

THE FIFTIETH ANNIVERSARY OF THE WILDERNESS ACT: THE NEXT CHAPTER IN WILDERNESS DESIGNATION, POLITICS, AND MANAGEMENT

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In commemorating the fiftieth anniversary of the Wilderness Act, we examine what might be the next chapter in wilderness politics, designation, and management. In Parts I and II of the Article, we review the base of wilderness-eligible lands managed by the U.S. Forest Service and Bureau of Land Management. These two parts evaluate inventoried roadless areas, lands with wilderness characteristics, wilderness study areas, and recommended wilderness areas. These are the lands from which future wilderness and other protected land designations may come, and we analyze the interim management measures, planning processes, and politics that determine whether or not these lands will be protected in the future. In Part III, we examine three interrelated factors that will largely shape future wilderness politics: extreme political polarization, the use of collaboration, and increasing demands for the manipulation of wilderness areas. Congressional polarization may push wilderness politics onto different political pathways, including action by the executive branch aimed at protecting wilderness-eligible lands. Outside of Congress, collaboration will also continue to shape wilderness politics in the future, with questions focused on the scope and degree of compromise in wilderness legislation. There will also be increasing demands to control and manipulate wilderness in the future. These three factors will complicate the politics surrounding future wilderness designations and influence how these lands are managed in the future. Yet despite these challenges, the reasons for adding to the Wilderness Preservation System are stronger in 2014 than they were fifty years ago.

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INTRODUCTION

September 3rd, 2014 commemorates the fiftieth anniversary of the Wilderness Act of 1964. Instead of looking back at the history of this law, or celebrating its success, we look forward and survey what might be the next chapter in wilderness designation, politics, and management. The focus of the Article is on lands managed by the U.S. Forest Service (USFS) and Bureau of Land Management (BLM). We focus on these two agencies because, compared with the National Park Service and U.S. Fish and Wildlife Service, they have more areas suitable for wilderness designation, and we believe contentious future debates will center around lands within the purview of these agencies' management.

Which lands remain eligible for wilderness designation? How are they currently managed? And what factors will determine whether these lands will receive protection in the future? We answer these questions in the following pages and scout some of the rapids that lie ahead and some of the different routes that can be taken through them.

The Article first reviews the base of roadless and wilderness-eligible lands as managed by the USFS and BLM. These agency-focused sections of the Article examine several issues related to the management of inventoried roadless areas, lands with wilderness characteristics, wilderness study areas, and recommended wilderness areas. These are the lands from which future wilderness and other protected land designations may come, and their interim management will determine whether or not they are protected in some form in the future. Part III of the Article then discusses three interrelated factors that will shape wilderness politics in the future: extreme political polarization, the use of collaboration, and increasing demands for the manipulation of wilderness areas. We finish by making the case for additional wilderness and other protected land designations in the future. The reasons for adding to the National Wilderness Preservation System are stronger in 2014 than they were fifty years ago.

I. WILDERNESS-ELIGIBLE LANDS IN THE NATIONAL FOREST SYSTEM

A. Inventoried Roadless Areas

The Wilderness Act included a congressional mandate that the USFS inventory its land for possible wilderness designation.¹ This led to the USFS conducting its Roadless Area Review and Evaluation (RARE I) in the early 1970s. This evaluation was criticized by conservationists on both substantive and procedural grounds and eventually gave way to

1. 16 U.S.C. § 1132 (2000).

another study. The primary goal of RARE II, as it was called, was “to select appropriate roadless areas to help round out the National Forest System’s share of a quality National Wilderness Preservation System and, at the same time, maintain opportunities to get the fullest possible environmentally sound use from other multiple use resources and values.”² RARE II was completed in 1979 and its recommendations fell into three categories: (1) USFS roadless lands for wilderness designation by Congress; (2) areas that were to be further studied by the agency; and (3) areas that should be released to non-wilderness, multiple use management.³ RARE II was also quite controversial and conservationists complained that not enough roadless areas were recommended by the agency for wilderness designation.⁴

California sued the USFS over the adequacy of the RARE II EIS process, successfully arguing that before an inventoried area could be released for development, an EIS for each area would have to be prepared.⁵ There were also some questions about how to legislatively proceed with the USFS’s wilderness recommendations: should wilderness be designated in a piecemeal fashion like it had in the past or should these multiple areas be combined and voted on in one big omnibus bill?⁶ In retrospect, California’s EIS challenge made certain that there would be no tidy ending to the RARE II process: conservationists wanted more wilderness and industry wanted more non-wilderness multiple use management, and no one seemed too excited about a RARE III.⁷

This litigation notwithstanding, the RARE inventory set the stage for Congress to pass several wilderness laws covering particular states, such as the Washington State Wilderness Act.⁸ Between 1980 and 1990, Congress passed thirty statewide national forest

2. U.S. DEP’T OF AGRIC., FOREST SERVICE, FS-324, ROADLESS AREA REVIEW AND EVALUATION: SUMMARY FINAL ENVIRONMENTAL IMPACT REPORT, 2 (1979).

3. The final RARE II EIS (1979) called for wilderness designation of 624 areas totaling 15,008,838 acres (five million of these acres were on Alaska’s Tongass National Forest), allocation to nonwilderness of 1981 areas totaling 36,151,558 acres, and further planning for 314 areas totaling 10,796,508 acres. *Id.* at 3.

4. See H. Michael Anderson & Aliko Moncrief, *America’s Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 419-22 (1999).

5. *California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980), *aff’d in part, rev’d in part sub nom. California v. Block*, 690 F.2d 753 (9th Cir. 1982).

6. JOHN C. HENDREE & CHAD P. DAWSON, WILDERNESS MANAGEMENT: STEWARDSHIP AND PROTECTION OF RESOURCES AND VALUES 54 (3d ed. 2002).

7. See CRAIG W. ALLIN, THE POLITICS OF WILDERNESS PRESERVATION 160-66 (1982).

8. Act of July 3, 1984, 1984 Pub. L. No. 98-339, 98 Stat. 299.

laws with release language.⁹ Idaho and Montana are the only two states having large roadless areas but no statewide wilderness law with release language.¹⁰ The typical compromises in these laws concerned how much inventoried roadless land would be designated as wilderness, how the boundaries would be drawn, and how much inventoried land would be “released” to non-wilderness multiple use management—and whether these releases would permanently (so-called “hard release”) or temporarily (“soft release”) preclude wilderness designation in the future.¹¹

Roadless lands not designated as wilderness continued to cause controversy throughout the 1980s and 1990s. Since RARE II was completed in 1979, roads had been constructed in an estimated 2.8 million acres of inventoried “roadless lands,”¹² and as of 2001 approximately 34.3 million acres (out of 58.5 million acres of inventoried roadless areas) had prescriptions allowing for road construction and reconstruction.¹³ Some roadless areas remained roadless because of the economic costs associated with building roads in steep, rugged, challenging locations to access relatively marginal timber.¹⁴ Nonetheless, the future of these areas was precarious without some form of protection, and this helps explain the controversy and litigation focused on roadless areas after the untidy ending of RARE II.¹⁵

In 1999 the USFS began another inventory of its roadless lands, which culminated in its 2001 roadless rule.¹⁶ This decision protected 58.5 million acres—thirty-one percent of Forest Service land, and two percent of the total U.S. land base—from road building and most types of timber cutting.¹⁷ The roadless rule prohibits road (re)construction and timber

9. ROSS W. GORTE, CONG. RESEARCH SERV., R41649, WILDERNESS LAWS: STATUTORY PROVISIONS AND PROHIBITED AND PERMITTED USES 7 (2011).

10. ROSS W. GORTE, CONG. RESEARCH SERV., 93-280 ENR, WILDERNESS LEGISLATION: HISTORY OF RELEASE LANGUAGE, 1979-1992, at 8 (1993).

11. *Id.*

12. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1105 (9th Cir. 2002).

13. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001) [hereinafter Roadless Rule].

14. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado, 77 Fed. Reg. 39,576, 39,580 (July 3, 2012) (discussing why the topography of roadless areas limited their economic development).

15. See Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 688 (2004).

16. Roadless Rule, *supra* note 13, at 3246.

17. *Id.*

harvesting in inventoried roadless areas, except for stewardship purposes. Various exceptions and mitigations include when a road is needed: (1) to protect public health and safety (in cases of an imminent threat of flood, fire, or other catastrophic event); (2) to conduct a response action under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and (3) to access a reserved or outstanding right as provided by statute or treaty.¹⁸

Unless an exception applies, the roadless rule essentially restricts only two activities: road construction and commercial timber harvesting.¹⁹ These lands are not de facto wilderness areas. There are several activities permitted in roadless areas that are prohibited by the Wilderness Act, such as prohibitions on “commercial enterprise,” “motorized equipment or motorboats,” “form[s] of mechanical transport,” and any “structure or installation,” unless an exception applies.²⁰ The 2001 rule also does not prohibit the use of off-highway vehicles (OHVs) in Inventoried Roadless Areas (IRAs), and their use in these areas can be extensive. For example, within Montana’s six million acres of USFS roadless areas, motorized use is permitted on between three and four million.²¹ The roadless rule is also more permissive than the Wilderness Act when it comes to mining and accessing mineral resources. The rule grants exceptions when a “road is needed pursuant to reserved or outstanding rights, or as provided for by statute or treaty” and when needed “in conjunction with the continuation, extension, or renewal of a mineral lease on lands that are under lease [as of 2001] or for a new lease issued immediately upon expiration of an existing lease.”²²

The 2001 rule immediately faced a barrage of lawsuits from an assortment of states and other interests.²³ Alaska fought a prolonged legal battle over the rule, with the state once

18. U.S. DEP’T OF AGRIC., FOREST SERVICE, FOREST SERVICE ROADLESS AREA CONSERVATION: FINAL ENVIRONMENTAL IMPACT STATEMENT, VOL. 1 3-21 (2000) [hereinafter ROADLESS FEIS].

19. *Id.* at 3-21.

20. 16 U.S.C. § 1133(c) (2006). For a complete analysis of differences between the Roadless Rule and the Wilderness Act, see *Wyoming v. U.S. Dep’t of Agric.*, 661 F.3d 1209 (10th Cir. 2011).

21. Martin Nie & Michael Fiebig, *Managing the National Forests Through Place-Based Legislation, Society and Conservation Faculty Publications*, 37 *ECOLOGY L.Q.* 1, 8 (2010).

22. Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3272-73 (Jan. 12, 2001).

23. Kristina Alexander & Ross W. Gorte, Cong. Research Serv., RL30647, NATIONAL FOREST SYSTEM (NFS) ROADLESS AREA INITIATIVES (2011).

exempted from the rule,²⁴ but then covered by it once again.²⁵ The rule's application to the Tongass National Forest was particularly controversial because roughly 9.5 million acres of inventoried roadless areas are outside of federally designated wilderness in the Tongass, and because a substantial amount of timber harvesting on the forest was planned to take place in roadless areas of the Tongass.²⁶ The State of Alaska argued that the roadless rule violated multiple laws,²⁷ including those which specifically applied to Alaska, such as the Alaska National Interest Lands Conservation Act (ANILCA)²⁸ and the Tongass Timber Reform Act

24. Kirsten Ronholt, *Where the Wild Things Were: A Chance to Keep Alaska's Challenge of the Roadless Rule out of the Supreme Court*, 29 ALASKA L. REV. 237, 242 (2012).

25. *Organized Village of Kake v. Dep't of Agric.*, 776 F. Supp. 2d 960 (D. Alaska 2011); *Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d 30 (D.D.C. 2013).

26. *See* Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 413-415 (2006); *Organized Village of Kake v. Dep't of Agric.*, 776 F. Supp. 2d 960, 974.

