercial use.

182. *Road Building: Izembek National Wildlife Refuge*, WILDERNESS SOC'Y, https://www.wilderness.org/wild-places/alaska/road-building-izembek-national-wildlife-refuge (last visited Nov. 30, 2022).

183. *Agdaagux Tribe of King Cove*, 128 F. Supp. 3d at 1201.

184. *See Trump Era Renews Hopes for Izembek Road*, E&E NEWS (Apr. 28, 2017, 1:02 PM), https://subscriber.politicopro.com/article/eenews/1060053767.

that it did, and the appeal was dismissed.[185] In what might be described as a swift decision, the Trump Administration approved a land exchange in January 2018.[186] While that land exchange failed to survive judicial review,[187] the Trump Administration appealed the decision[188] but also entered into a new land exchange in summer of 2019.[189] That exchange too was invalidated in the summer of 2020.[190] That rejection was appealed, leaving the new Biden Administration with a choice of how to proceed.[191] Eight years after Interior rejected the initial proposal, King Cove supporters pressed on,[192] and the Biden Administration has since supported the Trump Administration's decision.[193] This story, however it may unfold, exudes politics, not a sound vision for how to manage a project through a refuge.

The message from this story and surfacing from judicial scrutiny of challenges to agency management decisions is simple: Compliance with the agency's governing statutory mandate(s) is subsumed either by (1) *Chevron*

185. Agdaagux Tribe of King Cove v. Zinke, No. 15-35875, 2017 WL 5198384 (9th Cir. Aug. 11, 2017).

186. *See* Juliet Eilperin, *Zinke Signs Land-Swap Deal Allowing Road Through Alaska's Izembek Wilderness*, WASH. POST (Jan. 22, 2018, 1:40 PM), https://www.washingtonpost.com/news/energy-environment/wp/2018/01/22/zinke-to-sign-land-swap-deal-allowing-road-through-alaskas-izembek-wilderness/.

187. Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 381 F. Supp. 3d 1127, 1144 (D. Alaska 2019).

188. *See* Scott Streater, *DOJ Challenges Ruling on Alaska's Izembek Refuge*, GREENWIRE (May 28, 2019, 1:07 PM), https://subscriber.politicopro.com/article/eenews/2019/05/28/doj-challenges-ruling-on-alaskas-izembek-refuge-028551.

189. The Administration signed the exchange quietly, with little notice. *See* Scott Streater, *Bernhardt Secretly Signs Land Swap for Alaska Refuge Road*, E&E NEWS PM (July 24, 2019, 4:25 PM), https://subscriber.politicopro.com/article/eenews/2019/07/24/bernhardt-secretly-signs-land-swap-for-alaska-refuge-road-026364.

190. Friends of Alaska Nat'l Wildlife Refuges v. Bernhardt, 463 F. Supp. 3d 1011 (D. Alaska 2020). The government only approved the land exchange, and deferred consideration of the road and its environmental impacts for later.

191. Adam Federman, *'In the Dark of Night': Trump's Interior Chief Snuck Murkowski an Eleventh-Hour Win*, POLITICO (Mar. 19, 2021, 1:34 PM), https://www.politico.com/news/2021/03/19/lisa-murkowski-bernhardt-izembek-refuge-477196; Porter Wells, *Alaskan Land Exchange for Road Draws Suit After Setback*, BLOOMBERG L. NEWS (Aug. 7, 2019, 3:10 PM), https://www.bloomberglaw.com/bloomberglawnews/environment-and-energy/X4P0MEO000000?bna_news_filter=environment-and-energy#jcite.

192. *See* Scott Streater, *Izembek Road Proponents Press Interior on Fiercely Debated Project*, GREENWIRE (Dec. 23, 2021, 1:22 PM), https://subscriber.politicopro.com/article/eenews/2021/12/23/izembek-road-proponents-press-interior-on-fiercely-debated-project-284689.

193. *See* Scott Streater, *Haaland's Role in Izembek Appeal Irks 9th Circuit Judges*, E&E NEWS (Aug. 5, 2021, 1:29 PM), https://www.eenews.net/articles/haalands-role-in-izembek-appeal-irks-9th-circuit-judges/. The Ninth Circuit initially reversed the lower court's opinion and upheld the land exchange agreement—concluding that the agency enjoyed discretion to choose how best to balance the various considerations, Friends of Alaska Nat'l Wildlife Refuges v. Haaland, 29 F.4th 432, 443 (9th Cir. 2022), but the Ninth Circuit en banc vacated the panel decision and agreed to rehear the dispute. *Haaland*, 54 F.4th 608 (9th Cir. 2022) (Mem.).

deference or exploring whether the agency engaged in arbitrary and capricious behavior, or (2) by a resolution of whether the agency deviated from its management plan or regulations, or violated some other statute, principally NEPA or the ESA.[194] To be sure, the ESA does contain a prescription against jeopardizing a protected species or adversely modifying or destroying critical habitat, and it also prohibits the activities that may "take" a protected species.[195] But consider, for instance, FLPMA's mandate to avoid UUD.[196] When interpreting that language, a court held that BLM must protect against both forms of degradation.[197] But in doing so, the Interior Department's interpretation of FLPMA's mandate—that is, what constitutes UUD—would be entitled to *Chevron* deference.[198] The exercise of that deference can then occur in the context of a NEPA document, where decisions about what threshold might trigger UUD "are afforded broad discretion."[199] So long as either the agency's record of decision or its NEPA

194. *E.g.*, Ctr. for Biological Diversity v. U.S. Dep't of Interior, 623 F.3d 633, 641 (9th Cir. 2010) (FLPMA compliance reviewed under the APA standard); All. for the Wild Rockies v. Marten, No. CV-20-156-M-DLC, 2021 WL 4551496, at *5 (D. Mont. Oct. 5, 2021) (remanded for development of a better administrative record to assess whether project violates the plan); Hunters v. Marten, 470 F. Supp. 3d 1151 (D. Mont. 2020) (holding Forest Service decision for reducing fuels and creating fire breaks arbitrary and capricious). "Although the Forest Service has discretion to interpret the Forest Plan, this deference does not extend to decisions that the agency has made without explanation or analysis." WildEarth Guardians v. Jeffries, 370 F. Supp. 3d 1208, 1237 (D. Or. 2019) (citation omitted); *cf.* All. for Wild Rockies v. Higgins, 535 F. Supp. 3d 957, 979 (D. Idaho 2021) (violated the Healthy Forest Restoration Act by not using the definition of wildland-urban interface). The Supreme Court's narrowing of *Chevron* seems unlikely to cabin land managing agency's discretion. *Cf.* West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587 (2022).

195. 16 U.S.C. §§ 1536, 1538.

196. 43 U.S.C. § 1732(b).

197. *See* Mineral Pol'y Ctr. v. Norton, 292 F. Supp. 2d 30, 41 (D.D.C. 2003).

198. *Id.* at 45.

199. Biodiversity Conservation All. v. Bureau of Land Mgmt., No. 09-CV-08-J, 2010 WL 3209444, at *13 (D. Wyo. June 10, 2010); *see also* Or. Nat. Desert Ass'n v. Gammon, No. 06-523-HO, 2007 WL 9809179, at *3 (D. Or. June 28, 2007) (broad discretion). The D.C. Circuit noted that UUD is context-specific, and it generally will be averted when it is considered along with the multiple use and sustained yield mandate. Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 76–77 (D.C. Cir. 2011) (effectively looking at whether agency was arbitrary or capricious in applying multiple use and sustained yield mandate, and thus complying with obligation to prevent UUD); *see also* S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior, 588 F.3d 718, 724–25 (9th Cir. 2009) (finding that BLM did not act arbitrarily or capriciously and as such did not violate UUD); Quechan Tribe of the Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior, 927 F. Supp. 2d 921, 940 (S.D. Cal. 2013) (finding that BLM did not act arbitrarily or capriciously in concluding no violation of UUD); *cf.* Or. Nat. Desert Ass'n v. Shuford, No. 06-242-AA, 2007 WL 1695162, at *11 (D. Or. June 8, 2007) (suggesting that to allege a violation of standard must establish that BLM did not adequately analyze resource impact); Soda Mountain Wilderness Council v. Norton, 424 F. Supp. 2d 1241, 1270–71 (E.D. Cal. 2006) (finding that agency needs to address UUD in NEPA document). Conversely, however, the UUD standard may support an agency decision, even if the governing plan may otherwise suggest that the activity is permitted. *See* Utah Shared Access All. v. Carpenter, 463 F.3d 1125, 1135–36 (10th Cir. 2006) (upholding closing off ORV access when allowed under the plan).

document adequately analyzes UUD and explains why any UUD can be avoided by mitigation measures, a court will "routinely uphold" such a decision.[200] Moreover, further constraining the judicial check against allowing a violation of the UUD standard, or other standards, is the Court's admonition in *Norton v. Southern Utah Wilderness Alliance*.[201] There, the Court held that, under APA § 706(1), which allows a court to "compel agency action unlawfully withheld or unreasonably delayed,"[202] a court can only exercise its power if the agency has "failed to take a *discrete* agency action that it is *required to take*."[203] That means that some courts might easily dispose of a UUD claim.[204]

For both national forest lands and BLM lands, specific actions must conform to the applicable management plan.[205] Many challenges, therefore, question whether an activity is consistent with the applicable land management plan.[206] But not only does an agency enjoy considerable deference when interpreting ambiguous language in one of its plans,[207] it also

200. Moapa Band of Paiutes v. U.S. Bureau of Land Mgmt., No. 2:10-CV-02021-KJD-LRL, 2011 WL 4738120, at *4 (D. Nev. Oct. 6, 2011); *see also* W. Org. of Res. Councils v. Bureau of Land Mgmt., 591 F. Supp. 2d 1206, 1226–27 (D. Wyo. 2008) (noting measures identified in final FEIS to defeat UUD claim).

201. 542 U.S. 55 (2004).

202. 5 U.S.C. § 706(1).

203. Norton v. S. Utah Wilderness All., 542 U.S. 55, 64 (2004) (emphasis in original). As the Ninth Circuit notes, "FLPMA is primarily procedural in nature, and it does not provide a private right of action" and is consequently governed by the APA. Gros Ventre Tribe v. United States, 469 F.3d 801, 814 (9th Cir. 2006). In *Hells Canyon Preservation Council v. United States Forest Service*, 593 F.3d 923 (9th Cir. 2010), the court concluded that there was no identifiable requirement to adjust the boundary of a wilderness area. *Id.* at 933. *Southern Utah Wilderness Alliance* also has been applied to restrict claims under the WSRA. *See* Idaho Rivers United v. U.S. Forest Serv., 857 F. Supp. 2d 1020, 1028 (D. Idaho 2012).

204. *See, e.g.*, Gardner v. U.S. Bureau of Land Mgmt., 638 F.3d 1217, 1222 (9th Cir. 2011) (finding that a broad mandate does not require specific restrictions, that there was no evidence of BLM violating UUD, and that BLM enjoys discretion in accordance with its multiple-use mandate).

205. *See* 16 U.S.C. § 1604(i); 43 U.S.C. § 1732(a); *see also* Great Old Broads for Wilderness v. Kimbell, 709 F.3d 836, 851 (9th Cir. 2013); Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1249 (9th Cir. 2005) ("[C]onsistent with each forest's overall management plan . . . ."); Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 962 (9th Cir. 2002) ("[A]ll management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with the Forest Act . . . .").

206. *See* Or. Nat. Desert Ass'n v. U.S. Forest Serv., 957 F.3d 1024, 1033–34 (9th Cir. 2020) (grazing authorization consistent with plan and no obligation to memorialize that consistency); Native Ecosystems Council v. Marten, 883 F.3d 783, 787 (9th Cir. 2018) (forest thinning project's compliance with plan); Se. Alaska Conservation Council v. U.S. Forest Serv., 443 F. Supp. 3d 995, 1004 (D. Alaska 2020) (challenge to compliance with Tongass Forest Plan). If an activity complies with standards in or developed under a plan, courts appear inclined to pronounce that the activity being approved complies with NFMA. Conservation Cong. v. U.S. Forest Serv., 409 F. Supp. 3d 861, 883 (E.D. Cal. 2019).

207. Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1099 (9th Cir. 2003) (suggesting even "substantial deference" on interpretation of whether the plan allowed allocating 100% of

enjoys some discretion in simply amending a plan to tinker with what activities will be allowed.[208] Or, if a court concludes that the agency violated NEPA, it can avoid addressing an organic act claim.[209] Organic act claims can also get lost in the shuffle. In *Stop B2H Coalition v. BLM*,[210] for instance, the plaintiffs marshaled a bevy of claims against BLM's decision to allow a 300-mile transmission line to cross BLM managed lands.[211] Among the claims was a challenge to the agency's compliance with FLPMA's detailed proscriptions for issuing rights-of-way.[212] Yet because the plaintiffs avoided arguing any specific violation of a FLPMA proscription, the court correspondingly obliged by declining to discuss compliance with the FLPMA in its opinion and merely concluded that its judgment about NEPA compliance dictated the outcome of the FLPMA claim.[213]

II. PLANNING'S PROGNOSIS?

If land management planning serves as the engine driving the future of our public lands, and if planning decisions are mostly within the discretion of the administering agency, subject only to an assurance that an agency must comply with NEPA and the ESA[214] and not act arbitrarily and capriciously, then four issues warrant resolution. In his critique of modern public land planning, Mark Squillace opens his analysis by observing how "[a]nyone who ventures into the esoteric world of public land use planning will likely discover much to criticize."[215] It is, in his words, "fundamentally broken."[216]

available forage to livestock); Hells Canyon All. v. U.S. Forest Serv., 227 F.3d 1170, 1180 (9th Cir. 2000) ("Because the plan language is susceptible to more than one reasonable interpretation, we defer to the agency's interpretation.").

208. *E.g.*, Native Ecosystems Council v. Erickson, 330 F. Supp. 3d 1218, 1245–46 (D. Mont. 2018) (amending plan to allow forest health project). The dubious decision in *Ohio Forestry Association, Inc. v. Sierra Club*, 523 U.S. 726 (1998), suggesting that a challenge to a forest plan may not be ripe, continues to reverberate. *Id.* at 739; *see, e.g.*, WildEarth Guardians v. U.S. Forest Serv., No. 2:20-CV-223-RMP, 2021 WL 4142668, at *10 (E.D. Wash. Sept. 10, 2021) (challenging failure of Forest Service to assess impacts to gray wolves from livestock grazing not ripe—albeit also employing standing analysis).

209. *E.g.*, Bark v. U.S. Forest Serv., 958 F.3d 865, 868 (9th Cir. 2020) (holding that NEPA violated and no need to reach the NFMA claims).

210. 552 F. Supp. 3d 1101 (D. Or. 2021).

211. *Id.* at 1113.

212. *Id.*

213. *Id.* at 1144.

214. Of course, other programs apply as well, such as the National Historic Preservation Act, but NEPA and the ESA are typically why a planning decision becomes imperiled.

215. Mark Squillace, *Rethinking Public Land Use Planning*, 43 HARV. ENV'T L. REV. 415, 416 (2019).

216. *Id.* at 475. Michael Blumm and Olivier Jamin chronicle the history surrounding land use planning and add that "controversy over federal land planning is not exactly breaking news." Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "the Public" in Public Land Law*, 48 ENV'T L. 311, 336–48 (2018).

First, he chronicles how land use planning is often scaled incorrectly. On the one hand, planning analyses must reflect the operation of ecosystems and the principles of landscape ecology, not bureaucratic or political boundaries.[217] I had the pleasure of serving on an interagency ecosystem management team during the Clinton Administration, when the notion of employing ecosystem management captured attention—and when departments began to appreciate some of the barriers, particularly agency structures and the lack of incentives, necessary to promote collective communication and collaboration across jurisdictional divides.[218] Nevertheless, the Florida everglades, the Chesapeake Bay, the Great Lakes, the Gulf Coast, and Northwest Timber harvesting all illustrated the urgency of expanding planning efforts—epitomized by the Northwest Forest Plan designed to protect the Northern Spotted Owl.[219] For decades now, Yellowstone and particularly its wildlife are no longer managed in isolation, but understood as part of the Greater Yellowstone Ecosystem.[220] Employing landscape level planning, consequently, has blossomed—somewhat. BLM, for instance, developed programmatic environmental impact statements ("EISs") that examine the development of uses of the public lands, such as for wind and solar, on a large landscape level.[221] To avoid a listing under the

217. Squillace, *supra* note 215, at 434–44. Robert Keiter too champions landscape-level planning along with adaptive management but would add, to protect species and ecological resiliency, the necessity of "expand[ing]" and "reconfigur[ing]" a "nature reserve system that promotes ecological resiliency by providing adequate sanctuary for threatened or displaced species." 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, 92–93, 100 (2018).

218. *See* COUNCIL ON ENV'T QUALITY, *Ecosystem Approach to Management and Biodiversity*, *in* ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1993) (discussing creation and purpose of the Interagency Ecosystem Management Task Force). Ecosystem management for public lands was not necessarily novel or innovative, however. Protecting ecosystems had been appreciated by ecologists for many decades; for instance, Lynton Caldwell wrote a 1970 article on ecosystem management. Lynton K. Caldwell, *The Ecosystem as a Criterion for Public Land Policy*, 10 NAT. RES. J. 203 (1970). And it is embedded in the ESA's purpose that the Act would "provide a means whereby the ecosystems upon which" species "depend may be conserved." 16 U.S.C. § 1531(b). *See generally* John Freemuth, *Ecosystem Management and Its Place in the National Park Service*, 74 DENV. L. REV. 697 (1997); Richard Haeuber, *Setting the Environmental Policy Agenda: The Case of Ecosystem Management*, 36 NAT. RES. J. 1 (1996).

219. *See generally* George Frampton, *Ecosystem Management in the Clinton Administration*, 7 DUKE ENV'T L. & POL'Y F. 39, 40–41 (1996).

220. *See* THE GREATER YELLOWSTONE ECOSYSTEM: REDEFINING AMERICA'S WILDERNESS HERITAGE 3–4 (Robert B. Keiter & Mark S. Boyce eds., 1991); Robert B. Keiter, *The Greater Yellowstone Ecosystem Revisited: Law, Science, and the Pursuit of Ecosystem Management in an Iconic Landscape*, 91 U. COLO. L. REV. 1, 4–7 (2020). Keiter's detailed account of the changes since the 1990s leads him to conclude that "[t]he GYE concept of the area as an intertwined ecological entity has attained recognition and legitimacy among much of the local populace and within the federal land management agencies." *Id.* at 175.

221. "BLM has produced two [programmatic EISs] addressing renewable energy development under NEPA, one each for wind and solar. The purpose of these PEISs is to complete the bulk of required environmental analysis for energy projects ahead of time so that each individual project

ESA of the sage grouse, both the FS and the BLM broke previous boundaries and amended several land use plans across the intermountain west.[222] It also attempted to engage in landscape level master plans for oil and gas leasing.[223] And it has employed rapid ecological assessments to examine ecoregions, albeit not fully utilizing them in their plans.[224]

On the other hand, Squillace favors layered planning, where agencies deploy an incremental analysis of the environmental effects, deferring consideration of some decisions to a "unit" level plan or a project level plan, where specific decisions, such as on oil and gas leasing or timber harvesting can be addressed more meaningfully.[225] He would have the upper layers "wider, signifying a much broader scale, but shallower, indicating less depth," while "the lower layers [would be] narrower but deeper."[226]

---

can tier to the PEIS." PETER DANIELS, HARV. L. SCH., ENV'T & ENERGY L. PROGRAM, SITING RENEWABLE ENERGY ON PUBLIC LANDS: EXISTING REGULATIONS AND RECOMMENDATIONS 6 (2021), http://eelp.law.harvard.edu/wp-content/uploads/PDaniels_EELP_Renewables-Siting_Final.pdf.

222. The plan changes were finalized in 2015 and then amended in 2019. *See Greater Sage-Grouse*, BUREAU LAND MGMT., https://www.blm.gov/programs/fish-and-wildlife/sage-grouse (last visited Sept. 11, 2022) (noting history); *see also* Notice of Intent to Amend Land Use Plans Regarding Greater Sage-Grouse Conservation and Prepare Associated Environmental Impact Statements, 86 Fed. Reg. 66331 (Nov. 22, 2021). *See generally* Cally Younger & Sam Eaton, *Lessons Learned from the Greater Sage-Grouse Land Use Planning Effort*, 53 IDAHO L. REV. 373 (2017).

223. *See* Squillace, *supra* note 215, at 435–36 (describing "master leasing plans"). The Obama Interior Department also adopted a landscape level mitigation policy, only to be abandoned during the Trump Administration. *See* Juliet Eilperin, *Interior Rescinds Climate, Conservation Policies Because They're "Inconsistent" with Trump's Energy Goals*, WASH. POST (Jan. 5, 2018, 6:00 AM), https://www.washingtonpost.com/news/energy-environment/wp/2018/01/05/interior-rescinds-climate-conservation-policies-because-theyre-inconsistent-with-trumps-energy-goals/.

224. *E.g.*, *Ecoregional Programs*, BUREAU LAND MGMT., https://www.blm.gov/programs/natural-resources/native-plant-communities/native-plant-and-seed-material-development/ecoregional-programs (last visited Sept. 11, 2022); *BLM Issues Rapid Ecoregional Assessments for the Northwest Plains and Middle Rockies*, BUREAU LAND MGMT. (Nov. 6, 2014), https://www.blm.gov/press-release/blm-issues-rapid-ecoregional-assessments-northwestern-plains-and-middle-rockies.

225. Squillace, *supra* note 215, at 435–37. He suggests this approach will streamline the planning process, possibly avoid some litigation, and allow "tiering" under NEPA, with the agency relying on the landscape level planning NEPA document when preparing a localized unit level NEPA document. *Id.* He favors three, possibly four, layered stages: a landscape-level (ecoregional) plan; a unit-level plan; an optional activity-level plan; and then a project-level plan. *Id.* at 438. Such a layered process would also need to navigate the somewhat confusing cases involving tiered decision-making under the ESA. *See* Cottonwood Env't L. Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1083 (9th Cir. 2015) (discussing reinitiating consultation for different actions); Wild Fish Conservancy v. Salazar, 628 F.3d 513, 521 (9th Cir. 2010) (examining what is the triggering action); Conner v. Burford, 848 F.2d 1441, 1452–53 (9th Cir. 1988) (discussing incremental consultations).

226. Squillace, *supra* note 215, at 438. He further posits that this layered approach would focus attention on unit-level decisions and allow for more meaningful public engagement. *Id.* at 461.

Second, Squillace and many others advocate for a more effective use of adaptive management principles.[227] Adaptive management requires monitoring resources with specific metrics that allow for an assessment of whether changing or modifying a previously decided course of action or decision is necessary.[228] Agencies, unfortunately, struggle with how best to incorporate adaptive management into their decision-making processes. One likely concern is that, if an agency uses specific metrics and monitors for those metrics—and then must modify its decision through a plan amendment—it creates a continuous level of uncertainty and possible necessity for plan amendments. And federal land use planning is notorious for how agencies allow plans to become stale, not updating them often enough. This became apparent when I served as an attorney at the Interior Department, and the recognition of stale plans was acknowledged by those around me. And while Congress often charges land managing agencies with an obligation to update their plans, enforcing that mandate is problematic.[229] Adaptive management would change that, and potentially require additional agency resources for developing scaled amendments. But adaptive management presents an even more mettlesome conundrum. Squillace aptly portrays how planning will only succeed if an agency monitors "the impacts that various activities and events have on land resources" and then adapts its "management of those resources to meet the goals and objectives laid out in their plans over time."[230] Fair enough, but that takes us to possibly two more fundamental, and what I consider more pressing, problems.

Third, as discussed earlier, agencies enjoy considerable discretion when deciding on a plan's "goals and objectives" capable of informing an adaptive management program.[231] A fundamental problem is that planning requires discernable management objectives, the achievement of which is complicated, as we have seen, by sufficiently broad language in organic acts to justify agency discretion in choosing those objectives.[232] Planning is also

227. *Id.* at 446, 449–50, 452; *see also* HOLLY DOREMUS ET AL., CTR. FOR PROGRESSIVE REFORM, MAKING GOOD USE OF ADAPTIVE MANAGEMENT 1 (Apr. 2011), http://progressivereform.net/articles/Adaptive_Management_1104.pdf; Robert L. Glicksman & Jarryd Page, *Adaptive Management and NEPA: How to Reconcile Predictive Assessment in the Face of Uncertainty with Natural Resource Management Flexibility and Success*, 46 HARV. ENV'T L. REV. 121, 185–95 (2022). *See generally* J.B. Ruhl & Robert Fischman, *Adaptive Management in the Courts*, 95 MINN. L. REV. 424 (2010).

228. Squillace, *supra* note 215, at 452–53.

229. *See, e.g.*, Biodiversity Assocs. v. U.S. Forest Serv., 226 F. Supp. 2d 1270, 1278, 1284–89, 1299–305, 1316 (D. Wyo. 2002) (noting that as of the disposition of this case "only 12 National Forests out of 127 had completed their Plan revisions" and assessing consequences of failure to comply with requirement for updating).

230. Squillace, *supra* note 215, at 452.

231. *See supra* Section I.E.