27. *See* Complaint for Declaratory and Injunctive Relief, *Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d 30, (D. D.C. 2011).

28. ANILCA includes what is often referred to as the "no more" clause, which states:

This Act provides sufficient protection for the national interest in the scenic, natural, cultural and environmental values on the public lands in Alaska, and at the same time provides adequate opportunity for satisfaction of the economic and social needs of the State of Alaska and its people; accordingly, the designation and disposition of the public lands in Alaska pursuant to this Act are found to represent a proper balance between the reservation of national conservation system units and those public lands necessary and appropriate for more intensive use and disposition, and thus Congress believes that the need for future legislation designating new conservation system units, new national conservation areas, or new national recreation areas, has been obviated thereby.

Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, § 101(d), 94 Stat. 2371 (1980).

Often cited along with this provision is language prohibiting future executive branch action that withdraws more than 5,000 acres of public lands in the state unless approved by a joint resolution of Congress. *Id.* § 1326(a). ANILCA also states that "[n]o further studies of Federal lands in the State of Alaska for the single purpose of considering the establishment of a conservation system unit, national recreation area, national conservation area, or for related or similar purposes shall be conducted unless authorized by this Act or further Act of Congress." *Id.* § 1326(b). Alaska views ANILCA as providing some finality to protected lands in the state and thus views efforts to administratively protect more of the Tongass and Chugach National Forests as renegeing on a promise.

(TTRA).²⁹ At the time of this writing, the roadless rule's application to the Tongass is legally uncertain.³⁰

As illustrated in the Tongass case, the roadless rule was also subject to shifting executive branch priorities and powers.³¹ The Bush Administration sought a more state-based approach to resolving the roadless issue, and it proposed replacing the 2001 rule with a state petitioning process providing governors an opportunity to seek establishment of management requirements for roadless areas within their states.³² A variation of this state petitioning process, using the Administrative Procedures Act, was used successfully by Idaho and Colorado.³³

Conservationists, on the other hand, argue that the USFS has a statutory obligation, spelled out in NFMA, to review lands for possible wilderness and wild and scenic rivers designation. *See* Martin Nie, *Governing the Tongass: National Forest Conflict and Political Decision Making*, 36 ENVTL. L. 385, 402-03 (2006), referencing *Sierra Club v. Lyons*, Civil Case No. J00-0009-JKS, slip op. at 31 (D. Alaska 2001). Conservationists also argue that there are millions of acres of federal lands in Alaska qualifying as wilderness that have yet to be reviewed, as called for by Congress, and that several sections of ANILCA require additional wilderness reviews, including those for the national forests. Alaska National Interest Lands Conservation Act of 1980, Pub. L. No. 96-487, § 708, 94 Stat. 2371 (1980).

29. The TTRA requires the USFS to seek to meet demand for timber from the Tongass, a responsibility that is supposed to be balanced with other statutory obligations. Tongass Timber Reform Act, Pub. L. No. 101-626, § 101, 104 Stat. 4426 (1990). Alaska argued that providing sufficient timber volume to meet industry needs is not possible because of the amount of land set aside by the 2001 roadless rule. *See* Plaintiff's Complaint, *Alaska v. U.S. Dep't of Agric.*, 932 F. Supp. 2d 30 (D.D.C. 2011).

30. *See* *Organized Village of Kake v. U.S. Dep't of Agric.*, D.C. No. 1:09-cv-00023 JWS (9th Cir. 2014).

31. *See generally* Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687 (2004) (providing some history and political context of the 2001 rule).

32. Special Areas; State Petitions for Inventoried Roadless Area Management, 69 Fed. Reg. 42,636-42,637 (July 16, 2004).

33. The State Petitioning Rule was found in violation of the processes required by National Environmental Policy Act and the Endangered Species Act. *See* *California v. U.S. Dep't of Agric.*, 575 F.3d 999, 1007 (9th Cir. 2009). Despite this setback, the state petitioning process proceeded under the APA, at 5 U.S.C. § 553(e). *See* 71 Fed. Reg. 58,577 (Oct. 4, 2006).

Outside of Alaska, Idaho has the most roadless acreage in the nation, and it will manage these 9.3 million acres in accordance with the Idaho Roadless Rule.³⁴ Instead of a uniform approach to all NFS roadless lands in the state, the Idaho rule uses different categories and management themes, each with its own set of permitted and prohibited uses. According to the USFS, the Idaho Rule provides more protection to 3.25 million acres of Idaho Roadless Areas (IRAs) that are managed as “wildland recreation,” “special areas of historic and tribal significance,” and “primitive” than the 2001 roadless rule.³⁵ Less protection is provided to 5.26 million acres of land managed as “backcountry/restoration” in the Idaho Rule, as this management theme allows for temporary roads and logging to reduce the threat of wildfire.³⁶ And finally, 405,900 acres managed as “general forest, rangeland, and grassland” are managed according to forest plan direction with allowances provided to access phosphate deposits.³⁷

Roughly 4.2 million acres in Colorado are also managed by a state-specific roadless rule.³⁸ According to the USFS the Colorado Rule provides a greater degree of protection than the 2001 rule for approximately 1.2 million acres of “upper tier” roadless areas.³⁹ Unlike the 2001 rule, the state rule also restricts the use of “linear construction zones,” such as pipe, transmission and telecommunication lines within roadless areas.⁴⁰ But outside of upper-tier roadless areas, the Colorado Rule provides for more exceptions for road building than the 2001 rule does to protect “at risk” communities from wildfires and for use within a designated coal mining area.⁴¹ In addition, 8,300 acres found within permitted ski area boundaries were also excluded by the Colorado Rule, opening the possibility for future ski area expansion.⁴²

This condensed history sets the stage for future wilderness politics on USFS lands. After years of litigation and executive branch pendulum swings, the 2001 roadless rule was

34. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Idaho, 73 Fed. Reg. 61, 456 (Oct. 16, 2008).

35. *Id.* at 61,460.

36. *Id.*

37. *Id.*

38. Special Areas; Roadless Area Conservation; Applicability to the National Forests in Colorado. 77 Fed. Reg. 39,576, 39,578 (July 3, 2012).

39. *Id.* at 39,578.

40. *Id.* at 39,580.

41. *Id.* at 39,578.

42. *Id.*

eventually upheld by the Ninth and Tenth Circuit Courts of Appeals.⁴³ Outside of Idaho and Colorado, which have their own state-specific roadless rules, the 2001 roadless rule governs how roadless lands will be managed by the USFS. Though the 2001 rule was in legal purgatory for more than a decade, the rule has been very successful in doing what it set out to do—keep roadless areas roadless. From 2001 to 2009, roughly seventy-five miles of road (re)construction occurred in roadless areas because of the rule's various exceptions, such as allowing timber sales or mineral leases that were authorized before 2001.⁴⁴ The USFS also permitted twelve projects in roadless areas associated with mining under the General Mining Law of 1872, a statutory right that the 2001 rule did not change.⁴⁵

Also important to note at this point are the ecological values associated with lands protected under the 2001 rule. These areas differ in important respects from lands protected as wilderness or in some other form. For instance, one study focused on the Northern Rockies region of Montana, Idaho and Wyoming showed that roadless areas protect “a wider range of land-cover types [such as aspen, whitebark pine, sagebrush and grassland communities] and elevation ranges than protected areas alone, especially those characteristics of mid-to-low elevations that are underrepresented in protected areas.”⁴⁶ These lands, in short, differ from existing wilderness areas and we believe that this will help explain some of the controversy pertaining to their future management, such as conflicts associated with some preexisting uses.

From the base of roughly fifty-nine million acres of roadless areas are two additional categories of land that will be the focus of attention in the future: wilderness study areas (WSAs) and recommended wilderness areas (RWAs). We discuss each in turn.

B. Wilderness Study Areas

43. See *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002) *abrogated by* *Wilderness Soc. v. USFS*, 630 F.3d 1173 (9th Cir. 2011); see also *Wyoming v. USDA*, 661 F.3d 1209 (10th Cir. 2011).

44. MICHAEL ANDERSON & THE WILDERNESS SOCIETY, *THE ROADLESS RULE: A TENTH ANNIVERSARY ASSESSMENT*, WILDERNESS.ORG, 6 (Jan. 20, 2011), <http://wilderness.org/sites/default/files/Roadless-Rule-paper-10th-anniversary.pdf>.

45. NEWS RELEASE NO. 0260.10, USDA, AGRICULTURE SECRETARY VILSACK ANNOUNCES DECISION ON FOURTEEN ROADLESS AREA PROJECTS (MAY 13, 2010).

46. The study also showed how roadless areas increase the connectivity across the region, reducing the distance between protected areas in the Northern Rockies, and thus playing a central role in the conservation of biological diversity. See Michele R. Crist, Bo Wilmer & Gregory H. Aplet, *Assessing the Value of Roadless Areas in a Conservation Reserve Strategy: Biodiversity and Landscape Connectivity in the Northern Rockies*, 42 J. APPLIED ECOLOGY 181, 187 (2005).

The USFS currently manages thirty-three areas, totaling 3,255,531 acres that Congress has designated as wilderness study areas (WSA) in fourteen different public land laws.⁴⁷ More than eighty percent of this acreage is located in Alaska and Montana. Several of these laws use similar language pertaining to how a WSA is to be managed.⁴⁸ For example, a New Mexico wilderness law enacted in 1980 designated certain lands to be managed “to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.”⁴⁹ However, Congress also added that within these areas “current levels of motorized and other uses and improvements shall be permitted to continue subject to such reasonable rules and regulations as the Secretary of Agriculture shall prescribe.”⁵⁰

WSA laws with similar provisions have caused considerable controversy and litigation because of how the USFS has managed these areas. In 1977, for example, Congress passed the Montana Wilderness Study Act, which mandates the USFS manage nearly a million acres of WSAs “to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.”⁵¹ This law does not, however, prohibit the use of off-road vehicles in these areas, and motorized use has the potential of diminishing those wilderness characteristics that Congress intended to protect. The Montana District Court aptly summarized the resulting legal question and managerial dilemma: “The controversy at hand questions what it means to ‘maintain’ these areas-in-limbo. Did Congress intend to keep the land and its use as it was in 1977? Or did Congress intend to preserve the potential of the land without major concern for its use while it was studied?”⁵² In this case, the Ninth Circuit held that the law requires the USFS to manage the

47. Numbers calculated by author from data provided by USFS, last updated March 2013 (on file with author). Note that out of this total, 1,968,730 acres are found within the large Nellie Juan-College Fiord WSA managed by the Chugach National Forest in Alaska.

48. ROSS W. GORTE, CONG. RESEARCH SERV., R41649, WILDERNESS LAWS: STATUTORY PROVISIONS AND PROHIBITED AND PERMITTED USES 7 (2011); *see also* U.S. Gov’t Accountability Office, GAO/RCED-93-151 GEN. ACCOUNTING OFFICE, FEDERAL LAND MANAGEMENT: STATUS AND USES OF WILDERNESS STUDY AREAS (1993).

49. Act of Dec. 19, 1980, Pub. L. No. 96-550, § 103, 94 Stat. 3221.

50. *Id.*

51. Pub. L. No. 95-150, 91 Stat. 1243 (1977).

52. *Montana Wilderness Assoc. v. U.S. Forest Serv.*, 146 F. Supp. 2d. 1118, 1122 (2001).

wilderness character of one of these areas as it existed in 1977, pending a congressional decision on whether to designate it as wilderness.⁵³

C. Recommended Wilderness Areas

Inventoried roadless lands that have been recommended for wilderness designation through national forest planning processes are more widespread than WSAs managed by the USFS. Recommended wilderness areas (RWAs) are lands that have been identified, evaluated, and found suitable for wilderness designation by the USFS. The agency follows a process whereby a Regional Forester recommends wilderness designation to the Chief via a forest plan, and the Chief decides whether to forward the recommendation to the Secretary of Agriculture, who then may advance the recommendation to Congress.⁵⁴ As of 2012, the USFS manages 5,076,045 million acres of recommended wilderness, covering 188 different areas in fifty national forests.⁵⁵ As several national forests revise their forest plans in the near future, this figure will likely change, with some forests recommending more or less acreage.

Areas recommended for wilderness will be the focus of several wilderness campaigns in the future. Several of these places have been part of wilderness bills that have not successfully made it through the lawmaking process. But more immediate conflict and litigation will revolve around how these areas are managed pending congressional action.⁵⁶ USFS policy states that “any inventoried roadless area recommended for wilderness or designated wilderness study is not available for any use or activity that may reduce the wilderness potential of an area [and] [a]ctivities permitted may continue, pending designation, if the activities do not compromise wilderness values of the area.”⁵⁷ Different administrative regions of the USFS interpret this policy differently, with serious implications for possible future wilderness designation.⁵⁸ Of fundamental concern is whether the USFS

53. *Montana Wilderness Assoc. v. McAllister*, 666 F.3d 549, 551 (9th Cir. 2011).

54. *See* U.S. FOREST SERV., FOREST SERVICE HANDBOOK, 1909.12, Ch. 70 (2014).

55. Data supplied by the Washington Office of the USFS, current as of April 2012 (on file with author).

56. *See, e.g.,* *Beaverhead Cnty. Comm’rs v. U.S. Forest Serv.*, No. 2:10-cv-00068-SEH (D. Mont. July 22, 2013) (Bloomberg Law).

57. U.S. FOREST SERV., FOREST SERV. MANUAL, Ch. 1920 § 1923.03.

58. Megan Wertz & C. Denise Ingram, Issue Paper: Recommended Wilderness in the Forest Service (2011) (unpublished report) (on file with author).

allows motorized and mechanized (mountain bike) use in RWAs, two uses that are prohibited by the Wilderness Act and create a precedent of “historic use” in these areas.⁵⁹

Management of RWAs in Idaho provides an example of the inconsistent approach taken by the USFS in managing RWAs and the implications for wilderness designation.⁶⁰ National forests in Idaho are managed by two regions of the USFS, the Intermountain (Region 4) and Northern (Region 1). Forests located within the former permit off-road vehicle and snowmobile use in every RWA in the region. But the Northern Region of the USFS has supplemented national RWA policy with additional guidance that allows only recreation uses that are consistent with wilderness designation so to maintain the area’s suitability for wilderness. This means that motorized use is not allowed in RWAs in the Northern Region.⁶¹ Data supplied by the USFS show that the agency allows motorized or mechanized use on 45 out of 188 (23.9%) areas recommended for wilderness.⁶² (Our research suggests that this figure is likely low, as we know of some forests in the Northern Region that allow for mechanized recreational use in RWAs, even though the USFS reports that none of the forests in the region allow such use.)⁶³

There is considerable controversy over USFS management of RWAs. Wilderness proponents emphasize that motorized and mechanized use is generally prohibited in wilderness areas; therefore, allowing such use in RWAs is obviously inconsistent with maintaining the wilderness character of these places.⁶⁴ Wilderness advocates also believe that motorized and mechanized use in these areas creates a pattern of “historic use” that will make it more politically difficult to designate these areas as wilderness, since Congress has

59. The USFS and BLM include bicycles in their definitions of “mechanical transport,” which is prohibited in Wilderness areas. *See* Forest Service Manual § 2320.5(3) (2007) and 43 C.F.R. § 6301.5 (2008) (pertains to BLM).

60. IDAHO CONSERVATION LEAGUE, *IN NEED OF PROTECTION: HOW OFF-ROAD VEHICLES AND SNOWMOBILES ARE THREATENING THE FOREST SERVICE’S RECOMMENDED WILDERNESS AREAS* (2011) (unpublished report) (on file with author).

61. U.S. Forest Serv., *Management of Recommended Wilderness* (unpublished guidance document) (on file with author).

62. Data supplied by the Washington Office of the USFS (Apr. 2012) (on file with author).

63. For example, the Kootenai National Forest Plan draft EIS notes that “no recommended wilderness is currently closed to bicycles or other nonmotorized mechanized transport.” U.S. Forest Service, *Draft Environmental Impact Statement for The Draft Land Management Plan, Kootenai National Forest*, 302 (2011).

64. *See* ICL, *In Need of Protection*, *supra* note 60, at 3.

often been reluctant to designate areas as wilderness if motorized use has been established.⁶⁵ As one study summarizes, the allocation to off-road vehicles (ORVs) creates a “history of use and a constituency with a vested and rhetorically-potent interest in opposing wilderness designation.”⁶⁶ We found examples where the USFS, in revising their forest plans, proposed to no longer recommend an area for wilderness designation because of existing motorized use in these areas—uses that the agency allowed.⁶⁷ In other cases, “historic” uses have been used to justify the redrawing of wilderness boundaries or to legislatively designate special management areas that allow for such use.⁶⁸

The issues of maintaining wilderness characteristics in RWAs and historic use are likely to become more prevalent as forests throughout the system write new travel management plans and revise their land and resource management plans, two separate but interconnected planning processes with implications for future wilderness designation. In 2005 the USFS adopted a Travel Management Rule requiring the designation of roads, trails, and areas that are open to motor vehicle use.⁶⁹ In making such designations the Rule requires national forests to “consider effects on [NFS] natural and cultural resources, public safety, provision of recreational opportunities, access needs . . . [and] . . . [c]onflicts between motor vehicle use and existing or proposed recreational uses of [NFS] lands”⁷⁰ Part of this NEPA-based analysis includes a duty by the USFS to sufficiently analyze impacts of motorized use on “wilderness values and roadless characteristics in the recommended wilderness areas and inventoried roadless areas,” with one court already finding such analysis lacking.⁷¹ Both issues will also be in the foreground when roughly half of the national forests

65. John C. Adams & Stephen F. McCool, *Finite Recreation Opportunities: The Forest Service, the Bureau of Land Management, and Off-Road Vehicle Management*, 49 NAT. RESOURCES J. 45, 55-56 (Winter 2009).

66. *Id.* at 56.

67. *See, e.g.*, the draft decision to not recommend the Ten Lakes WSA for wilderness designation. U.S. FOREST SERV., DRAFT LAND MANAGEMENT PLAN: KOOTENAI NATIONAL FOREST, 47 (2011). *See also supra* note 63 and accompanying text.

68. *See, e.g.*, Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 1806-07 (Mar. 30, 2009) (codified at 16 U.S.C.A. § 460vvv (West 2014)).

69. Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005).

70. *Id.* at 68,289-90.

71. Idaho Conservation League v. Guzman, 766 F. Supp. 2d 1056, 1079-80 (D. Idaho 2011).

in the system begin revising their forest plans under the 2012 planning regulations.⁷² As of 2012, sixty-eight forest plans (out of 127) are past due for revision.⁷³ Among other provisions, the 2012 planning regulations require that plan components be used for “management of areas recommended for wilderness designation to protect and maintain the ecological and social characteristics that provide the basis for their suitability for wilderness designation.”⁷⁴

These issues are currently playing out on the Clearwater (now Clearwater-Nez Perce) National Forest in Idaho, a forest that is at the forefront of these issues because of its position in writing a travel management plan and being one of the first forests to revise its forest plan under the 2012 NFMA regulations. The Clearwater’s EIS analysis noted that:

The increase in vehicle capability, numbers, and local use, puts areas of recommended wilderness at far greater risk of degradation and loss of wilderness character than they were when the Forest Plan was written [and] other areas recommended for wilderness have not received serious consideration for designation once motorized use has become established.⁷⁵

The Forest also noted in its Record of Decision that the “continuing or expanding use of vehicles will do nothing but reduce the chances of these areas being designated as Wilderness.”⁷⁶ For these reasons, the Clearwater restricted motorized and bicycle use in most RWAs on the forest.

On the other hand, the USFS has been criticized and litigated by motorized users for managing RWAs as “de facto” wilderness. For example, motorized users of the Clearwater National Forest challenged the Clearwater’s 2011 Travel Management Plan for imposing “the equivalent of a Wilderness management scheme on the four RWA’s and [prohibiting] almost all historic, pre-existing motorized and mechanized use.”⁷⁷ Among other

72. National Forest System Land Management Planning, 7 Fed. Reg. 21,162 (Apr. 9, 2012).

73. *Id.* at 21,164.

74. National Forest System Land Management Planning, 36 C.F.R. § 219.10(b)(iv) (May 9, 2012).

75. U.S. FOREST SERV., CLEARWATER NATIONAL FOREST: TRAVEL PLANNING DRAFT ENVIRONMENTAL IMPACT STATEMENT, 3-83-84 (2009).

76. U.S. FOREST SERV., CLEARWATER NATIONAL FOREST: TRAVEL PLANNING: RECORD OF DECISION, 44 (2011).

77. Complaint for Declaratory and Injunctive Relief, Idaho State Snowmobile Assoc. & the Blue Ribbon Coalition v. U.S. Forest Serv. (D. Idaho 2012) (3:12-cv-00447-MHW), at 3.

claims, these groups argue that “Congress has not delegated to the Forest Service, through the Wilderness Act, NFMA, or otherwise, the power to impose Wilderness management prescriptions or proscriptions in RWA’s or elsewhere through administrative regulation, decision, or other final agency action.”⁷⁸

So prevalent is this conflict over managing RWAs that several members of Congress entered the fray in 2010. Representative Raul Grijalva, a democrat from Tucson Arizona, and seventy-one members of Congress sent a letter to USFS Chief Tom Tidwell expressing concern that the agency’s management of RWAs was impacting the wilderness character of these places and thus making future wilderness designation more difficult. These members of Congress urged the USFS to manage such places in such fashion “to preserve the congressional prerogative to designate wilderness by issuing national guidance on the management of agency-recommended wilderness.”⁷⁹ This correspondence was followed by a letter from Representative Doc Hastings, a republican from Washington State, and seventeen members of Congress, who viewed Grijalva’s request as contrary to the Wilderness Act and Congress’s power over wilderness designation: “The law is crystal clear that the power to designate wilderness rests squarely and solely with the Congress. It is a baseless, twisted reading of the law to suggest that Congress intended to allow an agency to administratively declare an area as recommended for wilderness designation and then to manage that area exactly as if Congress had taken action to make such a designation.”⁸⁰

II. WILDERNESS-ELIGIBLE LANDS MANAGED BY THE BUREAU OF LAND MANAGEMENT

A. Inventoried Roadless Areas

The end result of identifying wilderness-eligible lands—congressional action to consider designating an area as a unit in the National Wilderness Preservation System—is the same for both the Forest Service and the Bureau of Land Management (BLM). However, the paths taken by each agency reveal telling differences as well as parallels.

78. *Id.* at 34.

79. Letter from Representative Raul M. Grijalva to Tom Tidwell (Jan. 25, 2010) (on file with author).

80. Letter from Doc Hastings to Tom Tidwell (Apr. 19, 2010) (on file with author).

The BLM was not mentioned in the Wilderness Act as having any mandate to inventory or recommend lands for wilderness suitability, or to manage lands as wilderness once designated by Congress. These mandates were extended to the BLM in 1976 with the passage of the Federal Land Policy and Management Act (FLPMA).⁸¹ Section 201 of FLPMA required the BLM to inventory public lands for a variety of resources. In Section 603(a), Congress directed the BLM to review those roadless areas of at least 5,000 acres (and roadless islands), identified in the inventory as having “wilderness characteristics described in the Wilderness Act of September 3, 1964.”⁸² Within fifteen years (by the end of 1991), the BLM was to report to the Secretary of the Interior (and, consequently, to the President) “as to the suitability or nonsuitability of each such area or island for preservation as wilderness.”⁸³ The President then had two years (until 1993) to submit his recommendations to Congress upon receipt of each report from the Secretary.⁸⁴ This direction closely followed that given to the National Park Service and Fish and Wildlife Service in Section 3(c) of the Wilderness Act; however, the BLM was given an additional five years—perhaps as a concession to the enormity of the task presented to the Bureau.⁸⁵

81. Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-85 (1976).