232. *See supra* Section I.E.

marred by the residue of bygone eras. Take, for instance, the Interior Department's approach to resource development. If an onshore BLM resource management plan identifies an area as authorizing tracts as available for oil and gas development, absent amending the plan those parcels must, according to some courts, be leased on a quarterly basis.[233] Then, of course, we have antiquated statutes that persist and affect planning decisions—such as the 1872 Mining Law,[234] or the diligent development requirements in the Federal Coal Leasing Amendments Act,[235] or the outmoded assumption for five-year plans under the Outer Continental Shelf Lands Act.[236]

Fourth, and lastly, an elemental structural weakness infects modern planning. Planning is a product of human decision-makers, and who sits around the decision-making table could be as important as anything else. Agency organic statutes and NEPA afford the public with an opportunity to comment during the planning process, and occasionally a state, a local community, or a Tribal Nation (particularly under the National Historic Preservation Act) might be singled out for a consultation obligation.[237] The question, however, is whether something more is necessary, illustrated by current dialogues surrounding Tribal co-management.

After all, our public lands in places like Yellowstone or the larger Greater Yellowstone Ecosystem may be "ours" from one perspective, as the notion of ownership is a slippery and malleable concept, aptly portrayed in the book *Mine* by James Heller and Jim Salzman,[238] but today they are only "ours" or owned in trust for us by the United States because they were *taken* from Indigenous inhabitants. Prior to colonization, Indigenous peoples naturally interacted with the landscape. Unfortunately, we sometimes too easily ignore how many groups actively engaged in activities that transformed the land, whether through farming or mining. Emma Marris suggests that: "Indigenous land management was in many places

233. 30 U.S.C. § 226(b)(1); 43 C.F.R. § 3120.1–2; *see, e.g.*, Louisiana v. Biden, 45 F.4th 841 (5th Cir. 2022); Louisiana v. Biden, No. 2:21-CV-00778, 2022 WL 3570933 (W.D. La. Aug. 18, 2022); S. Utah Wilderness All. v. Bernhardt, 512 F. Supp. 3d 13, 17 (D.D.C. 2021).

234. *See* Sam Kalen, *Mining Our Future Critical Minerals: Does Darkness Await Us?*, 51 ENV'T L. REP. 11006, 11008 (2021) (describing the problem with the Mining Law's use of a location system rather than a leasing system).

235. *See generally* Sam Kalen, *Where Do We Go From Here: The Federal Coal Leasing Amendments Act—Past, Present, and Future*, 98 W. VA. L. REV. 1023 (1996).

236. *See* Sam Kalen, *Cruise Control and Speed Bumps: Energy Policy and Limits for Outer Continental Shelf Leasing*, 7 ENV'T & ENERGY L. & POL'Y J. 155, 178–87 (2012); Michael LeVine & Andrew Hartsig, *Modernizing Management of Offshore Oil and Gas in Federal Waters*, 49 ENV'T L. REP. 10452, 10464–65 (2019).

237. *See supra* notes 118, 136, 142 and accompanying text; *cf. Seven Tribes Sign Preservation Agreements with the National Park Service*, NAT'L PARK SERV. (Nov. 24, 2021), https://www.nps.gov/orgs/1207/2021-thpo-agreements.htm.

238. *See generally* MICHAEL HELLER & JAMES SALZMAN, MINE: HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES (2021).

creating . . . 'natural' states: prescribed burns maintained prairies and grasslands; hunting determined populations of prey species; harvest and replanting shifted the ranges and abundances of some plant species; agriculture domesticated others."[239] In Yellowstone, Indigenous groups took advantage of the resources, including its mountains, rivers, lakes, and geysers; for instance, evidence shows that Indigenous groups have mined obsidian in Yellowstone for thousands of years.[240]

A. Tribal Nation Co-Management Arrangements

Today, consequently, conversations about managing public lands and resources typically promote not only more meaningful consultation with all affected Tribal Nations and Indigenous peoples but also meaningful co-management arrangements.[241] The Bureau of Indian Affairs describes consultation as a "government-to-government dialogue between official representatives of Tribes and Federal agencies,"[242] one that can be fostered, for instance, through listening sessions.[243] Listening sessions are essential.

239. EMMA MARRIS, WILD SOULS: FREEDOM AND FLOURISHING IN THE NON-HUMAN WORLD 63 (2021). Marris further suggests that the portrayal of Indigenous groups as having no impact on the landscape and as such were simply existing in a "virgin wilderness," "has been used around the world to deny Indigenous people rights to their lands." *Id.* at 64. Shephard Krech III attempts to explore how some Indigenous groups interacted with the landscape and resources, in SHEPARD KRECH III, THE ECOLOGICAL INDIAN: MYTH AND HISTORY (1999), while Adam R. Hodge chronicles the history of the Shoshones. ADAM R. HODGE, ECOLOGY AND ETHNOGENESIS: AN ENVIRONMENTAL HISTORY OF THE WIND RIVER SHOSHONES, 1000–1868 (2019).

240. DOUGLAS H. MACDONALD, BEFORE YELLOWSTONE: NATIVE AMERICAN ARCHAEOLOGY IN THE NATIONAL PARK 4, 14, 83 (2018); *see also* PAUL SCHULLERY, SEARCHING FOR YELLOWSTONE: ECOLOGY AND WONDER IN THE LAST WILDERNESS 15 (1997) (dating obsidian trade back to "more than 10,000 years"); ATLAS OF YELLOWSTONE 15–17 (W. Andrew Marcus et al. eds., 1st ed. 2012) (noting well organized trade between 1,800 and 2,200 years ago).

241. *See generally* Martin Nie, *The Use of Co-Management and Protected Land-Use Designations to Protect Tribal Cultural Resources and Reserved Treaty Rights on Federal Lands*, 48 NAT. RES. J. 585 (2008).

242. *What Is Tribal Consultation?*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS., https://www.bia.gov/service/tribal-consultations/what-tribal-consultation (last visited Jan. 26, 2023).

243. Following the passage of the Bipartisan Infrastructure Act, the Department of the Interior hosted a Nation to Nations consultation with Tribes. *See Interior Department to Host Tribal Consultations on Bipartisan Infrastructure Law*, U.S. DEP'T OF THE INTERIOR (Dec. 21, 2021), https://www.doi.gov/pressreleases/interior-department-host-tribal-consultations-bipartisan-infrastructure-law. Interior published a notice in the Federal Register, for instance, announcing a listening session with Tribal Nations on Climate Change. Tribal Listening Sessions on Climate Change and Discretionary Grants, 86 Fed. Reg. 55,632 (Oct. 6, 2021). The Biden Administration's Department of Energy, for example, held a listening session on the Department's Tribal Energy Programs. *Listening Session Provided Valuable Feedback on DOE's Tribal Energy Programs*, U.S. DEP'T ENERGY (June 3, 2021), https://www.energy.gov/lpo/articles/listening-session-provided-valuable-feedback-does-tribal-energy-programs. The Federal Energy Regulatory Commission ("FERC") posts on its website listening sessions with Tribal Nations. *OPP Listening Sessions: Tribal Governments*, FERC (Apr. 23, 2021), https://www.ferc.gov/news-events/events/opp-

They are just not sufficient. Although since 1970 we now respect Indian self-determination and elevate the importance of Tribal sovereignty, we are only inching beyond "listening sessions" to active Tribal engagement that respects that sovereignty in decision-making.[244] And even when agencies expand beyond listening sessions and engage in consultation, they may lack the cultural competency to do even that. As one Tribal leader explained during a listening session, when an agency contacted his Tribe, they lacked the understanding of who to identify and "communicate with. I think that's the most important thing. And then, to establish a formal communication and up the game plan. And then, on top if it have a cultural competency piece that's actually developed for those individuals who are going to reach out."[245] Consultations between sovereigns only work when they are consulted early in the agency's decision-making process, sovereign to sovereign, and confidentiality is respected—no different than when the federal family talks amongst itself.[246] The Cheyenne River Sioux Tribe, for instance, has identified seven elements of any meaningful consultation.[247]

listening-sessions-tribal-governments-03242021. The EPA held a listening session on understanding cumulative effects. J. Williams, *EPA ORD Tribal Listening Sessions on Cumulative Impacts 9/16 & 9/23*, TRIBAL LANDS ASSISTANCE CNTR. (Sept. 9, 2021), https://triballands.org/ord-tribal-listening-sessions-on-cumulative-impacts/.

During the Obama Administration, the White House Domestic Policy Council and the Office of Public Engagement held an August 31, 2009, listening session designed "to prepare the Obama Administration to address tribal consultation and the government-to-government relationship." WHITE HOUSE DOMESTIC POL'Y COUNCIL & OFF. OF PUB. ENGAGEMENT, WHITE HOUSE LISTENING SESSIONS WITH TRIBAL LEADERS ON STRENGTHENING GOVERNMENT-TO-GOVERNMENT COMMUNICATION AND CONSULTATION MEETING SUMMARY 1 (2009), https://www.ncai.org/attachments/Consultation_WEHUiDEqDdfhYbggfmGlOfAxEGSYgazoWGHUJFGvUPlfbLnOQCg_Summary%20of%20White%20House%20Listening%20Sessions%20on%20Tribal%20Consultation%20100709.pdf. The Trump Administration continued with listening sessions, as well. *E.g.*, *Interior Holds Listening Session with Tribal Partners on Reclaiming Native Communities*, U.S. DEP'T OF INTERIOR (June 13, 2019), https://www.doi.gov/pressreleases/interior-holds-listening-session-tribal-partners-reclaiming-native-communities.

244. Soon after taking office, President Biden issued a memorandum on strengthening Tribal consultation, bolstering the opportunity for meaningful and robust consultation and furthering sovereign-to-sovereign relationships. It talks about "including Tribal voices in policy deliberation." Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 26, 2021); *see also Fact Sheet: Building A New Era of Nation-to-Nation Engagement*, WHITE HOUSE (Nov. 15, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement/. It is too soon to speculate whether that "voice" will resonate loudly enough in actual decisions. *Id.*

245. David Greendeer, Legislator for Ho-Chunk Nation, Address at Tribal Council Listening Session, at 151–52 (Oct. 11, 2016), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-050614.pdf.

246. Fatima Dames, Vice Chairwomen for the Mashantucket Pequot Tribal Nation, Address at Tribal Council Listening Session, at 140 (Oct. 11, 2016), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-050614.pdf.

247. CHEYENNE RIVER SIOUX TRIBE, TRIBAL CONSULTATION COMMENT PERSPECTIVE (Oct. 17, 2016), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-055453.pdf

The sovereign-to-sovereign relationship elevates the role of Indigenous peoples and Tribal Nations to a status beyond being a stakeholder and to one commensurate with the Federal government. Here, it is important to appreciate that, unlike sovereign states, Tribal sovereignty enjoys even greater respect for two reasons. First, while the Supreme Court may have concluded that Tribal Nations are not synonymous with foreign nations,[248] today they are the equivalent of a Nation, not a subservient sovereign such as a state in a federalist system. And the Federal government owes Tribal Nations a special trust responsibility when managing "millions of acres of Federal lands and waters that were previously owned and managed by Indian Tribes."[249] That takes us to the second reason, that the lands being administered were wrested from the Tribal Nations as part of the country's sordid past of removing Indigenous populations from many of the areas today we call "our" public lands. Tribal Nations, therefore, are not merely another "stakeholder" or "special interest" in infrastructure permitting processes. Rather, Tribal Nations exercise jurisdiction over their retained lands and

(provide timely information; early consultation with Tribal Nations; consult with appropriate Tribal representatives; make every effort to meet with representative(s) at seat of Tribal government or in the territory; those who meet with representative(s) should have federal decisional authority; respond in writing to Tribal comments and concerns; and "[o]btain resolution of approval from the tribe that the United States has" satisfactorily met its consultation obligation and that the "tribe agrees with the United States' response to tribal concerns in each instance").

248. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831).