82. *See id.* § 1782(a). When the inventory was started, areas under 5,000 acres were also inventoried for wilderness characteristics if they were: (1) contiguous with land managed by another agency which has been formally determined to have wilderness or potential wilderness values, (2) contiguous with an area of less than 5,000 acres of other federal lands administered by an agency with authority to study and preserve wilderness lands, and the combined total is 5,000 acres or more, or, (3) subject to strong public support for wilderness identification and of sufficient size to make practicable their preservation and use in an unimpaired condition and of a size suitable for wilderness management. In 1982, Secretary of the Interior James Watt ordered that such areas be dropped from wilderness study area consideration. That order was overturned in court which found that they could be managed so as not to impair the wilderness characteristics—not under Section 603 of FLPMA, but under Section 202 and 302. *See Sierra Club v. Watt*, 608 F. Supp. 305, 342 (E.D. Cal. 1985).

83. 43 U.S.C. § 1782(a).

84. *Id.* § 1782(b).

85. In 1976, the BLM managed approximately 450 million surface acres—more than the Forest Service, Fish & Wildlife Service, and the National Park Service combined. After an initial screening to determine if an area warranted field review, 174 million acres received the intensive inventory for wilderness characteristics. *See Wilderness Inventory for the 14 Contiguous Western States*, 45 Fed. Reg. 75,574 (Nov. 14, 1980) & *Managing the Public Lands: A Snapshot of pre- and post-FLPMA Management*, <http://www.blm.gov/flpma/snapshot.htm#> (last visited Nov. 7, 2013).

As in the Wilderness Act, FLPMA required an Act of Congress to designate of wilderness for management by the BLM,⁸⁶ and made it clear that once designated, “the provisions of the Wilderness Act which apply to national forest wilderness areas shall apply” to BLM wilderness areas.⁸⁷ Congress, however, had an additional mandate for the BLM: “During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness.”⁸⁸

With the passage of FLPMA, the BLM had three major tasks with respect to wilderness-eligible lands: (1) organize and conduct an inventory on hundreds of millions of acres of public lands; (2) identify which areas possessed wilderness characteristics; and (3) determine how to manage lands identified as having wilderness characteristics “in a manner so as not to impair [their wilderness] suitability.”

Within two years, the BLM had published its procedures for conducting the wilderness inventory on the public lands.⁸⁹ Cognizant of the problems associated by the RARE I inventory by the USFS, and in keeping with the spirit of the recently passed Endangered American Wilderness Act,⁹⁰ the BLM’s inventory or roadless areas consisted of examining three questions: (1) Does it have sufficient size? (2) Does it appear to be sufficiently natural, with the imprint of humans substantially unnoticeable? and (3) Is there an outstanding opportunity for solitude or primitive recreation?⁹¹ Within another two years,

86. 43 U.S.C. § 1782(b).

87. *Id.* § 1782(c).

88. *Id.*

89. BUREAU OF LAND MGMT., WILDERNESS INVENTORY HANDBOOK: POLICY, DIRECTION, PROCEDURES, AND GUIDANCE FOR CONDUCTING WILDERNESS INVENTORY ON THE PUBLIC LANDS. (1978) [hereinafter 1978 INVENTORY HANDBOOK].

90. Endangered American Wilderness Act of 1978, Pub. L. No. 95-237 § 1(a), 92 Stat. 40 (“[L]ands exhibiting wilderness values are immediately threatened by pressures of a growing and more mobile population, large-scale industrial and economic growth, and development and uses inconsistent with the protection, maintenance, restoration, and enhancement of their wilderness character. . . . [S]uch immediately threatened areas are . . . not being adequately protected or fully studied for wilderness suitability by the agency responsible for their administration.”).

91. For details on how these factors were evaluated, see Bureau of Land Mgmt., *supra* note 89, at 12-14. To compare and see how little these factors have changed over time, see Bureau of Land Mgmt., Conducting Wilderness Characteristics Inventory on BLM Lands, 6310 (2012).

the BLM, with public input as required by FLPMA and the Wilderness Act, identified over 800 so-called “Wilderness Study Areas” (WSAs) totaling over twenty-six million acres.⁹²

B. Wilderness Study Areas

Having identified wilderness-eligible lands, the BLM proceeded to “study” them as part of its land use planning. This process included public involvement to determine if these areas known to possess wilderness characteristics would be more suitable for designation as wilderness or more suitable for other uses. A wide range of criteria, including mineral values, manageability, and public opinion, were considered. Between July 1991 and the end of his term in January 1993, President George H. W. Bush submitted state-by-state recommendations to Congress, totaling just under twenty-three million acres.⁹³

In addition to identifying areas with wilderness characteristics, FLPMA required that “the Secretary . . . from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area.”⁹⁴ That is, FLPMA recognized that even though an area might possess wilderness characteristics, there might be some other potential use of the area that would make it unsuitable for designation—thereby implying, in essence, two classes of WSAs. The areas with wilderness characteristics found “unsuitable” often had high (though undeveloped) mineral potential. By the end of the review process in early 1993, the BLM had recommended 335 areas totaling 9,660,922 acres as suitable, and 594 areas totaling 13,161,664 areas as unsuitable.⁹⁵ (Some areas had portions that were both suitable and non-suitable, and so while the acres are additive, the numbers of areas are not.) In addition, 1,610,363 acres had already been designated by Congress as wilderness.⁹⁶

92. See H.R. 2578, *To Amend the Wild and Scenic Rivers Act Related to a Segment of the Lower Merced River in California*; and H.R. 1581, “*Wilderness and Roadless Area Release Act of 2011*” Before the H. Natural Resources Comm., & Subcomm. on Nat’l Parks, Forests and Public Lands, 112th Cong. 16-21 (2011) (statement of Robert Abbey, Director, Bureau of Land Mgmt.), (on file with author), available at <http://www.gpo.gov/fdsys/pkg/CHRG-112hhrg67649/pdf/CHRG-112hhrg67649.pdf>.

93. See BUREAU OF LAND MGMT., PRESIDENTIAL RECOMMENDATIONS TO THE CONGRESS ON BLM WILDERNESS STUDY AREAS 1991-1993 (2003) (on file with author) [hereinafter PRESIDENTIAL RECOMMENDATIONS].

94. 43 U.S.C. § 1782(a).

95. PRESIDENTIAL RECOMMENDATIONS, *supra* note 93.

96. There is no record of what happened to the other 1.5 million acres from the original inventory. Presumably, they were “released” from WSA review status during the designation of the sixty-one areas created by Congress prior to the Presidential recommendations. See Wilderness

Though FLPMA called for the President to make wilderness recommendations, the direction “not to impair” the wilderness suitability did not differentiate between the two classes of recommendations as to how they should be managed. In 1979, the BLM issued its first policy on how all WSAs were to be managed—regardless of recommendation—until Congress decided whether or not to designate them as wilderness.⁹⁷ This Interim Management Policy (commonly referred to simply as “the IMP”) was so called because it set forth management direction “in the interim” between inventory and congressional disposition. In contrast with policies in the Fish and Wildlife Service⁹⁸ and National Park Service,⁹⁹ the BLM chose not to manage a WSA as if it were wilderness, but rather to essentially “freeze” conditions on the ground pending a decision by Congress on the ultimate fate of the area. The IMP was revised in 1983,¹⁰⁰ 1987,¹⁰¹ and 1995.¹⁰² In 2012, the BLM recognized that Congress was taking so long to decide what to do with the WSAs that “freezing” their management was not particularly good stewardship, so revised the policy for managing these lands once again.¹⁰³ Throughout all these revisions, however, the same basic non-impairment standard was set: unless allowed by some exception (such as for valid existing rights or to improve wilderness characteristics), permitted activities had to be temporary activities creating no new surface disturbance.

However, Wilderness Study Areas designated by this initial inventory of BLM lands were not the only areas managed under the IMP. Section 201 of FLPMA requires BLM to “maintain on a continuing basis an inventory of all public lands and their resource and other values This inventory shall be kept current so as to reflect changes in

Date Search Results, <http://www.wilderness.net/NWPS/advSearch> (select “Bureau of Land Management” and “Before” Year: “1993,” then follow “Find Matching Wilderness Areas” hyperlink).

97. BUREAU OF LAND MGMT., INTERIM MANAGEMENT POLICY AND GUIDELINES FOR LANDS UNDER WILDERNESS REVIEW (1979) [hereinafter 1979 IMP].

98. U.S. FISH & WILDLIFE SERV., NATURAL AND CULTURAL RESOURCES MANAGEMENT, PART 610: WILDERNESS STEWARDSHIP (2008).

99. NAT’L PARK SERV., DIRECTOR’S ORDER #41: WILDERNESS STEWARDSHIP (2013).

100. BUREAU OF LAND MGMT., INTERIM MANAGEMENT POLICY AND GUIDELINES FOR LANDS UNDER WILDERNESS REVIEW, H-8550-1 (1983) [hereinafter 1983 IMP].

101. BUREAU OF LAND MGMT., INTERIM MANAGEMENT POLICY AND GUIDELINES FOR LANDS UNDER WILDERNESS REVIEW, H-8550-1 (1987) [hereinafter 1987 IMP].

102. BUREAU OF LAND MGMT., INTERIM MANAGEMENT POLICY AND GUIDELINES FOR LANDS UNDER WILDERNESS REVIEW, H-8550-1 (1995) [hereinafter 1995 IMP].

103. BUREAU OF LAND MGMT., MANAGEMENT OF WILDERNESS STUDY AREAS, 6330 (2012) [hereinafter 2012 WSA MANUAL].

conditions and to identify new and emerging resource and other values.”¹⁰⁴ These inventories were to be the basis for making decisions about the use of these areas “with public input and consistent with the terms and conditions of this Act” in land use plans as outlined in FLPMA Section 202.¹⁰⁵ These sections of FLPMA formed the legal background for inventorying and using land use plans to designate additional WSAs after the initial inventory was completed. Many small (under 5,000 acres) areas were found adjacent to designated Wilderness or wilderness-eligible lands managed by other agencies, and land exchanges or acquisitions also accounted for identifying these “new” areas. They are commonly referred to as “202 WSAs” to differentiate them from the “603 WSAs” that were designated under that section of the law. But all WSAs were—and are—managed under the same policy. The BLM stopped designating 202 WSAs by 2001. Prior to then, 102 areas totaling 279,672 acres were added to the Wilderness Study Area management portfolio.¹⁰⁶

As of January 1, 2014, the BLM managed 221 wilderness areas totaling 8,710,640 acres,¹⁰⁷ and 528 WSAs totaling 12,760,472 acres.¹⁰⁸ Of the designated wilderness areas, twenty-eight were 202 WSAs.¹⁰⁹ Perhaps more telling, ninety-eight of the BLM WSAs designated as wilderness by Congress were recommended—either in whole or in part—as non-suitable by the agency.¹¹⁰ That’s just under forty-five percent of all BLM wilderness areas. As BLM Director Bob Abbey testified to the House Natural Resources Committee Subcommittee on National Parks, Forests and Public Lands:

[The] recommendations are now twenty years old, and the on-the-ground work associated with them is as much as thirty years old. In that time, resource conditions have changed, our understanding of mineral resources has changed,

104. 43 U.S.C. § 1711.

105. *Id.* § 1712.

106. See BUREAU OF LAND MGMT., *202 Wilderness Study Areas* (Apr. 2, 2001) (on file with author).

107. See BUREAU OF LAND MGMT., *Wilderness Area List*, http://www.blm.gov/pgdata/etc/medialib/blm/wo/Law_Enforcement/nlcs/wilderness.Par.56734.File.dat/Wilderness_Q2_2014.pdf (last updated July 2014).

108. See BUREAU OF LAND MGMT., *Wilderness Study Area List*, http://www.blm.gov/pgdata/etc/medialib/blm/wo/Law_Enforcement/nlcs/wilderness.Par.98208.File.dat/WSAs_Q2_2014.pdf (last updated July 2014).

109. See BUREAU OF LAND MGMT., *202 WSAs designated as Wilderness* (undated) (on file with author).

110. See BUREAU OF LAND MGMT., *BLM's "non-suitable" WSAs subsequently designated by Congress as Wilderness* (undated) (on file with author).

and public opinion has changed. If these suitability recommendations were made today, many of them would undoubtedly be different.¹¹¹

C. Lands with Wilderness Characteristics

In the decades since the first BLM accounting, further inventories of wilderness characteristics were subject to the repetitive seesaw of both political ideology and court orders. The fight started in Utah in 1996, where Secretary of the Interior Bruce Babbitt started a second round of inventories, and the next Secretary, Gale Norton, stopped them. A decade later, court decisions in Oregon made it clear that wilderness characteristics were a resource like any other, subject to the same inventory and planning requirements as other resources. And after another halting episode, the BLM has settled into a process for identifying additional lands that have wilderness characteristics, and deciding how to protect (or not) those characteristics in land use planning.

1. The second Utah inventory

Through the original Section 603 inventory in Utah, the BLM found approximately 2.5 million acres possible for designation as WSAs on the 23 million acres managed by the agency in the state.¹¹² Utah conservation groups filed a series of appeals with the Interior Board of Land Appeals (IBLA), and in 1983 the IBLA ruled that the Utah inventory erred in the vast majority of the lands under appeal.¹¹³ In response, the BLM eventually increased the Utah WSA acreage, and the Presidential recommendation listed slightly less than 2 million acres of suitable WSAs and about 1.3 million acres of non-suitable WSAs.¹¹⁴

Simultaneously, several wilderness advocacy groups formed the Utah Wilderness Coalition (UWC) and did their own inventory of BLM lands in Utah—primarily the eastern, central, and southern portions of the state. The result,¹¹⁵ published in 1989, claimed to find 5.7 million acres of wilderness-quality land and formed the basis of America's Red Rocks Wilderness Act, first introduced that year by Utah Congressman Wayne Owens.

111. Statement of Robert Abbey, *supra* note 92.

112. For one detailed description of the inventory process in Utah, see THE UTAH WILDERNESS COALITION, WILDERNESS AT THE EDGE: A CITIZEN PROPOSAL TO PROTECT UTAH'S CANYONS AND DESERTS 34-40 (1990).

113. *Id.*

114. Presidential Recommendations, *supra* note 93.

115. UTAH WILDERNESS COALITION, *supra* note 112.

In 1996, Secretary of the Interior Bruce Babbitt ordered the BLM to update its inventory of land with wilderness characteristics in Utah. According to the court record in *Utah v. Babbitt*:

On July 24, 1996, Secretary Babbitt sent a letter to Utah Congressman James Hansen acknowledging the ‘stalemate’ on the Utah wilderness issue and informing him that ‘a small team of career professionals, who have substantial expertise in addressing wilderness issues in Utah and elsewhere,’ were going to ‘take a careful look at the lands identified in the 5.7 million acre bill [H.R. 1500] that have not been identified by the BLM as wilderness study areas, and report their findings. . . .’ Babbitt noted the team was ‘explicitly instructed to apply the same legal criteria that were used in the original inventory’ and estimated the work would be completed within six months.¹¹⁶

The BLM had never undertaken such an action, and it is not known exactly what prompted Secretary Babbitt to make such an order at that time. According to BLM legend, Secretary Babbitt and Utah Representative Jim Hansen were discussing the merits of the Red Rocks Wilderness bill and Hansen “dared” Babbitt to find 5.7 million acres of wilderness-quality lands where the UWC said they were. Or perhaps Babbitt’s interest in the wildlands of Utah was in concert with President Clinton’s designation of the Grand Staircase-Escalante National Monument, which would be made just two months later. Whatever the reason, BLM started the inventory in the late summer of 1996, using essentially the same criteria as had been used in the initial inventories eighteen years before.¹¹⁷

Before the inventory was completed, the State of Utah sued the Secretary of the Interior in the United States District Court for the District of Utah.¹¹⁸ The State alleged eight causes of action, which the court of appeals eventually combined into five types of injuries stemming from: (1) BLM’s lack of legal authority for conducting the inventory; (2) BLM’s failure to allow the public to be involved in the inventory; (3) BLM changed the inventory procedures from those used in 1978; (4) BLM failed to prepare an Environmental Impact Statement (EIS) prior to initiating the inventory; and (5) in preparation for the inventory, the BLM was applying de facto wilderness management to non-WSA federal lands.¹¹⁹

116. *Utah v. Babbitt*, 137 F.3d 1193, 1199 (10th Cir. 1998).

117. UTAH WILDERNESS REVIEW PROCEDURES, BUREAU OF LAND MGMT., 3-10 (Sept. 9, 1996) [hereinafter 1996 UTAH PROCEDURES]; *see also supra* note 89.

118. *Utah v. Babbitt*, 137 F.3d at 1199.

119. *Id.* at 1200, 1206-17.

The State was granted a preliminary injunction by the Utah District Court, stopping the inventory on November 15, 1996.¹²⁰ In its reasoning, the district court determined that neither FLPMA section 201 nor FLPMA section 603 authorized the inventory. The court then noted that even if section 201 did authorize the inventory, BLM violated the section by failing to allow public participation, and then concluded that the State would be irreparably harmed if the inventory was not stopped—even though "it is not presently known what the results of the reinventory will be or for that matter whether the Plaintiffs will disagree with those results."¹²¹ The district court concluded the State of Utah was likely to prevail on their legal claims, and prohibited BLM "from further work on the Utah Wilderness Review until this case is finally adjudicated on its merits."¹²²

BLM appealed the injunction to the Tenth Circuit Court of Appeals. On March 3rd, 1998, the Tenth Circuit found: (1) the State had offered no evidence to support its claim that the BLM lacked the authority to conduct the inventory; (2) FLPMA section 201 does not require public participation during the inventory process—only at the point of land use planning (where the results of inventories are used to determine use allocations) as required by section 202; (3) that the State failed to show how any alleged change in the inventory procedures caused injury, particularly since there is no right of participation in the inventory process; and (4) merely conducting an inventory does not constitute "a 'major federal action significantly affecting the quality of the human environment,'" since "FLPMA section 201 expressly provides that an inventory 'shall not, of itself, change or prevent change of the management or use of public lands'" and that therefore, no EIS was necessary to conduct an inventory.¹²³

The Tenth Circuit vacated the injunction and remanded to the district court "to dismiss those causes of action related directly to the inventory."¹²⁴ However, the Circuit remanded one cause of action for further consideration: the State's claim that the BLM had already started imposing a de facto wilderness management standard on non-WSA public lands without public involvement as required by FLPMA section 202.¹²⁵ (The circuit court made no determination on whether the State's claim should succeed on its merits, but reasoned that the State did have standing to attempt to prove this in court. However, since the management standard was not a result of the still-incomplete inventory, this cause of

120. *Id.* at 1197.

121. *Id.* at 1201.

122. *Id.*

123. *Id.* at 1206-10.

124. *Id.* at 1215.

125. *Id.* at 1216.

action was independent of conducting the inventory, and could not be used as a basis for stopping it.)¹²⁶

The BLM resumed its inventory process, and in November 1999 published its findings: approximately 2.6 million acres in the inventory area (not already designated as a wilderness or WSA) were found to have wilderness characteristics.¹²⁷ On January 10, 2001, the BLM issued Handbook H-6310-1, outlining procedures for maintaining wilderness characteristics inventories, essentially following the procedures used in Utah between 1996 and 1999 (and consistent with the procedures first described in the 1978 Inventory Handbook).¹²⁸ No decision had yet been made on the disposition of the areas identified in the Utah Wilderness Inventory Report.

The State claim of de facto wilderness management remained in the district court. With the change of administration in 2001, the name of the case was changed—now, *Utah v. Norton*. Rather than go to trial, the new administration chose to settle with the State of Utah. In the settlement agreement filed on April 11, 2003¹²⁹—rife with factual errors and technical inconsistencies¹³⁰—the BLM agreed that the agency had indeed implemented de facto

126. See *id.* at 1216.

127. U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., UTAH WILDERNESS INVENTORY, 1999. When coupled with the 3.3 million acres of Utah WSAs (*supra* note 93), this means that approximately 5.9 million acres of lands managed by the BLM in Utah were found to have wilderness characteristics—far more than Hansen thought Babbitt could find.

128. WILDERNESS INVENTORY AND STUDY PROCEDURES, BUREAU OF LAND MGMT. HANDBOOK H-6310-1 (Jan. 10, 2001); Compare with 1978 INVENTORY HANDBOOK, *supra* note 89 [hereinafter 2001 INVENTORY HANDBOOK].

129. Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint at 1, *Utah v. Norton*, 2:96CV00870 (D. Utah Apr. 14, 2003) [hereinafter Settlement].

130. Jarvis, Jeff. *Briefing for the Group Manager*. Apr. 21, 2003 (on file with author). Jarvis, at the time the Senior Wilderness Specialist in the BLM, and later Division Chief of the National Landscape Conservation System, detailed twenty errors in a four-page briefing paper soon after the settlement. The mistakes in the Settlement included: repeatedly confusing the direction in section 603 of FLPMA with the direction in section 202; erroneously stating the nonimpairment mandate only applied to the WSAs recommended to Congress for designation; claiming the 1978 Inventory Handbook had expired when it had been extended through a series of Instruction Memoranda; asserted that only section 603 WSAs could be managed by the IMP, when the court in *Sierra Club v. Watt* made it clear that the IMP could also be used to manage section 202 WSAs; misquoted the requirements for incorporating new inventory information and amending Land Use Plans found in the 2001 Inventory Handbook; claimed both the 1996 UTAH PROCEDURES and the 2001 Inventory

wilderness management on non-WSA lands without public involvement. In addition, the BLM re-opened the other causes of action and stated: (1) the BLM had no authority to conduct wilderness reviews after 1993; (2) the BLM has no authority to establish WSAs outside of the process outlined in section 603; (3) the BLM would apply the Interim Management Policy only to section 603 WSAs, since the BLM could manage no lands as WSAs if they had not been identified by the section 603 process without direct authorization from Congress; and (4) consequently, the BLM would rescind its inventory manual H-6310-1.¹³¹

The Settlement was legally binding in Utah, and adopted as policy for the rest of the BLM outside Alaska. The Settlement did not divest BLM of the authority granted by FLPMA section 201 and section 202 to continue to inventory public lands for wilderness

Handbook changed the criteria for establishing new WSAs, when in fact the criteria were consistent all previous versions of the Handbook; and repeatedly confused the various iterations of the Inventory Handbooks with the various IMPs (the latter having nothing to do with inventory, only management). The most serious error was the assertion that Congress gave BLM fifteen years to identify roadless lands and that the “window of opportunity” to identify additional areas was closed. In fact, as subsequent court cases found, the fifteen years cited in FLPMA section 603 was a deadline for review of the initial inventory, not an end to all inventories (*see supra* notes 1-6 and accompanying text).