249. DEP'T OF THE INTERIOR & USDA, SECRETARIAL ORD. NO. 3403, JOINT SECRETARIAL ORDER ON FULFILLING THE TRUST RESPONSIBILITY TO INDIAN TRIBES IN THE STEWARDSHIP OF FEDERAL LANDS AND WATERS (Nov. 15, 2021), https://www.doi.gov/sites/doi.gov/files/elips/documents/so-3403-joint-secretarial-order-on-fulfilling-the-trust-responsibility-to-indian-tribes-in-the-stewardship-of-federal-lands-and-waters.pdf. This order comes on a cascade of earlier presidential and secretarial orders and memoranda. *E.g.*, DEP'T OF THE INTERIOR, SECRETARIAL ORD. NO. 3342, IDENTIFYING OPPORTUNITIES FOR COOPERATIVE AND COLLABORATIVE PARTNERSHIPS WITH FEDERALLY RECOGNIZED INDIAN TRIBES IN THE MANAGEMENT OF FEDERAL LANDS AND RESOURCES (Oct. 21, 2016), https://www.doi.gov/sites/doi.gov/files/uploads/so3342_partnerships.pdf; DEP'T OF INTERIOR & DEP'T OF COM., SECRETARIAL ORD. NO. 3206, AMERICAN INDIAN TRIBAL RIGHTS, FEDERAL-TRIBAL TRUST RESPONSIBILITIES, AND THE ENDANGERED SPECIES ACT (June 5, 1997), https://www.doi.gov/sites/doi.gov/files/elips/documents/3206_-american_indian_tribal_rights_federal-tribal_trust_responsibilities_and_the_endangered_species_act.pdf; DEP'T OF THE INTERIOR, SECRETARIAL ORD. NO. 3335, REAFFIRMATION OF THE FEDERAL TRUST RESPONSIBILITY TO FEDERALLY RECOGNIZED INDIAN TRIBES AND INDIVIDUAL INDIAN BENEFICIARIES (Aug. 20, 2014), https://www.doi.gov/sites/doi.gov/files/migrated/news/pressreleases/upload/Signed-SO-3335.pdf; DEP'T OF THE INTERIOR, SECRETARIAL ORD. NO. 3317, DEPARTMENT OF THE INTERIOR POLICY ON CONSULTATION WITH INDIAN TRIBES, (Dec. 1, 2011), https://www.doi.gov/sites/doi.gov/files/migrated/tribes/upload/SO-3317-Tribal-Consultation-Policy.pdf; Memorandum on Tribal Consultation, 74 Fed. Reg. 57,881 (Nov. 9, 2009); Exec. Order 13,175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67,249 (Nov. 9, 2000); Exec. Order 13,007, Indian Sacred Sites, 61 Fed. Reg. 26,771 (May 29, 1996); Memorandum on Government-to-Government Relations with Native American Tribal Governments, 59 Fed. Reg. 22,951 (May 4, 1994).

resources, both on and off the reservation. Federal permitting agencies nonetheless tend to treat Tribal Nations as members of the public, entitled to only limited information and the ability to submit comments rather than incorporating them into decision-making processes as non-Federal governmental entities. This is inappropriate and contrary to long-recognized Tribal sovereign rights.[250]

To be sure, this is changing, as, for instance, with the Biden Administration's acknowledgment of the importance of traditional knowledge.[251]

Co-management could occur in several ways. Several years ago, Martin Nie categorized two scenarios for Tribal co-management: "(1) cooperative management arrangements, and (2) protected land-use designations."[252] Tribal Nations could enter into conservation agreements tied to the exercise of their treaty rights; the government could protect cultural sites either through a planning process or under the Antiquities Act; or the government could agree to a land transaction—such as agreeing to a land into trust proposal or ceding lands to tribes.[253] These are not the only scenarios, however. For privately owned and operated hydroelectric projects, the idea of providing affected Tribal Nations either management authority over a federally licensed project or a share of the revenue stream has become one solution for addressing systemic issues between the project proponents and Tribal Nations.[254] When mining activities threatened to harm historic lands claimed by the Sandia Pueblo, Congress addressed the threat by establishing the T'uf Shur Bien Preservation Trust Area, inside the Cibola National Forest

250. COMMENTS OF THE SHOSHONE-BANNOCK TRIBES REGARDING CONSULTATION BY THE FEDERAL GOVERNMENT ON INFRASTRUCTURE PROJECTS 3 (Nov. 27, 2016), https://www.indianaffairs.gov/sites/bia.gov/files/assets/as-ia/raca/pdf/idc2-055641.pdf.

251. *See Fact Sheet: Building A New Era of Nation-to-Nation Engagement*, WHITE HOUSE (Nov. 15, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/15/fact-sheet-building-a-new-era-of-nation-to-nation-engagement/; Council on Environmental Quality ("CEQ"), *Guidance for the Federal Departments and Agencies on Indigenous Knowledge* (Nov. 30, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf; CEQ, *Implementation of Guidance for Federal Departments and Agencies on Indigenous Knowledge* (Nov. 30, 2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/IK-Guidance-Implementation-Memo.pdf.

252. Nie, *supra* note 241, at 586. In Secretarial Order No. 3342, *supra* note 249, Secretary Jewell included some examples of types of Tribal arrangements.

253. Grand Canyon National Park Enlargement Act of 1975, Pub. L. No. 93-620, 88 Stat. 2089 (transferring land to the Havasupai Indian Reservation, with caveats).

254. *E.g.*, *Warm Springs Tribes, PGE, and Interior Sign Agreement for the Pelton Round Butte Hydro Project*, U.S. DEP'T OF THE INTERIOR: INDIAN AFFS. (Apr. 12, 2000), https://www.bia.gov/as-ia/opa/online-press-release/warm-springs-tribes-pge-and-interior-sign-agreement-pelton-round. The Salish-Kootenai were the first to acquire a hydroelectric project. *See* Jack McNeel, *Salish-Kootenai Dam: First Tribally Owned Hydro-Electric Dam in U.S.*, ICT (Sept. 13, 2018), https://indiancountrytoday.com/archive/salish-kootenai-dam-first-tribally-owned-hydro-electric-dam-in-us.

and the Sandia Mountain Wilderness.[255] It afforded Pueblo members the right to continue to use identified lands along with some measure of authority over subsequent uses.[256] In her article outlining the possibility for co-management arrangements, Mary Ann King explores the benefits from joint management arrangements between Tribal Nations and the NPS through agreements under the 1994 Tribal Self-Governance Act.[257] Additionally, she offers instances where Tribal Nations have been afforded particular opportunities on public lands, including when from a pointed directive from Congress.[258]

Fostering co-management relationships has become a routine part of dialogues about managing scarce resources, whether water, wildlife, fisheries, or land. The Columbia River Inter-Tribal Fish Commission ("CRITFC"), for instance, plays a prominent role in coordinating and crafting fishery management decisions in the Columbia River Basin, serving as a voice for protecting treaty rights.[259] It is now widely regarded as "a leader in co-management of salmonid fisheries."[260] Tribal Nations in the Colorado River Basin are working assiduously to advance Indigenous peoples' role in managing the Basin's water resources.[261] Tribal Nations with treaty fishing

255. T'uf Shur Bien Preservation Trust Area, Pub. L. No. 108-7, 117 Stat. 279 (2003) (codified as amended at 16 U.S.C. § 539m-2); *see also* Rich Nathanson, *Sandia Mountains Land Swap Is Nearly Complete*, ALBUQUERQUE J. (May 30, 2014, 12:02 AM), https://www.abqjournal.com/408206/land-swap-nearly-done.html (noting the legislative history that led to a 2014 land swap in the Sandia Mountains).

256. The area is managed as part of the National Forest System, but subject to the specific provisions of the Trust Area legislation. 16 U.S.C. § 539m-2(b)(1). The original legislation required the Secretary to consult with the Pueblo at least twice a year about proposed new uses and gave the Pueblo an effective veto power over the proposed new use. T'uf Shur Bien Preservation Trust Area, 117 Stat. at 279.

257. Mary Ann King, *Co-Management or Contracting? Agreements Between Native American Tribes and the U.S. National Park Service Pursuant to the 1994 Tribal Self-Governance Act*, 31 HARV. ENV'T L. REV. 475 (2007).

258. *Id*. at 508–20. Though the Park Service has long regulated concessionaires' sale of merchandise in gift shops (including Native American art and jewelry), Tribal entities have yet to enjoy any preference or meaningful opportunity to participate in the concessions program, except for those in Alaska, where there have been contracts under the Indian Self-Determination and Education Assistance Act for managing some public lands. *E.g.*, *Alaska Tribes to Get Contract for Wildlife Refuge*, INDIANZ (Feb. 18, 2004), https://www.indianz.com/News/2004/000561.asp. An arrangement, however, can remedy some of the program's failure to promote Tribal participation. *E.g.*, *US Park Service, Tourism Group Partner to Highlight Tribes*, AP NEWS (Oct. 28, 2021), https://apnews.com/article/lifestyle-business-environment-and-nature-new-mexico-travel-f3ab21173d1e443ee1b70cabfff3149a.

259. *See The Founding of CRITFC*, CRITFC, https://critfc.org/about-us/critfcs-founding/ (last visited Dec. 13, 2022).

260. Jason Robison et al., *Indigenous Water Justice*, 22 LEWIS & CLARK L. REV. 841, 880 (2018); *see also* Elizabeth Ann Kronk Warner, *Tribal Treaty Rights: A Powerful Tool in Challenges to Energy Infrastructure*, 51 CONN. L. REV. 843, 869 (2019).

261. *See, e.g.*, *Keepers of the River*, TEN TRIBES P'SHIP, https://tentribespartnership.org (last visited Sept. 20, 2022); Jeremy P. Jacobs, *Tribes Seek Water-Management Role as Colorado River Shrivels*, E&E NEWS (Nov. 3, 2021, 01:12 PM), https://www.eenews.net/articles/tribes-seek-water-

rights occasionally enter into co-management fishery management plans with states.[262] Similar arrangements could surface with the management of bison in the Greater Yellowstone Ecosystem or as a consequence of Tribal hunting rights.[263] The Bears Ears Inter-Tribal Coalition was formed to protect the sacred lands; and while the original monument designation did not, as urged by some, "[g]rant Native Americans legally binding or even exclusive rights to manage the region's antiquities on federal land,"[264] it afforded Tribes an unexceptional seat at a federal advisory committee table.[265] It also endorsed a five member Bears Ears Commission, functioning as an advisory group providing guidance and recommendations.[266]

management-role-as-colorado-river-shrivels/; Debra Utacia Krol, *Tribes Take a Greater Role in Managing the Colorado River, Still Seek Water Rights*, ARIZ. REPUBLIC (Dec. 16, 2021, 9:21 PM), https://www.azcentral.com/story/news/local/arizona-environment/2021/12/16/tribes-take-greater-role-colorado-river-talks/8920004002/. *See generally* Jason Robison, Matthew McKinney & Daryl Vigil, *Community in the Colorado River Basin*, 57 IDAHO L. REV. 1 (2021); Jason Anthony Robison, *Indigenizing Grand Canyon*, 2021 UTAH L. REV. 101, 134, 140–41, 143 (noting importance of reconnecting Indigenous people with native homelands, and noting Tribal Nation cooperation language in the Grand Canyon Enlargement Act). Though progress seems likely, the Navajo Nation has been forced to litigate a breach of trust suit against the Interior Department to ensure that the Nation's unquantified water rights are protected during decisions affecting river management. Navajo Nation v. U.S. Dep't of Interior, 996 F.3d 623 (9th Cir. 2021), *amended and superseded by* 26 F.4th 794 (9th Cir. 2022), *cert. granted* 143 S. Ct. 398 (2022).

262. *See, e.g.*, *Salmon and Steelhead Co-Management*, WASH. DEP'T OF FISH & WILDLIFE, https://wdfw.wa.gov/fishing/tribal/co-management (last visited Sept. 28, 2022).

263. *See* Tara Righetti et al., *Unbecoming Adversaries: Natural Resources Federalism in Wyoming*, 21 WYO. L. REV. 289, 327 (2021). While I cannot delve too deeply here into the Interagency Bison Management Plan, the program for the introduction and management of Bison on the Wind River Reservation demonstrates how successful cooperation can promote wildlife restoration. *See* Olivia Weitz, *Yellowstone Bison Are Thriving—And Now, Some Are Restoring Herds On Tribal Reservations*, YELLOWSTONE PUB. RADIO (Mar. 31, 2022, 5:26 PM), https://www.ypradio.org/wildlife-outdoors/2022-03-31/282ellowstone-bison-are-thriving-and-now-some-are-restoring-herds-on-tribal-reservations.

264. PROP. & ENV'T RSCH. CTR. & SUTHERLAND INST., TRIBAL CO-MANAGEMENT OF THE BEARS EARS NATIONAL MONUMENT 2 (2017), https://www.perc.org/wp-content/uploads/2017/08/PERC_BearsEars_IssueBrief.pdf.

265. *Bears Ears National Monument Advisory Committee*, U.S. DEP'T OF THE INTERIOR, BUREAU LAND MGMT., https://www.blm.gov/get-involved/rac-near-you/282tah/benm-mac (last visited Sept. 28, 2022); *see* Robison et al., *supra* note 261, at 162–64. Tribal Nations, in certain circumstances, could be considered as inherently sharing intergovernmental responsibilities, and if so, they would be exempt from the requirements of the Federal Advisory Committee Act when they provide input to federal officials. *See* 41 C.F.R. § 102-3.40(g) (exempt when inherently sharing intergovernmental responsibilities). Regardless, on November 11, 2021, the Interior Department issued the Secretary's Tribal Advisory Committee Charter, designed to "seek consensus and provide a forum to discuss ways to enhance . . . intergovernmental relationship[s]." U.S. DEP'T OF THE INTERIOR, SECRETARY'S TRIBAL ADVISORY COMMITTEE CHARTER 1 (2021), https://www.doi.gov/sites/doi.gov/files/secretarys-tribal-advisory-committee-charter-11-16-2021.pdf.