131. At the time of the Settlement, there were eighteen WSAs totaling almost 30,000 acres throughout Utah established under the authority of section 202 of FLPMA. Although part of the Settlement stipulated that the IMP would no longer apply to section 202 WSAs, on September 29, 2003 the BLM issued an Instruction Memorandum (“BLM Implementation of the Settlement of Utah v. Norton Regarding Wilderness Study,” IM 2003-274) which stated that the IMP would still apply to those section 202 WSAs which had already been reported to Congress along with the section 603 WSAs. This became the agency’s “no more wilderness study areas” policy. Since the settlement, Congress has passed two laws (Pub. L. No. 109-163, § 384 and Pub. L. No. 111-11, § 1972) designating fifteen areas totaling 230,175 acres as wilderness in Utah. Of this, only five areas and about sixty percent of the acreage is from the original section 603 inventory, with seven areas and about two percent of the acreage from section 202 WSAs. The 1999 inventory found acreage having wilderness characteristics, which consequently was incorporated into the designation of four of the eleven WSAs existing at the time of the Settlement (one WSA was a section 603 area with a section 202 area added to it). (One section 202 WSA with adjacent 1999 Inventory acreage was transferred to the NPS to be incorporated into the Zion Wilderness.) Three wilderness areas were entirely made up of lands identified in the 1999 Inventory. Approximately twenty-five percent of the land designated as wilderness by these two bills was found as a result of the 1999 Inventory. (Interestingly, one area, as well as significant acreage in another, was made of land not identified in *any* inventory as having wilderness characteristics.)

characteristics and to use the results of those inventories in land use planning. The Settlement also permitted the BLM to develop “directives, guidance and policies” on implementing these authorities.¹³² The guidance that did so¹³³ contained no inventory procedures and, since no more WSAs could be designated, suggested that discrete wilderness-like characteristics identified in land use planning could be protected through other designations, such as Areas of Critical Environmental Concern.

2. *Oregon and the need for current inventories*

Ultimately, BLM’s failure to keep its inventories of wilderness characteristics current found the agency back in court in 2006 (*ONDA v. Rasmussen*¹³⁴). The BLM had approved several grazing developments in Oregon’s Lakeview Resource Area. The Oregon Natural Desert Association (ONDA) sued, claiming the BLM had not kept its inventory of wilderness characteristics current, and had failed to address the ONDA-prepared inventory in the approval process. The Oregon District Court ruled:

[The BLM] was obligated under NEPA to consider whether there were changes in or additions to the wilderness values within the [project area], and whether the proposed action in that area might negatively impact those wilderness values, if they exist. The court finds BLM did not meet that obligation by relying on the one-time inventory review Such reliance is not consistent with its statutory obligation to engage in a continuing inventory so as to be current on changing conditions and wilderness values.¹³⁵

In 2008, the Ninth Circuit went even further in *ONDA v. BLM*,¹³⁶ rejecting both BLM’s contention that wilderness inventory was only a “one-time duty” tied to the section 603 process and the agency’s denial that wilderness characteristics constitute one of the values of the public lands which it may manage under the multiple-use mandate in its land use plans:

Read carefully and in context, the FLPMA makes clear that wilderness characteristics are among the values which the BLM can address in its land use plans, and hence, needs to address in the NEPA analysis for a land use plan governing areas which may have wilderness values [FLPMA] specifically

132. Settlement at 15.

133. CONSIDERATION OF WILDERNESS CHARACTERISTICS IN LAND USE PLANNING (EXCLUDING ALASKA), BLM INSTRUCTION MEMORANDUM NO. 2003-275, Sept. 29, 2003.

134. *ONDA v. Rasmussen*, 451 F. Supp. 2d 1202 (D. Or. 2006).

135. *Id.* at 1213.

136. *ONDA v. BLM*, 531 F.3d 1114 (9th Cir. 2008).

contemplates that the [section 201] inventory process includes identification of wilderness characteristics — including those that are ‘new and emerging’ or which arise from ‘changes in conditions’ — and that it will do so continuously, with no time limitOnce the statute is so understood, it becomes evident that permanent preservation of wilderness using the [section 603] process is just one aspect of the BLM's broader management authority for lands with wilderness characteristics.¹³⁷

So, at the time of the change of administrations in 2009, the BLM had clear direction from the courts that it needed to keep its inventory of wilderness characteristics current; address impacts to these characteristics in project analyses;¹³⁸ and take the results of these inventories into account in the development of land use plans. If an area's wilderness characteristics were to be protected, it could not be as a Wilderness Study Area or through applying the Interim Management Policy—a management scheme based on the legal settlement in Utah, and extended by policy elsewhere in BLM (except Alaska).

3. *Wild lands and its aftermath*

Soon after his confirmation as Secretary of the Interior, Ken Salazar rescinded oil and gas leases on seventy-seven parcels in eastern Utah, and the history of that rescission is tangential to the history of WSA management in the BLM. As a result of Salazar's rescission, Senator Robert Bennett of Utah placed a hold on the nominations of David Hayes as Interior Deputy Secretary and Hilary Tompkins as Interior Solicitor. As a condition of removing the hold, Bennett asked for written answers to a series of questions. While most of these concerned the seventy-seven leases, some of them concerned the *Utah v. Norton* Settlement and the authority to establish new WSAs. Among other questions, Bennett specifically wanted to know if Salazar agreed that: (1) the Department's authority to establish new WSAs under section 603 of FLPMA expired in 1993; (2) the Department has had no authority to create new WSAs since that date; and (3) that the *Utah v. Norton* Settlement “is consistent with FLPMA.” Christopher Mansour, writing the response to these questions on

137. *Id.* at 1133-35.

138. Several court cases remanded BLM decisions where updated inventories were absent or ignored and upheld decisions where the updated inventories were considered—even when the BLM's inventory was at odds with the appellant's inventory. For an example of each, compare *Southern Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253 (D. Utah 2006), with *ONDA v. Shuford*, 2007 U.S. Dist. LEXIS 42614 (D. Or. 2007).

behalf of Secretary Salazar, answered “Yes” to all these questions, adding, “We do not expect our position on this question to change.”¹³⁹

When made public, this response brought a strong rebuttal from over fifty of the country’s leading natural resource law professors:

The 2003 agreement between the Department of the Interior and the State of Utah is an unpublished and unenforceable out-of-court settlement, whose legal effect was nothing more than to terminate the litigation that it purported to settle. It did not bind the new administration brought in by the 2008 election, and the new administration is free to adopt the same interpretation of FLPMA that was followed by all previous administrations from the passage of FLPMA in 1976 until 2003, namely, that the BLM has continuing authority under section 202 of FLPMA to designate WSAs and to manage them so as not to impair their suitability for preservation by Congress as wilderness.¹⁴⁰

But Salazar had gone on record that new WSAs would not be designated. Fifteen months later, Secretary Salazar issued Secretarial Order 3310,¹⁴¹ the seminal document of the so-called “Wild Lands Policy.” This appeared to be an attempt to reconcile three factors: court direction to update inventories of wilderness character and to use the results in land use planning decisions; the compelling argument from the natural resource legal experts that WSAs could be designated outside the section 603 process; and Salazar’s statement that he would not designate WSAs or use the Interim Management Policy to manage areas not already designated as WSAs. The Secretarial Order directed the BLM to “maintain wilderness resource inventories on a regular and continuing basis” and “to protect wilderness characteristics through land use planning and project-level decisions unless the BLM determines . . . that impairment of wilderness characteristics is appropriate.”¹⁴² The Order directed BLM to develop inventory and management policies for “Wild Lands” within sixty days.

139. Letter from C.J. Mansour to the Honorable Robert Bennett, Sen., Utah (May 20, 2009) (on file with author).

140. Letter from Robert Adler, Professor of Law, University of Utah S.J. Quinney College of Law, *et al.*, to the Honorable Ken Salazar, Sec’y of the Interior, U.S. (Sept. 30, 2009).

141. SEC’Y OF THE INTERIOR, ORDER NO. 3310, PROTECTING WILDERNESS CHARACTERISTICS ON LANDS MANAGED BY THE BUREAU OF LAND MANAGEMENT (2010), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf.

142. *Id.*

Consequently, the BLM drafted three manuals. Manual 6301, the Wilderness Inventory Manual, followed the general procedures for determining if an area had wilderness characteristics that had always been used by the BLM.¹⁴³ Manual 6302, Consideration of Lands with Wilderness Characteristics in the Land Use Planning Process, covered how Wild Lands would be addressed in land use plans.¹⁴⁴ Manual 6303, Consideration of Lands with Wilderness Characteristics in Project-Level Decisions for Areas Not Analyzed in Accordance with BLM Manual 6302, covered how the resource would be considered in project analyses where an inventory had not yet been done.¹⁴⁵ Key aspects of these second two manuals included the following: a de facto protection of wilderness characteristics where present, unless there was a compelling reason that they not be protected;¹⁴⁶ a partial list of actions (which did not duplicate the proscriptions of the IMP) that could be implemented to protect an area with wilderness characteristics as “Wild Lands” in revising a land use plan;¹⁴⁷ and descriptions of situations where inventories would or would not be required in project analyses.¹⁴⁸ Because “all BLM offices shall place a high priority on the protection” of wilderness characteristics, “the BLM shall avoid impairing such wilderness characteristics unless, as part of its decision-making process, the BLM concludes that impairment of wilderness characteristics is appropriate.”¹⁴⁹ And the policy outlined the various levels of

143. U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., WILDERNESS CHARACTERISTICS INVENTORY, MS-6301 (2011) (on file with author), *superseded by* U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CONDUCTING WILDERNESS CHARACTERISTICS INVENTORY ON BLM LANDS (2012), *available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html. [hereinafter 2011 INVENTORY MANUAL].

144. U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CONSIDERATION OF LANDS WITH WILDERNESS CHARACTERISTICS IN THE LAND USE PLANNING PROCESS, MS-6302 (2011) (on file with author), *superseded by* U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CONSIDERING LANDS WITH WILDERNESS CHARACTERISTICS IN THE BLM LAND USE PLANNING PROCESS (2012), *available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html.

145. U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CONSIDERATION OF LWCS FOR PROJECT-LEVEL DECISIONS IN AREAS NOT ANALYZED IN ACCORDANCE WITH BLM MANUAL 6302 MS-6303 (2011) (on file with author), *superseded by* U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CONSIDERING LANDS WITH WILDERNESS CHARACTERISTICS IN THE BLM LAND USE PLANNING PROCESS (2012), *available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html.

146. MS-6302 § .06; MS-6303 § .06.

147. *Id.* § .13.

148. MS-6303 §§ .11-.12.

149. *Id.* § .14; *see also* MS-6302 § .13.

authority for approving a project in an area with wilderness characteristics. Projects which would degrade wilderness characteristics to the point where the BLM would be precluded from exercising its discretion to designate the land identified as having wilderness characteristics as “Wild Land” in subsequent land use planning would, in essence, have to be approved by the BLM Director. Finally, the policy tasked each State Director with the determination of whether the BLM should develop a recommendation for Congress to designate identified Wild Lands as wilderness areas within the National Wilderness Preservation System.

Naturally, some members of Congress took exception to a policy that Utah Representative Rob Bishop described as one which “would lock up millions of acres of public lands” and “destroy thousands of jobs.”¹⁵⁰ As part of the budget negotiations to keep the government from shutting down in April 2011, the appropriations bill contained a rider prohibiting the use of any funds to implement the Wild Lands Policy.¹⁵¹

And yet, as various courts had determined, BLM still had an obligation to inventory wilderness characteristics and take the results into consideration in land use planning and project approvals. As a result, the manuals 6301, 6302, and 6303 were put in abeyance, and a revised set of policies was released in July.¹⁵² Inventory procedures remained the same. The substantive differences in the planning section of the policies were that BLM would no longer place a priority on the protection of wilderness characteristics above other BLM resources; Bureau-wide plan conformance reviews to determine consistency with the policy would no longer be conducted; and special review by the BLM Director of projects that

150. Thomas Burr & Matt Canham, *Federal Budget Plan a Barrier to 'Wild Lands' Policy*, SALT LAKE TRIBUNE, Apr. 13, 2011.

151. Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. No. 112-10, § 1769 (“For the fiscal year ending September 30, 2011, none of the funds made available by this division or any other Act may be used to implement, administer, or enforce Secretarial Order No. 3310 issued by the Secretary of the Interior on December 22, 2010.”).

152. Requirement to Conduct and Maintain Inventory Information for Wilderness Characteristics and to Consider Lands with Wilderness Characteristics in Land Use Plans, BLM Instruction Memorandum No. 2011-154, July 25, 2011. This IM contained two attachments: “Instructions on Conducting Wilderness Characteristics Inventory on BLM Lands” and “Instructions on Considering Lands with Wilderness Characteristics in the BLM Land Use Planning Process.” In 2012, these attachments were converted to Manuals. *See* Conducting Wilderness Characteristics Inventory on BLM Lands, BLM Manual 6310, Mar. 15, 2012 [hereinafter 2012 Inventory Manual]; *see also* Considering Lands with Wilderness Characteristics in the BLM Land Use Planning Process, BLM Manual 6320, Mar. 15, 2012.

impacted or impaired lands that have wilderness characteristics would no longer be required. However, BLM still will consider lands with wilderness characteristics in plans and project-level decisions and make decisions to either protect or not protect these lands, as provided for under FLPMA section 202.

Since the 2011 Instruction Memorandum, and as of the end of June 2014, BLM has issued Records of Decision for seven Resource Management Plans in five states, not including Alaska.¹⁵³ The planning areas encompass approximately 4.1 million acres. Inventories found areas with wilderness characteristics not designated as wilderness or WSA on a total of 715,673 acres, with planning decisions to protect 357,679 of those acres (about fifty percent). When coupled with already-designated wilderness and WSAs in those planning areas, 741,575 acres (about eighteen percent of the planning areas) are managed in some manner that protects wilderness characteristics.¹⁵⁴ Because of the small number of completed plans, and the great variety among even that small number, there is no way to predict how other planning areas or the Bureau as a whole will treat its areas with wilderness characteristics not already protected as a wilderness or WSA.

D. Wilderness Characteristics in Alaska

Alaska still has the largest unfinished inventory of wilderness characteristics. At the passage of FLPMA, BLM managed approximately 450 million acres. Today BLM manages approximately 245 million acres.¹⁵⁵ The vast majority of the reduction occurred in 1980 with the passage of the Alaska National Interest Lands Conservation Act (ANILCA). As part of that law, large conservation areas (including many wildernesses) managed by the

153. BUREAU OF LAND MGMT., LITTLE SNAKE RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2011); BUREAU OF LAND MGMT., TAOS RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2012); BUREAU OF LAND MGMT., POCATELLO RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2012); BUREAU OF LAND MGMT., SONORAN DESERT NATIONAL MONUMENT RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2012); BUREAU OF LAND MGMT., LOWER SONORAN DECISION AREA RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2012); BUREAU OF LAND MGMT., IRONWOOD FOREST NATIONAL MONUMENT RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2013); BUREAU OF LAND MGMT., CLEAR CREEK MANAGEMENT AREA RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN (2014).

154. Data on file and analyzed by authors.

155. BUREAU OF LAND MGMT., THE BUREAU OF LAND MANAGEMENT: WHO WE ARE, WHAT WE DO, http://www.blm.gov/wo/st/en/info/About_BLM.html (last updated Jan. 26, 2012).

U. S. Fish and Wildlife Service and the National Park Service were created largely out of lands in the BLM estate.¹⁵⁶ ANILCA exempted the BLM from the wilderness characteristics inventory prescribed by FLPMA section 603(a):

Section 603 of the Federal Land Policy and Management Act of 1976 shall not apply to any lands in Alaska. However, in carrying out his duties under section 201 and section 202 of such Act and other applicable laws, the Secretary may identify areas in Alaska which he determines are suitable as wilderness and may, from time to time, make recommendations to the Congress for inclusion of any such areas in the National Wilderness Preservation System, pursuant to the provisions of the Wilderness Act.¹⁵⁷

On March 12, 1981, forty-nine days after his confirmation as Secretary of the Interior, James Watt determined “in light of the exhaustive wilderness reviews that have taken place . . . I have decided that no further wilderness inventory, review, study, or consideration by the Bureau of Land Management is needed or is to be undertaken in Alaska”¹⁵⁸ The door to wilderness characteristics inventory of BLM lands in Alaska was closed until January 18, 2001—two days prior to the end of the Clinton administration—when Secretary Bruce Babbitt rescinded Watt’s directive, noting that wilderness inventory and recommendations could be made under ANILCA Section 1320 as part of a land use planning process separate from any Section 603(a) inventory.¹⁵⁹ The inventory door was open, only to be shut by Secretary Gale Norton on April 11, 2003, using conditions unlikely to occur at that time:

[C]onsider specific wilderness study proposals in Alaska, as part of any new or revised resource management planning effort, if the proposals have broad support among the state and federal elected officials representing Alaska. Absent this broad support, wilderness should not be considered in these resource management plans.¹⁶⁰

156. See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, Titles II-III, 94 Stat. 2371 (1980).

157. *Id.* § 1320.

158. Secretarial Memorandum from James Watt, U.S. Sec’y of Interior, *Alaska Wilderness Reviews* (Mar. 12, 1981) (on file with author).

159. Secretarial Memorandum from Bruce Babbitt, U.S. Sec’y of Interior, *Alaska Wilderness Reviews* (Jan. 18, 2001) (on file with author).

160. Secretarial Memorandum from Gale Norton, U.S. Sec’y of Interior, to the Bureau of Land Mgmt., *Alaska Wilderness Reviews* (Apr. 11, 2001) (on file with author).

On December 22, 2010, as part of Secretarial Order 3310, Secretary Ken Salazar cited ANILCA Section 1320 as authority to undertake the “Wild Lands” inventory described above in Alaska.¹⁶¹ But, as noted earlier, Congress prohibited funding for implementation of that Order. Yet, the legal mandate to keep the inventory of all resources current remains. Consequently, neither IM 2011-154 nor BLM Manual 6310 exempt Alaska from the requirement of conducting inventories for wilderness characteristics.

The first inventory of BLM lands for wilderness characteristics in Alaska has been completed in only one area: the National Petroleum Reserve—Alaska (NRP-A). All 22.8 million acres in the NRP-A were found to have wilderness characteristics, and the planning decision was to protect 13,354,000 acres (about fifty-nine percent).¹⁶² Given the definition of “wilderness characteristics,”¹⁶³ it is reasonable to assume that additional tens of millions of acres of the remaining fifty million surface acres managed by BLM in Alaska will be found to possess wilderness characteristics. Whether they *should* be managed to *protect* those wilderness characteristics is another question entirely. That is a political decision informed, theoretically, by the will of the landowners—the American people. And that is largely the same decision model used in determining future congressional designations of wilderness.

III. THE FUTURE OF THE WILDERNESS SYSTEM

In this section we discuss three interrelated factors that we believe will greatly influence the debate over future wilderness designation and management. We begin our assessment by focusing on the increasing polarization of Congress and its impact on wilderness politics. We do so because the Wilderness Act requires an act of Congress to designate wilderness and what happens in this institution will impact what happens to wilderness-eligible lands.

161. SEC’Y OF THE INTERIOR, *supra* note 141, at 1.

162. BUREAU OF LAND MGMT., NATIONAL PETROLEUM RESERVE—ALASKA INTEGRATED ACTIVITY PLAN, RECORD OF DECISION 11 (2013).

163. *Id.* Inventory characteristics include that the area: (1) is of sufficient size to preserve the wilderness characteristics if they are found to be present; (2) must appear to have been affected primarily by the forces of nature, and any work of human beings must be substantially unnoticeable; and (3) has outstanding opportunities for solitude or primitive recreation. These are essentially the characteristics the BLM has used throughout its history of inventorying wilderness characteristics. Compare 2012 Inventory Manual, *supra* note 152, § .06, with 1978 INVENTORY HANDBOOK, *supra* note 89, at 5-7; 1996 UTAH PROCEDURES, *supra* note 117, at 3-10, and 2001 INVENTORY HANDBOOK, *supra* note 128, at 9-17, and 2011 INVENTORY MANUAL, *supra* note 143, at § .14.

A. Extreme Political Polarization

In July of 1964, the U.S. House of Representatives passed the Wilderness Act by a vote of 374 to 1. The previous year, the U.S. Senate passed a version of the Act by a 73 to 12 margin.¹⁶⁴ Impressive as they are, these numbers fail to convey the extraordinary amount of political logrolling and compromise it took to get the Wilderness Act through Congress. One account shows that Congress considered sixty-five wilderness bills and held eighteen hearings over the “eight year legislative odyssey” it took to get the Wilderness Act signed into law.¹⁶⁵ Champions of the bill included western democrats, such as Senator Frank Church of Idaho, and republicans such as John Saylor from Pennsylvania.¹⁶⁶ The biggest obstacle to the Wilderness Act was Representative Wayne Aspinall, a conservative democrat from Colorado who used his seniority and committee powers to stymie wilderness legislation and extract political concessions if it were to move forward; only acquiescing to the bill when Congress voted to convene a public lands law review commission, whose work laid the foundation for FLPMA.¹⁶⁷

The history of the Wilderness Act makes clear that congressional partisanship and ideological differences have always factored into wilderness politics. But what has changed since 1964, and from the golden 1970s-era of environmental lawmaking more generally, is the degree of partisan and ideological polarization of Congress. The “orgy of consensus” that ostensibly characterized the political mobilization and environmental lawmaking of the 1960s and 1970s¹⁶⁸ has all but disappeared in a loud and angry falling out of the center.

Research shows that the two parties are more polarized—or rather more ideologically consistent and distinct—now than they have been at any time in the last thirty years.¹⁶⁹ The numbers show “a drastic separation between and homogenization of the parties from the 1970s to the 2000s,” with the overall trend being clear: “democrats and republicans

164. DOUG SCOTT, *THE ENDURING WILDERNESS: PROTECTING OUR NATURAL HERITAGE THROUGH THE WILDERNESS ACT* 53-54 (2004).

165. *See id.* at 50.

166. *See* THOMAS G. SMITH, *GREEN REPUBLICAN: JOHN SAYLOR AND THE PRESERVATION OF AMERICA’S WILDERNESS* (2006).

167. *See* STEVEN C. SCHULTE, *WAYNE ASPINALL AND THE SHAPING OF THE AMERICAN WEST* (2002).

168. *See* J.B. Ruhl, *A Manifesto for the Radical Middle*, 38 *IDAHO L. REV.* 385, 388 (2002).