266. Proclamation No. 9558, Establishment of the Bears Ears National Monument, 82 Fed. Reg. 1139, 1144 (Jan. 5, 2017) ("[A] Bears Ears Commission (Commission) is hereby established to provide guidance and recommendations on the development and implementation of management

B. Councils and Commissions

Moving beyond co-management, initiatives can include measures designed to cultivate an even broader shared sense of collaborative decision-making, involving not just sovereigns but an array of stakeholders: Succinctly, co-opting a host of stakeholders and getting their buy-in. Mathew McKinney aptly captures the allure of securing buy-in when he opines how "[c]ollaboration—perhaps better referred to as shared problem solving—is increasingly the forum of first resort for one simple reason—it works."[267] Several prominent examples include places where decision-making already demands some element of shared governance. Transboundary issues, for instance, gravitate toward some form of governance structure that includes entities with aspects of jurisdictional decision-making.[268] In the nineteenth century, the U.S. joined with Mexico on the Mexican-United States Boundary Commission, under the Treaty of Guadalupe Hidalgo, and both nations also adjudicated claims under the auspices of the U.S. and Mexican Claims Commission.[269] The United States is part of the International Boundary and Water Commission, first established in 1889.[270] It similarly is part of the International Joint Commission under the 1909 Boundary Waters Treaty between the United States and Canada, for projects affecting both

plans and on management of the monument."); *see* Robison et al., *supra* note 261, at 165–66. In his plea for collaboration, Robison explores whether cooperative agreements, under *NPCA v. Stanton*, 54 F. Supp. 2d 7 (D.D.C. 1999), might become an improper sub delegation of federal authority. Robison et al., *supra* note 261, at 168–81. For more on the *Stanton* decision, see Daniel Franz, *The Subdelegation Doctrine as a Legal Tool for Establishing Tribal Comanagement of Public Lands: Through the Lens of Bears Ears National Monument*, 32 COLO. NAT. RES., ENERGY & ENV'T L. REV. 1 (2021) (discussing the issue as whether the agency retains final review authority). It is beyond the scope of my exploration here, but the issue is considerably nuanced, because when commissions are formed, there could be some question of whether they are federal agencies subject to suit under the APA, and what laws or restraints are enforceable against such entities if they enjoy decision-making power. *See, e.g.*, Del. Riverkeeper Network v. Del. River Basin Comm'n, No. 1:21-cv-1108-NLH-AMD, 2021 WL 5630298, at *2 (D.N.J. Dec. 1, 2021) (noting that review was governed by the compact, not the APA).

267. Matthew McKinney, *Whither Public Land Participation in Federal Land Management? Replicating Homegrown Innovations in Shared Problem Solving*, 48 ENV'T L. REP. 10015, 10029 (2018). We should be cautious and recall how aspects of the county supremacy movement (when local officials rebelled against federal management of public lands) sought to impose coordination on public land management. *See* Michael C. Blumm & James A. Fraser, *"Coordinating" with the Federal Government: Assessing County Efforts to Control Decisionmaking on Public Lands*, 38 PUB. LAND & RES. L. REV. 1, 2 (2017).

268. *See* LESHY, *supra* note 163, at 486–87 (describing some intergovernmental arrangements).

269. Settlement of Mexican Claims Act of 1942, ch. 766, 56 Stat. 1058.

270. Convention Between the United States and Mexico, Water Boundary, Extending the Duration of the Convention of March 1, 1889, U.S.-Mex., Dec. 2, 1898, T.S. No. 241; Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., Feb. 3, 1944, T.S. No. 994.

nations' boundary waters.[271] Internally, numerous interstate compacts furnish—whether useful or not—models of shared governance for allocating water use of interstate waterways.[272] The Great Lakes–St. Lawrence River Basin Water Resources Council, for instance, consists of the governors (or their alternates) of the signatory states, each with voting power and subject to a simple majority for matters submitted to the Council.[273] Several interstate compacts, moreover, include commissions or councils, mirroring aspects of river and basin commissions.[274]

This journey through the various approaches toward managing public landscapes or basins illustrates that we have numerous models at our disposal for modernizing public land management. Which model is best may depend upon whether one is trying to solve a singular problem, such as with Tribal Nations and Indigenous peoples, or the broader concern with management principles in general. Change seems inevitable; it is simply when and how we approach the task.

III. CRAFTING A TWENTY-FIRST CENTURY VISIONARY LANDSCAPE

To posit that our current statutory frameworks for public land management are functioning sufficiently eludes explanation. Almost uniformly, public land aficionados lament how many of our laws reflect a bygone era, outmoded policies, or discredited assumptions.[275] Now that we

271. *See generally* Mark Squillace & Sandra Zellmer, *Managing Interjurisdictional Waters Under the Great Lakes Charter Annex*, 18 NAT. RES. & ENV'T 8 (2003); Noah D. Hall, *Toward a New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006). For the most part, the IJC and the Great Lakes Basin Commission do not typically exercise decisional authority, but instead serve as a resource (such as issuing reports) and a forum for research and collaboration. Out of state diversions, for instance, require unanimity among the governors, pursuant to the Water Resources Development Act. 42 U.S.C. § 1962d-20(b)(3).

272. Reed D. Benson, *Environmental Issues in the Allocation and Management of Western Interstate Rivers*, 24 IND. INT'L & COMPAR. L. REV. 183, 183–84 (2014).

273. *See Compact and Agreement: Great Lakes–St. Lawrence River Basin Sustainable Water Resources*, GREAT LAKES COMPACT COUNCIL, https://www.glslcompactcouncil.org/laws-and-procedures/compact-agreement/ (last visited Nov. 30, 2022). *See generally* Mark Squillace, *Rethinking the Great Lakes Compact*, 2006 MICH. ST. L. REV. 1347 (discussing its history and issues).

274. *See, e.g.*, Wayne Land & Min. Grp. LLC v. Del. River Basin Comm'n, 894 F.3d 509, 515–517 (3d Cir. 2018) (discussing the Delaware River Basin Commission under the Delaware River Basin Compact); *see also* Del. Riverkeeper Network v. Del. River Basin Comm'n, No. 1:21-cv-01108-NLH-AMD, 2021 WL 5630298, at *1 (D.N.J. Dec. 1, 2021) (same).

275. *See* WILKINSON, *supra* note 12 (describing Lords of Yesterday); JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1987); Robert B. Keiter & Matthew McKinney, *Public Land and Resources Law in the American West: Time for Another Comprehensive Revie*w*?*, 49 ENV'T. L. 1, 5 (2019).

are done mourning the death of stationarity,[276] it is no longer tenable to rely on historical trends to predict the future and determine how to manage a landscape or water resource, and yet those historical trends often remain woven into our models for decision-making.[277] So too, statutes such as NEPA or the ESA were crafted when many in the scientific community assumed that ecosystems are stable or exist in a state of equilibrium, absent human intervention, a notion long since rejected.[278] Climate change, moreover, is causing ecological transformations, or for the most part irreversible changes in landscapes, demanding that we embark on a "deep shift in how resource managers understand and approach decision-making."[279] The mantra of merely incorporating adaptive management into management planning reflects the unresolved assumption, as well, that we have some idea of a management objective.[280] Even something as benign—and beneficial—as allowing nonuse rights that afford private citizens the ability to compete in the marketplace and purchase the right to protect a resource from being "used" has yet to gain enough headway.[281] The continuing chorus of those advocating for change seems endless, with the chorus of voices offering their own sequences for how best to continue the conversation. Is it Tribal co-management? What about another Public Land Law Review Commission?

---

276. *See* Robin Kundis Craig, *"Stationarity Is Dead"—Long Live Transformation: Five Principles for Climate Change Adaptation Law*, 34 HARV. ENV'T L. REV. 9 (2010).

277. "The natural resource management community is currently confronting" a paradigm shifting "moment between an established and an emerging paradigm," moving away from managing toward some "'natural' or 'historical' baseline conditions." Gregor W. Schuurman et al., *Navigating Ecological Transformation: Resist-Accept-Direct as a Path to a New Resource Management Paradigm*, 72 BIOSCIENCE 16, 17 (2022).

278. *See* Tik Root, *The "Balance of Nature" Is An Enduring Concept. But It's Wrong*, NAT'L GEOGRAPHIC (July 26, 2019), https://www.nationalgeographic.com/environment/article/balance-of-nature-explained.

279. Katherine R. Clifford, Amanda E. Cravens & Corrine N. Knapp, *Responding to Ecological Transformation: Mental Models, External Constraints, and Manager Decision-Making*, 72 BIOSCIENCE 57, 57 (2022); *see* Gregor W. Schuurman et al., *Resist-Accept-Direct (RAD)—A Framework for the 21st-Century Natural Resource Manager*, NAT'L PARK SERV. (2020). These and other authors favor the resist-accept-direct ("RAD") approach toward management, abandoning the notion that historical conditions or baselines are viable objects, and instead deciding whether to resist change by attempting to stabilize an ecosystem, accept the changes to the ecosystem, or manage how those changes will unfold. *See* John W. Williams, *RAD: A Paradigm, Shifting*, 72 BIOSCIENCE 13 (2022).

280. Abigail J. Lynch et al., *RAD Adaptive Management for Transforming Ecosystems*, 72 BIOSCIENCE 45, 45 (2022) (placing adaptive management inside a RAD framework, because "ecosystem transformation poses some direct challenges to adaptive management's basic tenets—namely stationarity, characterizing uncertainty, and controllability"). The authors, however, note that even "[i]f management objectives are no longer feasible but the current RAD pathway is still considered the appropriate strategy, managers can still operate in" the general six step model for adaptive management—a RAD adaptive management approach. *Id.* at 46.

281. *See* JAN G. LAITOS, THE RIGHT OF NONUSE (2012); Bryan Leonard et al., *Allow "Nonuse Rights" to Conserve Natural Resources*, 373 SCIENCE 958, 958 (2021).

Should we just jump into a new federal statutory program instead? Is the solution a new statute, as framed by Robert Keiter?[282] Less dramatic, can we proceed incrementally with promoting regulatory or legislative changes?

Something should be done. And it ought to be transformative, not incremental. Incremental has us where we are today, with overcrowded parks that often appear more like outdoor museums rather than areas where visitors occasionally wander to experience nature's wonder. Forest fires are devasting national forest lands, while timber harvesting still animates aspects of forest planning.[283] Climate change is threatening recreational opportunities in the Colorado River Basin, while Joshua Tree National Park risks its eponym.[284] The 1872 Mining Law still allows free appropriation of mineral resources on the nation's open public lands, often threatening Sacred Sites and Indigenous people's ancestral or aboriginal lands.[285] Grazing continues on public lands, threatening in some places the landscape with little economic return to society.[286] And incessant fights about various forms of recreational use of public lands routinely sprinkle the legal landscape, whether snowmobiles or kayaks in Yellowstone,[287] jetboats in Hells Canyon,[288] motorized rafts in the

282. *See infra* note 303 and accompanying text.

283. *See* Marc Heller, *Forest Service Faces New Pressure to Boost Timber Harvests*, E&E NEWS (Oct. 4, 2021, 4:09 PM), https://www.abralliance.org/wp-content/uploads/2021/10/Forest-Service-faces-new-pressure-to-boost-timber-harvests-EE-News_20211004.pdf (that Service likely to reach only 60% of its 2021 goal of harvesting 4 billion board feet and thus projecting 3.4 billion board feet).

284. *See supra* notes 33, 35 and accompanying text.

285. *See* Kalen, *supra* note 234, at 11017.

286. *See generally* DEBRA L. DONAHUE, THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY (1999); Peter A. Appel & Christopher Barns, *Grazing in the National Wilderness Preservation System*, 53 IDAHO L. REV. 465 (2017); John David Janicek, *Climate Change Has Beef with Federal Cattle Grazing*, 11 WASH. J. ENV'T. L. & POL'Y 349 (2021); Joseph M. Feller, *Grazing Management on the Public Lands: Opening the Process to Public Participation*, 26 LAND & WATER L. REV. 571 (1991); Mark Squillace, *Grazing in Wilderness Areas*, 44 ENV'T L. 415 (2014). In 1997, for instance, Congress sought a study of grazing on open lands near Grand Teton National Park. Act of Nov. 13, 1997, Pub. L. No. 105-81, 111 Stat. 1537. A grazing plan even allowed the killing of up to seventy-two grizzly bears near the Greater Yellowstone Ecosystem, prompting an outcry and litigation. *See* Michael Doyle, *Greens: Grizzly Bears Pay Too High A Price in Grazing Plan*, GREENWIRE (July 8, 2022, 1:37 PM) https://subscriber.politicopro.com/article/eenews/2022/07/08/greens-grizzly-bears-pay-too-high-a-price-in-grazing-plan-00044677; *cf.* Michael C. Blumm, Kacey J. Hovden & Gregory A. Allen, *Federal Grazing Lands as "Conservation Lands" in the 30 by 30 Program*, 52 ENV'T L. REP. 10279 (2022) (offering an explanation for how to assess the health or suitability for grazing on public lands, and arguing for the non-impairment standard to govern choices for when to allow grazing and for those lands to count toward the 30/30 program).

287. *See, e.g.*, Yellowstone and Grand Teton Paddling Act, H.R. 974, 114th Cong. (2015); *see also* Charles Pezeshki, *River Paddling Protection Act Won't Hurt the Yellowstone Experience*, DENV. POST (Apr. 4, 2014, 3:58 AM), https://www.denverpost.com/2014/04/04/river-paddling-protection-act-wont-hurt-the-yellowstone-experience/.

288. *See supra* note 155 and accompanying text.

Grand Canyon,[289] e-bikes in the national parks,[290] or roads and trails populated by various on road and off-road vehicles.[291]

Federico Cheever aptly touted, as one solution, crafting effective mission statements, ones that appreciate how "[e]ffective 'new law'—legislative, administrative or judicial—must be grounded in an historical understanding of the original purposes of the agencies *and the evolution of those purposes over time*."[292] Simply echoing the original purposes of our public land laws ignores their historical context. John Freemuth posits that "[r]eaders familiar with public land history, and public land policy, know that public land law is often ambiguous, contradictory, and inconsistent."[293] The nineteenth century construct of promoting multiple use and sustainable yield has since become nothing short of a mantra that justifies shifting priorities embodied in land management plans that do not violate NEPA, the ESA, or the proscription against arbitrary or capacious behavior.[294]

Characteristically, the NPS Organic Act's dual mandate of enjoyment and preservation is nothing short of a blurry vision.[295] To be sure, Emerson,

289. *See supra* note 157 and accompanying text.

290. *See supra* note 153 and accompanying text.

291. David Havlick, for instance, suggests that we should reassess where roads are necessary and otherwise remove them, and only tolerate ORV where impacts are de minimis. DAVID G. HAVLICK, NO PLACE DISTANT: ROADS AND MOTORIZED RECREATION ON AMERICA'S PUBLIC LANDS 210–11 (2002).

292. Cheever, *supra* note 149, at 646 (emphasis added).

293. John Freemuth, *Ecosystem Management and Its Place in the National Park Service*, 74 DENV. L. REV. 697, 707 (1997).

294. *See supra* notes 41, 42, 51, 145, 194 and accompanying text. One observer laments that "[p]ublic lands will always be the targets of pressure from private interests and their political comrades-in-arms." STEPHEN NASH, GRAND CANYON FOR SALE: PUBLIC LANDS VERSUS PRIVATE INTERESTS IN THE ERA OF CLIMATE CHANGE 211 (2017).

295. Robin Winks's historical account of the dual mandate suggests that enjoyment and preservation were not considered contradictory mandates, with the overriding objective of preserving resources, animated by an anthropocentric desire to ensure that they would be available for future generations to enjoy. Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate"?*, 74 DENV. L. REV. 575 (1997). Secretary Lane's 1918 letter exudes the principal management objective that parks would be "maintained in absolutely unimpaired form for the use of future generations" with the second objective of affording a ground for the pleasure of the people, and thirdly always considering the national interest. Stephen T. Mather, *The Ideals and Policy of the National Park Service Particularly in Relation to Yosemite National Park*, *in* HANDBOOK OF YOSEMITE NATIONAL PARK 77, 78 (Ansel F. Hall ed., 1921); *see also* HORACE ALBRIGHT AS TOLD TO ROBERT CAHN, THE BIRTH OF THE NATIONAL PARK SERVICE: THE FOUNDING YEARS, 1913–33, at 69 (1985); ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS 345 (1970) (noting that Lane's letter is often considered as the early Magna Carta for the Park Service). According to Albright, while Frederick Law Olmsted, Jr., did not draft the entire organic act, he did write the dual mandate language, "well aware of the inherent conflicts between use and preservation, but the political reality was that the issue could not be settled in an 'organic act because Congress would never close off enormous chunks of land." ALBRIGHT, *supra*, at 35. The junior Olmsted's language is often considered as a tribute to his father's 1865 Yosemite report. ROBERT O. BINNEWIES, YOUR YOSEMITE: A THREATENED PUBLIC TREASURE 156 (2015).

Thoreau, and Muir preferred the solitude of nature, keeping public lands as pristine as possible.[296] But others envisioned parks as manicured escapes where visitors could travel easily through newly built roads and trails and experience nature. After all, the early years of Yosemite and Yellowstone reflect a yearning to commodify the national parks: Build more roads, allow a host of concessionaires, and do what else was necessary to attract as many visitors as possible.[297] Echoing the mantra of conservationists such as Gifford Pinchot, the Park Service's first Director Stephen T. Mather agreed that "[i]n the administration of the parks the greatest good to the greatest number is always the most important factor determining the policy of the Service."[298] Since roughly shortly after the 1960s NPS Mission 66 program, the Service has shifted its focus away from elevating enjoyment and toward instead prioritizing preservation.[299]

296. *See generally* JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS (1980).

297. *See* DENNIS DRABELLE, THE POWER OF SCENERY: FREDERICK LAW OLMSTED AND THE ORIGIN OF NATIONAL PARKS 106–13 (2021) (describing the early concessionaires at Yosemite and why they prompted a desire to protect the area as a national park, and even Muir's ally was the owner of the Southern Pacific Railroad). Twentieth century conservationists often sought to prevent private, monopolistic, control over the nation's natural resources, and then later scientific management of those resources. *See* J. Leonard Bates, *Fulfilling American Democracy: The Conservation Movement, 1907 to 1921*, 44 MISS. VALLEY HIST. REV. 29, 29–30 (1957).

298. Mather, *supra* note 295, at 80. In the 1911 proceedings about the national parks, Secretary Fisher identified as his first principal concern the urgency of getting tourists into the parks. Walter L. Fisher, U.S. Sec'y of the Interior, Introductory Remarks at the Evening Session (Sept. 11, 1911), *in* DEP'T OF THE INTERIOR, PROCEEDINGS OF THE NATIONAL PARK CONFERENCE HELD AT THE YELLOWSTONE NATIONAL PARK SEPTEMBER 11 AND 12, 1911, at 3 (1912). During the 1915 park conference proceedings, Mather urged that "[t]he parks must be, of course, much better known that they are to-day if they are going to be the true playgrounds of the people that we want them to be." Stephen T. Mather, Assistant to the U.S. Sec'y of the Interior, Remarks at the Morning Session (Mar. 11, 1915), *in* DEP'T OF THE INTERIOR, PROCEEDINGS OF THE NATIONAL PARK CONFERENCE HELD AT BERKELEY, CALIFORNIA MARCH 11, 12, AND 13, at 11 (1915). In a 1916 report to the Secretary, Mather relayed how the Secretary had requested him "to make every effort to provide accommodations in the national parks for all classes of visitors, and to give as much attention to the needs of the tourist with a small income as to those of the wealthy visitor accustomed to luxury," noting further the "necessity for encouraging travel to the parks and approved plans for making better known their beauty and grandeur." STEPHEN T. MATHER, PROGRESS IN THE DEVELOPMENT OF THE NATIONAL PARKS 3 (1916).

A 1930s history of Yellowstone by the Special Assistant to the Secretary of the Interior emphasized the park's role as a pleasure (recreational) ground. LOUIS C. CRAMTON, EARLY HISTORY OF YELLOWSTONE NATIONAL PARK AND ITS RELATION TO NATIONAL PARK POLICIES 3 (1932).

299. NPS Mission 66 promoted roads and "resort-style development." DRABELLE, *supra* note 297, at 209, 213 (quoting RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS 46 (1997)); *see also* BINNEWIES, *supra* note 295, at 179–81; SHANKLAND, *supra* note 295, at 325–38. The Leopold Report by contrast promoted naturalness, albeit a fabricated one if necessary. *See* SELLARS, *supra* note 120, at 243–44. But since then, as Robert Keiter chronicles, the Service's policies and priorities have shifted toward science and preservation. ROBERT B. KEITER, TO CONSERVE UNIMPAIRED: THE EVOLUTION OF THE NATIONAL PARK IDEA (2013).

Yet, whether for parks, refuges, protected rivers, forests, or BLM lands, shifting political winds and personalities might continue to shape how public lands are managed. Even under the Wilderness Act, which enjoys a unique status in public land management for its focused vision,[300] one court found it lacked any basis for "weigh[ing] the relative public interest in access to local oysters with the public's interest in unencumbered wilderness."[301] And if discretion in management decisions remains the touchstone, then the solution must be to embrace visionary change. In short, public land management writ large requires a twenty-first century vision for how to manage our lands, particularly in the Anthropocene. Alyson Flournoy once suggested that perhaps we could use a National Environmental Legal Act.[302] Robert Keiter, on the other hand, proposes that we adopt a National Conservation Network Act.[303] Such an act would provide an "overlay" on existing land designations, and without altering any "legal mandates" it would promote landscape level planning and coordination and "direct the federal agencies to identify and define individual protected area complexes ('PACs') for conservation management purposes."[304] And Sarah Light offers a slightly distinctive perspective when describing how national parks are "big business" and why we ought to better appreciate the role that corporations do and "ought to play

300. *See generally* Peter A. Appel, *Planning for Adaptation and Restoration in Wilderness*, 6 GEO. WASH. J. ENERGY & ENV'T L. 52 (2015); John Copeland Nagle, *Wilderness Exceptions*, 44 ENV'T L. 373 (2014); Peter A. Appel, *Wilderness, the Courts, and the Effect of Politics on Judicial Decisionmaking*, 35 HARV. ENV'T L. REV. 275 (2011); Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENV'T L.J. 62 (2010).

301. Drakes Bay Oyster Co. v. Salazar, 921 F. Supp. 2d 972, 997 (N.D. Cal. 2013), *aff'd*, Drakes Bay Oyster Co. v. Jewell, 747 F.3d 1073, 1078 (9th Cir. 2014) ("Because Congress committed the substance of the Secretary's decision to his discretion, we cannot review 'the making of an informed judgment by the agency.'" (quoting Ness Inv. Corp. v. U.S. Dep't of Agric., Forest Serv., 512 F.2d 706, 715 (9th Cir. 1975))). In other instances, however, the Ninth Circuit declined to extend discretion to the Fish and Wildlife Service. *See* Wilderness Soc'y v. U.S. Fish & Wildlife Serv., 353 F.3d 1051 (9th Cir. 2003), *amended on reh'g*, 360 F.3d 1374 (Mem.) (9th Cir. 2004) (applying *Chevron* Step One to conclude that a commercial hatchery inside a wilderness violated the act); Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv., 629 F.3d 1024, 1037–40 (9th Cir. 2010) (requiring the Service make a necessity finding before allowing the creation of a structure in wilderness).

302. Alyson C. Flournoy, *The Case for the National Environmental Legacy Act*, *in* BEYOND ENVIRONMENTAL LAW: POLICY PROPOSALS FOR A BETTER ENVIRONMENTAL FUTURE 4 (Alyson C. Flournoy & David M. Driesen eds., 2010); Alyson C. Flournoy, *Protecting a Natural Resource Legacy While Promoting Resilience*: *Can It be Done?*, 87 NEB. L. REV. 1008, 1011 (2009).

303. Keiter, *supra* note 217, at 127.

304. *Id.* at 127–28. His proposal would explain the rationale for establishing a new national network for federally protected lands, create a new PAC designation, endorse existing management standards, promote coordinated landscape-scale planning and management among the responsible agencies, and enable non-federal lands devoted to nature conservation to affiliate with the network to expand the conservation effort. *Id.* at 128–29.

within" national parks.[305] The future for managing public lands, consequently, is open to a potpourri of possibilities.

Yet, a few animating principles ought to guide us. First, *all* public lands ought to be managed toward some predominant *vision*. That vision is not something we can easily identify. It will instead depend upon the outcome of a process for arriving at a clear and enforceable standard against which decisions can be measured, and meaningfully reviewed by the judiciary. The Biden Administration's focus on its 30/30 program and America the Beautiful is laudable but not sufficient as a vision.[306] It does not remove our multiple use and sustained yield mandates, nor the dual mandate of the NPS, nor our reliance on broken land use planning. Second, how decisions are made demands attention. Whether decision-making will embrace co-management or something else will again depend upon the outcome of a process, where land management planning problems can be examined and remedied, without a myopic lens often obscuring surrounding issues.

If, or hopefully when, we inch forward, I suggest we recognize the importance of *place* in public land management. Again, if we can arrive at a predominant and enforceable vision for all public land management, affording *place*—its people, particularly Indigenous peoples, along with acutely affected communities—a tailored role in the decision-making process could be transformative.

IV. PLACE

The legal status and future of any public landscape is shaped by its location, and its venue and surrounding environs in turn shape and influence the legal status and management of that landscape.[307] After all, unique features of a landscape might initially warrant special treatment: the waterfalls and sequoias of California's Yosemite;[308] the geysers in

305. Sarah E. Light, *National Parks, Incorporated*, 169 U. PA. L. REV. 33, 39, 43 (2020).

306. *See generally* Exec. Order No. 14008, Tackling the Climate Crisis at Home and Abroad, 86 Fed. Reg. 7619 (Feb. 1, 2021); U.S. DEP'T INTERIOR ET AL., CONSERVING AND RESTORING AMERICA THE BEAUTIFUL (2021).

307. As an apparent prelude to modern law and geography scholarship, Charles Wilkinson described the western landscape as a product of regionalism. *See* Charles F. Wilkinson, *The Law of the American West: A Critical Bibliography of the Nonlegal Sources*, 85 MICH. L. REV. 953 (1987); *see also* Charles F. Wilkinson, *Law and the American West: The Search for an Ethic of Place*, 59 U. COLO. L. REV. 401, 406 (1988); Robert L. Fischman, *Wringing Wonder From the Arid Landscape of Law*, 28 COLO. NAT. RES., ENERGY & ENV'T L. REV. 178, 180–81 (2017) (describing Professor Wilkinson's scholarship).

308. *See generally* BINNEWIES, *supra* note 295; *see also* HANDBOOK OF YOSEMITE NATIONAL PARK (Ansel F. Hall ed., 1st ed. 1921); DRABELLE, *supra* note 297, at 61–114.

Yellowstone;[309] the Grand Canyon along the Colorado River;[310] the towering peaks in Rocky Mountain National Park;[311] the wilderness in northern Alaska;[312] the California redwoods;[313] the limestone Carlsbad Caverns in New Mexico;[314] the sand dunes in San Luis Valley of Colorado;[315] or the sandstones, canyons, spires and mesas in the parks throughout Utah, to name just a few. Whether or how that special treatment unfolds is often a product of a coalescence of place-based influences. Yosemite was threatened with private exploitation. Railroad interests promoted Yellowstone as a tourist pleasure destination. The Grand Escalante National Monument occurred after Andelex Resources proposed mining coal under the Kaiparowits plateau.[316] More recently, Indigenous groups lobbied for protecting the sacred landscape of what is now Bears Ears National Monument;[317] and even residents in Wyoming secured protection for the scenic Hoback mountain range.[318] A place of cultural significance to Indigenous peoples might portend the necessity of working toward repatriation of that land to its original inhabitants.[319] We recently witnessed how that occurred with the return of a California redwood forest to a group of Tribal Nations.[320] Or, as discussed earlier, it might favor affording Indigenous people with a connection to the

309. *See* DRABELLE, *supra* note 297, at 115–65; Kalen, *supra* note 2, at 219.

310. *See generally* Byron E. Pearson, "*These Dismal Abysses": An Environmental History of Grand Canyon National Park*, 60 J. ARIZ. HIST. 395 (2019); Jason Anthony Robison, *Grand Canyon as Legal Creation*, 60 J. ARIZ. HIST. 557 (2019).

311. *See generally* JERRY J. FRANK, MAKING ROCKY MOUNTAIN NATIONAL PARK: THE ENVIRONMENTAL HISTORY OF AN AMERICAN TREASURE (2013).

312. *See generally* ROGER KAYE, LAST GREAT WILDERNESS: THE CAMPAIGN TO ESTABLISH THE ARCTIC NATIONAL WILDLIFE REFUGE (2006).

313. *See generally* SUSAN R. SCHREPFER, THE FIGHT TO SAVE THE REDWOODS: A HISTORY OF ENVIRONMENTAL REFORM, 1917–1978 (1983).

314. *See* CANDACE CRANE, CARLSBAD CAVERNS NATIONAL PARK: WORLDS OF WONDER (2000).

315. *See generally* MICHAEL M. GEARY, SEA OF SAND: A HISTORY OF GREAT SAND DUNES NATIONAL PARK AND PRESERVE (2016).

316. *See* James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 506 (1999) ("[I]n the case of the Kairparowits, the [Clinton] Administration could point to a reason for the designation: Andalex, a Dutch-owned company, had federal coal leases . . . .").

317. *See supra* notes 264–266 and accompanying text.

318. *See infra* notes 339–341 and accompanying text.

319. *See, e.g.*, *Minnesota Tribe to Get 28,000 Acres Back*, AP NEWS (June 9, 2022), https://apnews.com/article/politics-minnesota-climate-and-environment-business-11d28488a36feeefbf944c3a181384af; Zoe Sottile, *Native American Tribe Gets Its Land Back After Being Displaced Nearly 400 Years Ago*, CNN (Aug. 8, 2022, 11:37 AM), https://www.cnn.com/2022/04/02/us/sacred-land-rappahannock-tribe-trnd/index.html.

320. Brian Melley, *California Redwood Forest to be Returned to Tribal Group*, L.A. TIMES, (Jan. 25, 2022, 1:17 PM), https://www.latimes.com/california/story/2022-01-25/california-redwood-forest-returned-native-tribal-group.

landscape a role in its management.[321] In short, as I explain in this section, place and its environs—including its people—matter.

A. Place Matters

Washington, D.C., is characterized by its unique relationship to the federal government. The government's presence helps sustain the city and its ever-growing environs, and in turn the environs help shape the operation of the government. It is an iterative process and cycle. If Congress became geographically distant from the White House, the interaction and ability (perhaps as bad as it is today) to communicate in person and strive toward solutions would only worsen. Executive agency employees too need to be able to communicate—not just over Zoom, but in person—to nurture relationships and a level of trust capable of fostering effective dialogues and positive action. Policy folks at the FWS must be able to saunter over to the policy makers at BLM and sort through the endless stream of thorny issues. They also must enjoy easy access to congressional staff when either testifying or providing informal advice about nascent policies or course corrections. West Wing employees must be accessible to the Interior Secretary and her staff if the President is being asked to designate a national monument. This, after all, is the subtle underbelly of Washington, D.C., depicted in TV shows like Aaron Sorkin's *West Wing*. I would add here that it includes the swarm of lobbyists that, whether we like it or not, help inform—as they attempt to sway—governmental actors. And it helps characterize the city—not just in the popular media but for many who live there.[322]

Just as with Washington, D.C., western communities are not only influenced by, but also influence, their neighboring public lands. As Robert Keiter and Matthew McKinney aptly observe, "[f]ederally owned lands and the lack of water have long shaped western state economies and regional growth patterns while also giving rise to a unique body of law designed to fit the region."[323] I would go a bit farther and suggest that communities and nearby public lands are often their own microcosms. These microcosms are dynamic as the demographics and economies of the west continue to shift, first from Indigenous peoples to western settlers, and more recently away

321. *See supra* notes 239–240 and accompanying text; *see also* Rob Hotakainen, *Tribes Push to Co-Manage Lands in Historic Hearing*, E&E NEWS (March 9, 2022, 7:09 AM) https://www.eenews.net/articles/tribes-push-to-co-manage-public-lands-in-historic-hearing/.

322. For a counter narrative how place (particularly the capital) may be troublesome, see David Fontana, *Federal Decentralization*, 104 VA. L. REV. 727 (2018); David Fontana, *Forgetting the Place of Politics*, HARV. L. REV. BLOG (Jan. 17, 2019) https://blog.harvardlawreview.org/forgetting-the-place-of-politics/.

323. Keiter & McKinney, *supra* note 275, at 3.

from resource extraction users to recreational and other users.[324] But, as microcosms, they define the de facto legal institution or institutions that often govern today's management of federally owned and managed places. Greg Cawley and John Freemuth note that, while public lands are owned and managed by the national government, "they are also places in which local communities have developed. In consequence, management decisions are as much about defining the character of those local communities as they are about defining land-use practices."[325] Sarah Krakoff, for instance, chronicles how institutions, whether political, social, cultural, or economic, helped shape the development of the management of the Grand Canyon.[326] Appreciating how local geography and social conditions shape legal institutions dates back to the historical jurisprudence of the late nineteenth and early twentieth century.[327]

Also, occasionally, locally-focused groups organize to promote collective participation in decision-making around a place.[328] Such groups are voluminous across the country. And, quite often, they are prominent in

---

324. *See generally* WILLIAM R. TRAVIS, NEW GEOGRAPHIES OF THE AMERICAN WEST: LAND USE AND THE CHANGING PATTERNS OF PLACE (2007).

325. John Freemuth & R. McGreggor Cawley, *Ecosystem Management: The Relationship Among Science, Land Managers and the Public*, 10 GEORGE WRIGHT F. 26, 31 (1993).

326. Sarah Krakoff, *Not Yet America's Best Idea: Law, Inequality, and Grand Canyon National Park*, 91 U. COLO. L. REV. 559, 561–62 (2020).

327. "Both on its German side . . . and on its English side . . . the historical school drove home . . . [how] law was intimately related to the social context . . . . Further, by showing the parallelism between social and legal change, they propounded before Darwin" how law is a social evolutionary process. JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW: LAW AS LOGIC, JUSTICE, AND SOCIAL CONTROL—A STUDY IN JURISPRUDENCE 399–400 (1946). These scholars posit that law is an evolving product of geographic and social conditions associated with nation states. *See* JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870–1970, at 22–29 (1990); DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 229–51 (1990). This focus on law and nation states can apply to localized development as well, as any student of the prior appropriation doctrine or the law surrounding mining claims in the west can recount how legal intuitions followed geography and customs, respectively. *See* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST 20–21 (1992).

328. Sometimes Congress has allowed local groups to experiment with management. Perhaps most often discussed is the Quincy Library Group. And another is the Valles Caldera Preservation Act, which established a trust to manage the Valles Caldera National Preserve. The lands, while they would be subject to a multiple use and sustained yield mandate, presumably would become self-sufficient under a semi-private/public partnership. *See* Melinda Harm Benson, *Shifting Public Land Paradigms: Lessons from the Valles Caldera National Preserve*, 34 VA. ENV'T L.J. 1, 2 (2016) [hereinafter Benson, *Shifting Public Land Paradigms*]. Melinda Benson suggests that the Preserve "engaged in a management paradigm that resulted in many lessons that can guide its management for years to come," principally how to approach science and adaptive management. *Id.* at 46–47; *see also* Melinda Harm Benson, *Grazing 2.0: The Valles Caldera National Preserve*, 53 IDAHO L. REV. 347, 365 (2017). The experiment ended in 2014, largely unsuccessful but illustrating the possible efficacy of using a collaborative management process. Benson, *Shifting Public Land Paradigms*, *supra*, at 4.

highly visible gateway communities, or areas adjacent to or near highly trafficked public lands. The Grand Teton National Park Foundation in Jackson Hole provides a forum for initiatives focused on Grand Teton National Park.[329] Both the Southern Utah Wilderness Alliance and the Grand Canyon Trust notably engage with public land decision-making in the desert southwest.[330] Local initiatives also form to explore a targeted agenda, such as the Yellowstone to Yukon Initiative[331] or the—albeit unsuccessful—Wyoming Public Lands Initiative that sought a negotiated solution to Wilderness Study Areas in Wyoming.[332]

A sub-national group, after all, might help shape what occurs on the nearby public lands. Appreciating the impact of decisions on the people who often use or surround a place was an idea floated by John Wesley Powell, who advocated for what he envisioned as watershed democracy, promoting irrigation districts that would influence the development western watersheds.[333] Though Powell's vision never materialized, irrigation districts did, of course, proliferate—just not in the manner articulated by Powell.[334] But in a few limited circumstances, governmental programs have recognized the acute relevance of local input. The Taylor Grazing Act, for instance, established grazing districts[335] and today we have Resource Advisory Councils.[336] FLPMA land use planning separately identifies the need for BLM to engage in land use planning in partnership with state, local, as well as Tribal Nations. And often it is localized influences that affect public land

329. *See generally Who We Are*, GRAND TETON NAT'L PARK FOUND., https://www.gtnpf.org/who-we-are/ (last visited Jan. 26, 2023).

330. *See generally* S. UTAH WILDERNESS ALL., https://suwa.org (last visited Jan. 26, 2023).

331. *See generally* YELLOWSTONE TO YUKON CONSERVATION INITIATIVE (Y2Y), https://y2y.net (last visited Jan. 26, 2023) (describing organization as dedicated to ecological health of region).

332. WYO. CNTY. COMM'RS ASS'N, WASHAKIE COUNTY PUBLIC LAND INITIATIVE (2016), https://www.wyo-wcca.org/files/4614/8165/0361/PowerPoint_Presentation_PUBLIC_LANDS.pdf.

333. *See generally* Mark Squillace, Travis Miller & Cody Phillips, *The Remarkable Legacy of John Wesley Powell*, *in* PIONEERS OF ENVIRONMENTAL LAW 23 (Jan G. Laitos & John Copeland Nagle eds., 2020).

334. *See* John Wesley Powell, *Institutions for the Arid Lands*, 40 CENTURY 111 (1890), *reprinted in* SEEING THINGS WHOLE: THE ESSENTIAL JOHN WESLEY POWELL (William deBuys ed., 2001). *See generally* VISION & PLACE: JOHN WESLEY POWELL AND REIMAGINING THE COLORADO RIVER BASIN (Jason Anthony Robison, Daniel McCool & Thomas Minckley eds. 2020).

335. Taylor Grazing Act, Pub. L. No. 73-482, § 1, 48 Stat. 1269, 1269 (1934) (codified as amended at 43 U.S.C. § 315) (creating "grazing districts" but BLM can issue leases outside of grazing districts).

336. *See Resource Advisory Councils*, BUREAU LAND MGMT., https://www.blm.gov/get-involved/resource-advisory-council (last visited Jan. 26, 2023); 43 C.F.R. § 1784.6-2 (2022). *See generally* Elizabeth Miller, *Local Advisory Councils Fading Under Trump's Bureau of Land Management*, BITTERROOT (Oct. 25, 2019), https://bitterrootmag.com/2019/10/25/local-advisory-councils-fading-under-trumps-bureau-of-land-management/.

choices. Problems surrounding the management of the Elk Refuge in Wyoming are apparent, and its situate near Jackson Hole as a tourist attraction renders management choices complex.[337] Also, those who would propose to use our public lands often appreciate the need for what we call a social license to operate; that is, working with the local and affected communities to secure some level of acceptance for proposed activities on nearby public lands.[338]

B. Place-Based Solutions—Grass Root Efforts?

These locally-supported efforts illustrate how buy-in from enough of the local community can help shape and potentially transform decisions about the management of nearby public lands. Not far from the spotted landscape of oil and gas lands populating the Jonah Field and the Pinedale Anticline in Sublette County near Jackson Hole, a wonderous part of the Wyoming Range referred to as the Hoback was threatened by potential oil and gas development. A grass roots effort, working collaboratively with ideologically divergent stakeholders, many of whom from the local community that otherwise supported drilling, ultimately crafted a solution that became the Wyoming Range Legacy Act—preserving the area and its accompanying fishery habitat.[339] Justin Farrell posits that drilling in the Hoback area crossed a moral boundary unacceptable to the local community with a strong attachment to the place.[340] He suggests that this effort to protect the Hoback as a place reflects a shared commitment to value its pristineness and available recreational opportunities rather than for its development potential.[341]

C. Placing Vision and Visioning Place

Vision and place must meld into a decision-making structure that dramatically transforms public land management. Three tenets ought to guide

337. *See* W. Watersheds Project v. Christiansen, No. 20-CV-0067, 2021 WL 5711793 (D. Wyo. Sept. 21, 2021); W. Watersheds Project v. Christiansen, 348 F. Supp. 3d 1204 (D. Wyo. 2018); W. Watersheds Project v. Tidwell, 306 F. Supp. 3d 350 (D.D.C. 2017); *see also* Mead Gruver, *Groups Want Wyo. Refuge to Phase Out Elk Feeding Sooner*, GREENWIRE (Feb. 4, 2020, 1:17 PM), https://subscriber.politicopro.com/article/eenews/1062262567; Angus M. Thuermer, Jr., *CWD Panel Won't Consider Closing Elk Feedgrounds*, WYOFILE (June 11, 2019), https://wyofile.com/cwd-panel-wont-consider-closing-elk-feedgrounds/. *See generally* BRUCE L. SMITH, WHERE ELK ROAM: CONSERVATION AND BIOPOLITICS OF OUR NATIONAL ELK HERD (2012).

338. *See* Temple Stoellinger, L. Steven Smutko & Jessica M. Western, *Collaboration Through NEPA: Achieving a Social License to Operate on Federal Public Lands*, 39 PUB. LAND & RES. L. REV. 203, 205 (2018).

339. *See generally* FLORENCE ROSE SHEPARD & SUSAN MARSH, SAVING WYOMING'S HOBACK: THE GRASSROOTS MOVEMENT THAT STOPPED NATURAL GAS DEVELOPMENT (2017).

340. *See* FARRELL, *supra* note 19, at 217–57.

341. *Id.*

this transformation. First, all lands managed by the Forest Service or an agency within the Interior Department should be governed by an overriding vision that no use of public lands can be allowed if it will dimmish the relevant resources of those lands for future generations. Second, public land decision-making must be more flexible, capable of protecting those resources rather than floundering at the altar of procedure.[342] We know developing a land management plan is a cumbersome, time-consuming, and costly process, and plan amendments that would address, for instance, landscape-level climate change effects, are equally challenging. Plans, therefore, cannot be presumed to guarantee that allowable activities in a plan *should* occur, only that they *may* occur—reversing how plans have been used in the context of the Mineral Leasing Act.[343] It also means that the planning process itself must be remedied, as Mark Squillace and others aptly note.[344]

And third, in remedying the planning process, we must appreciate that place-based management occurs de facto, and it ought to be acknowledged and incorporated into the planning process while simultaneously protected against. Here, we might consider taking a cue from cooperative federalism models in environmental law. Cooperative federalism allows states (and Tribal Nations) the opportunity for decision-making, provided that their actions do not jeopardize some standard or fall below a mandated floor for protection.[345] If we develop a comparable public land management vision—articulated in a federal statute for all public lands—that is enforceable and ensures against allowing any activities that might jeopardize the values of the resource, as articulated in that enforceable vision,[346] we could elevate the role of place-based decision-making for public land management. Take, for instance, the Vail Agenda's recommendation for assessing the visitor

342. For a description of how legal adaptative capacity to address climate change in land management decision-making has lagged, see generally Alejandro E. Camacho & Robert L. Glicksman, *Legal Adaptive Capacity: How Program Goals and Processes Shape Federal Land Adaptation to Climate Change*, 87 U. COLO. L. REV. 711 (2016).

343. *See supra* note 111.

344. *See supra* notes 225–230 and accompanying text.

345. *See generally* ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (2011); THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM (Kalyani Robbins & Morris I. Leibman eds., 2015); Robert L. Glicksman, *From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy*, 41 WAKE FOREST L. REV. 719 (2006); Robert L. Fischman, *Cooperative Federalism and Natural Resources Law*, 14 N.Y.U. ENV'T. L. J. 179 (2005).

346. After all, Congress articulated a policy (albeit not much of one) for all public lands in 1964 when it established a Public Land Law Review Commission to engage in a comprehensive review and a policy for the agencies to only dispose of lands when necessary for identified reasons. Act of Sept. 19, 1964, Pub. L. No. 88-606, 78 Stat. 982 (establishing Public Land Law Review Commission); Act of Sept. 19, 1964, Pub. L. No. 88-607, 78 Stat. 986 (for pending the Commission's recommendations); Act of Sept. 19, 1964, Pub. L. No. 88-608, 78 Stat. 988 (for limited temporal sale authority).

carrying capacity on a park-by-park basis.[347] That naturally would be accomplished at the local level, but the standard for assessing carrying capacity as opposed to the capacity itself would be governed by a nationally applicable and enforceable objective. Achieving that standard, though, must acknowledge that each land unit need not "be managed in precisely the same way."[348]

This is the type of paradigm shifting thinking worth pondering. The subtle influences of place, after all, shape the human, geographic, and resource landscape, and, eventually, the legal institutions and their response as well. Why not overtly allow that to flourish—but only to a point, where the enforceable vision is maintained. Precisely how this might occur, and the composition and management structure that would allow this to occur and yet provide sufficient assurances that no actions can be taken that would diminish the values and vision for our public lands, is well beyond the purpose of this Article. The goal here, instead, is to illustrate the efficacy of shifting our focus away from too narrowly tailored objections to current public land management and toward the appropriateness of paradigm shifting thinking.

Only hubris would allow any one of us to know how to structure a new paradigm, mining the nuances and traps, and working toward protecting all public lands while simultaneously reshaping the planning landscape. While I might favor establishing locally developed "managing groups" that would include Tribal Nations capable of working alongside the federal agencies in deciding what uses to allow—consistent with a fully developed overriding vision—it will take more than a village to develop that vision and fashion even such a group or an alternative. Most prominently, this occurred recently with the establishment of Bears Ears National Monument and the development of a co-management structure.[349] But a vision is only as

347. NAT'L PARK SERV. STEERING COMM., NATIONAL PARKS FOR THE 21ST CENTURY—THE VAIL AGENDA: REPORT AND RECOMMENDATIONS TO THE DIRECTOR OF THE NATIONAL PARK SERVICE 92 (1992).

348. *Id.* at 22.

349. *See* BUREAU OF LAND MGMT., INTER-GOVERNMENTAL COOPERATIVE AGREEMENT BETWEEN THE TRIBAL NATIONS WHOSE REPRESENTATIVES COMPRISE THE BEARS EARS COMMISSION, THE HOPI TRIBE, NAVAJO NATION, UTE MOUNTAIN UTE TRIBE, UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION, AND THE PUEBLO OF ZUNI, AND THE U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT AND THE U.S. DEPARTMENT OF AGRICULTURE, FOREST SERVICE FOR THE COOPERATIVE MANAGEMENT OF THE FEDERAL LANDS AND RESOURCES OF THE BEARS EARS NATIONAL MONUMENT (2022), https://www.blm.gov/sites/blm.gov/files/docs/2022-06/BearsEarsNationalMonumentInter-GovernmentalAgreement2022.pdf. Among other things, the plan calls for cooperatively developing a management and travel plan, working cooperatively in program development, and infusing Indigenous knowledge and information sharing, along with coordinating, consulting, and regularly engaging "on resource management priorities." *Id.* at 3. *See generally supra* notes 264–266 and accompanying text.

efficacious as its enforceability. There must be meaningful judicial review, therefore, capable of protecting that vision, rather than just ensuring against arbitrary and capricious behavior. It will require bold action, with a tent large enough to assemble enough voices capable of crafting a new paradigm ready to meet the challenges today and into the future.

D. Moving Toward Visionary Landscapes

There are, in Martin Nie's words, "many ways to proceed" with "public land policy reform."[350] To be sure, I am advancing a complex, difficult, and radical change in how we approach federal land management. Some critics of current public land management understandably respond that, regardless of the efficacy of reforming public land management, radicalism is unachievable. I dare not deny that agency entrenchment tilts strongly toward inertia of the status quo, simply deviating within existing boundaries from administration to administration. I also cannot ignore how our existing overlapping agency jurisdictional boundaries provide a check and balance against inimical behavior—and sometimes environmentally destructive action itself. The last agency reorganization was for Homeland Security,[351] but that is a far easier task than what happened with the Department of Energy[352] or recommendations from the Ash Council.[353] Congress' entrenched committee structure further makes change seemingly unattainable, which is why change is unlikely to occur from a congressionally initiated process.

We have three obvious options, however, if we want transformative changes.[354] First, those inside and outside the government could advocate for change until enough voices overwhelm the political branches and cause them to react. Second, Congress could convene a fifth commission to examine and offer recommendations on changes to the administration of the public lands.[355] Finally, there could be an informal process, either initiated by

350. MARTIN NIE, THE GOVERNANCE OF WESTERN PUBLIC LANDS: MAPPING ITS PRESENT AND FUTURE 246 (2008). And, of course, he too furnishes ideas for reform, similarly noting that "[w]e must not be fooled about the obstacles inherent in each path. Talking about reform has proven much easier than actually doing it." *Id.* at 247. Focusing on place might diminish some of those obstacles by expanding the constituent beneficiaries.

351. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

352. Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565 (1977).

353. *See generally* PRESIDENT'S ADVISORY COUNCIL ON EXEC. ORG., A NEW REGULATORY FRAMEWORK: REPORT ON SELECTED INDEPENDENT REGULATORY AGENCIES (1971); Stephen Breyer, *The Ash Council's Report on the Independent Regulatory Agencies*, 2 BELL J. ECON. & MGMT. SCI. 628 (1971).

354. Robert Keiter and Matthew McKinney walk carefully through some of the options for reviewing public and management. Keiter & McKinney, *supra* note 275.

355. *See id.* at 46–51. The history of public lands counsels that a new commission is unlikely to garner enough support. *See generally* LESHY, *supra* note 163; *see also* ADAM M. SOWARDS,

Congress as with the initial dialogues about creating a national environmental policy, or from the Executive Branch. Weighing the likely success of any of these options is a political and strategic judgment. The choice, though, is less important than simply choosing. And not choosing has left us with a public land management paradigm ill-suited to address twenty-first century challenges.

CONCLUSION

Interior Secretary Bruce Babbitt wrote how:

> The fundamental issue facing public lands . . . is that we have yet to reach consensus as to their ultimate placement on the use spectrum from cities to wilderness—whether they are to be, like farmland, for resource uses such as livestock grazing and timber cutting, or are to be retained primarily for wilderness values.[356]

He is imploring the nation to accept some vision for these common landscapes. This requires accepting that today that vision is obscured by our reliance on process-oriented liberal democracy. It demands that we accept the tenets of modern ecology and articulate possible new visions and make a choice. That choice ought to be informed by a preservationist ideal of allowing public landscapes to escape any further long-term physical imprint from human activity, a legally enforceable non-impairment standard against which locally driven choices about uses might be measured.

MAKING AMERICA'S PUBLIC LANDS: THE CONTESTED HISTORY OF CONSERVATION ON FEDERAL LANDS (2022).

356. BRUCE BABBITT, CITIES IN THE WILDERNESS: A NEW VISION OF LAND USE IN AMERICA 178 (2005).