169. Sean M. Theriault, *Party Polarization in the US Congress: Member Replacement and Member Adaptation*, 12(4) *PARTY POL.* 483, 484 (2006).

in Congress are becoming less and less alike.”¹⁷⁰ Both chambers of Congress are being impacted by this trend, but republicans are polarizing to a greater extent than their democratic counterparts.¹⁷¹ A task force convened by the American Political Science Association show there to be a major partisan asymmetry in polarization.¹⁷² According to the authors, “[d]espite the widespread belief that both parties have moved to the extremes, the movement of the Republican Party to the right accounts for most of the divergence between the two parties.”¹⁷³ Just pick the measure—and data will generally show a pulling apart of the parties.¹⁷⁴ In reviewing the social science literature focused on the extreme partisan polarization that now characterizes American democracy, one comprehensive account concludes that “[w]e have not seen the intensity of political conflict and the radical separation between the two major political parties that characterizes our age since the late nineteenth century.”¹⁷⁵

The polarization of the parties on ideological and policy issues goes beyond Congress and includes the parties’ more widespread political coalitions and activist bases, meaning that such polarization flows in and out of the capitol.¹⁷⁶ Americans have become more partisan and more polarized in their political and policy preferences and such polarization appears most evident amongst those who are most engaged in politics.¹⁷⁷ An unusually large 2014 Pew Research Center poll of more than 10,000 people shows that republicans and democrats are “further apart ideologically than at any point in recent

170. *Id.* at 485.

171. *Id.* at 486-87.

172. AMERICAN POLITICAL SCIENCE ASSOCIATION, TASK FORCE REPORT, NEGOTIATING AGREEMENT IN POLITICS (Jane Mansbridge & Cathie Jo Martin eds., 2013), at 21, available at https://www.apsanet.org/media/PDFs/Publications/MansbridgeTF_FinalDraft.pdf [hereinafter APSA Task Force].

173. Nolan McCarty, *What we know and don't know about our polarized politics*, WASH. POST (Jan. 8, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/01/08/what-we-know-and-dont-know-about-our-polarized-politics/>.

174. See, e.g., Ted Benson, *2012 Congressional Vote Studies*, THE DATA MINE (Jan. 30, 2014, 2:40 PM), <http://media.cq.com/blog/2013/01/vote-studies/>.

175. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 273 (2011).

176. See Geoffrey C. Layman, Thomas M. Carsey & Juliana Menasce Horowitz, *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANNUAL REVIEW OF POLITICAL SCI. 83, 103-04 (2006).

177. See Pildes, *supra* note 175, at 278-79 (reviewing recent scholarship focused on partisanship).

history,” while concluding that “[p]olitical polarization is the defining feature of early 21st Century American politics, both among the public and elected officials.”¹⁷⁸

1. The implications for wilderness

This polarization has a significant impact on several policy areas, including the environment, where democrats generally vote more green than republicans.¹⁷⁹ The split between the parties is also pronounced on issues pertaining to federal lands management, where it remains a salient issue in the western states. Several recent votes in the House of Representatives show that chamber’s growing disdain for environmental regulations, especially if they are perceived to be an impediment to job creation or the development of oil and gas on federal lands. Even the idea of federal lands is suspect to the Republican Party.¹⁸⁰

Another sign of increasing polarization is that several western state legislatures have passed bills and resolutions that seek to convey federal lands to the states as a way to increase resource production on federal lands and to raise revenue for state budgets.¹⁸¹

178. Carroll Doherty, *7 Things to Know About Polarization in America*, available at <http://www.pewresearch.org/fact-tank/2014/06/12/7-things-to-know-about-polarization-in-america/> (June 12, 2014); see generally PEW RESEARCH CENTER, POLITICAL POLARIZATION IN THE AMERICAN PUBLIC (2014).

179. See Michael E. Kraft, *Environmental Policy in Congress*, in ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY 109, 109-24 (Norman J. Vig & Michael E. Kraft eds., 7th ed. 2010); Charles R. Shipman & William R. Lowry, *Environmental Policy and Party Divergence in Congress*, 54 POLITICAL RESEARCH QUARTERLY 245, 245 (2001).

180. See, e.g., JOHN BARRASSO & ROB BISHOP, THE WAR ON WESTERN JOBS: A REPORT BY THE SENATE AND CONGRESSIONAL WESTERN CAUCUSES (2010) (explaining how the “seizing” of western lands and the expansion of wilderness areas is a “job killing policy.”); see also COMM. ON ARRANGEMENTS FOR THE 2012 REPUBLICAN NAT’L CONVENTION, REPUBLICAN PLATFORM OF 2012, 18 (2012) (advocating for increased oil and gas development and for Congress to “reconsider whether parts of the federal government’s enormous landholdings . . . could be better used for ranching, mining, or forestry through private ownership.”), available at <http://www.gop.com/wp-content/uploads/2012/08/2012GOPPlatform.pdf> (last visited Dec. 18, 2013).

181. See, e.g., Mary Branham, *The New Battle Lands: States Seeking Control of Public Lands in the West*, CAPITOL IDEAS (Jan. 2014), http://www.csg.org/pubs/capitolideas/2013_nov_dec/publiclands.aspx; Laura Hancock, *Wyoming wants other states to join fight for federal land*, STAR TRIBUNE (June 5, 2013, 7:30 PM), http://trib.com/news/state-and-regional/wyoming-wants-other-states-to-join-fight-for-federal-land/article_46d25e79-f16e-5f7e-b7f4-a6ab81a474cc.html; Michelle Merlin, *Utah*

These initiatives have breathed life into a once dormant Sagebrush Rebellion, the name given to a similar political movement among the western states in the late 1970s and 1980s.¹⁸² The chances of these transfer bills ever being implemented are slim. But like the Sagebrush Rebellion before it, their real impact is more political and symbolic, and the bills create another wedge issue separating the parties.¹⁸³ And it makes the prospect of additional wilderness legislation all the more difficult because some factions question the very legitimacy of federal lands, never mind their protection as wilderness.

The House Republicans have also focused on wilderness in recent sessions, with one bill aimed at releasing roughly fifty million acres of USFS-managed roadless lands and BLM WSA's to non-wilderness multiple-use management.¹⁸⁴ The 112th Congress was not only one of the least productive in modern history,¹⁸⁵ but it was also the only Congress to actually decrease the size of the National Wilderness Preservation System.¹⁸⁶ And in 2012,

Lawmaker Drives Modern Sagebrush Rebellion, GREENWIRE (June 17, 2013), <http://www.cenews.net/gw/2013/06/17/>; John Miller, *Senate to consider Idaho's demand for Federal land*, ASSOCIATED PRESS (Mar. 29, 2013), http://m.cdapress.com/news/idaho_news/article_d83be791-79d9-525c-9fbc-7b92d2efaa44.html?mode=jqm; Rocky Barker, *Resolution demands federal government transfer all land to state*, IDAHO STATESMAN (Mar. 13, 2013), <http://blogs.idahostatesman.com/resolution-demands-federal-government-transfer-all-land-to-state/>; Jessica Goad & Tom Kenworthy, *State Efforts to "Reclaim" Our Public Lands*, CENTER FOR AMERICAN PROGRESS (Mar. 11, 2013), <http://www.americanprogress.org/issues/green/report/2013/03/11/56103/state-efforts-to-reclaim-our-public-lands/>.

182. The Sagebrush Rebellion was a political movement challenging the basic premise and constitutionality of federal land ownership in the American West. The rebels wanted federal lands transferred to the states or into private ownership so that they could be managed without some of the regulatory protections and processes provided in federal lands law, legal protections that were beginning to be more keenly felt in the 1970s and 1980s. *See, e.g.*, *United States v. Gardner*, 903 F. Supp. 1394, 1400 (D. Nev. 1995); *United States v. Nye County*, 920 F. Supp. 1108, 1108 (D. Nev. 1996).

183. *See generally* Robert L. Fischman & Jeremiah I. Williamson, *The Story of Kleppe v. New Mexico: The Sagebrush Rebellion as Un-Cooperative Federalism*, 83(1) U. COLO. L. REV. 123 (2011).

184. The Wilderness and Roadless Area Release Act of 2011, H.R. 1581, 112th Cong. (2011).

185. Stephen Dinan, *Congress Logs Most Futile Legislative Year on Record*, THE WASH. TIMES, Jan. 15, 2012.

186. The Quileute Tribe Tsunami Protection Act, Pub. L. No. 112-97, removed 222 acres from the Olympic Wilderness and transferred the land to the adjacent Quileute Indian Reservation to provide the Tribe with lands for housing and schools that are outside the tsunami and Quillayute River flood zones. This was the first time land had been removed from a wilderness

the republican-controlled House also passed the Sportsmen's Heritage Act,¹⁸⁷ which included language that, according to the non-partisan Congressional Research Service, "could be construed as opening wilderness areas to virtually any activity related to hunting and fishing, even if otherwise inconsistent with wilderness values."¹⁸⁸

Perhaps the clearest, simplest example of the anti-wilderness sentiment in the House of the 112th Congress is the fate of the Pinnacles National Park bill. On December 13, 2011, Democratic Representative Sam Farr of California introduced H.R. 3641, co-sponsored by California Republican Representative Jeff Denham. At the time, Pinnacles National Monument, approximately 26,600 acres, included almost 16,000 acres of designated wilderness.¹⁸⁹ The purpose of H.R. 3641 was to recognize the importance of Pinnacles by "upgrading" it to National Park status, to rename the wilderness, and to expand the wilderness by just over 2,900 acres. Among other congressional findings, "Pinnacles National Monument provides the best remaining refuge for floral and fauna species representative of the central California coast and Pacific coast range . . . [in part] because of its long-term protected status [as] congressionally designated wilderness."¹⁹⁰ The bill was referred to the Committee on Natural Resources, chaired by Republican Representative Doc Hastings of Washington, and the Subcommittee on Public Lands, chaired by Republican Representative Rob Bishop of Utah. When the bill was passed out of committee seven months later, the Committee had agreed that the Monument would become a park. Thus, the existing wilderness would be renamed, but the Committee would not add one acre to the wilderness.¹⁹¹

without at least the same acreage added elsewhere in the bill—usually in another location in the same wilderness.

187. Sportsmen's Heritage Act of 2012, H.R. 4089, 112th Cong. (2012).

188. CONG. RESEARCH SERV., MEMORANDUM ON H.R. 4089 Section 104(e) and Its Impacts on Wilderness Management (Apr. 13, 2012) (on file with authors).

189. Wilderness designation came in two bills: the untitled Pub. L. No. 94-567 was passed in 1976, only the fourth piece of legislation to designate part of a National Park as wilderness; and the Big Sur Wilderness and Conservation Act of 2002 Pub. L. No. 107-370, added lands which had been BLM WSAs and which had been transferred to the National Park Service by Presidential proclamation in 2000.

190. H.R. 3641, 112th Cong., (2013).

191. The omission of the 2,900 acres proposed as wilderness in the original bill was carried through all the way to the Pinnacles National Park Act, Pub. L. No. 112-245, approved January 10, 2013.

There is little reason to believe that the polarization now characterizing Congress will abate any time soon, as the recent government shutdown and debt ceiling debates have shown.¹⁹² There are larger historical and institutional forces at work here, from the reshaping of southern politics to campaign finance trends that appear to exacerbate polarization.¹⁹³ One must also consider that the Senate now operates as a sort of super-majoritarian body due to the pervasive threat and use of the filibuster.¹⁹⁴ The skyrocketing use of the filibuster in recent years means that a new veto point has essentially been added to the political process, making legislation all the more difficult to pass.¹⁹⁵

2. Polarization and alternatives to wilderness designation

The polarization of the parties will impact wilderness politics in several ways. Most obvious is the policy gridlock, stalemate, or “logjam” that it has produced in environmental lawmaking in general.¹⁹⁶ Congress has failed to act on a number of pressing environmental fronts, which gives doubt that the institution is currently capable of providing comprehensive and thoughtful reforms to natural resources and environmental law.¹⁹⁷

The gridlock and stalemate in Congress also helps explain some of the “alternative pathways” that have been used to protect federal lands in recent years, such as the executive branch using its powers to designate national monuments and its rulemaking powers to protect roadless areas.¹⁹⁸ In other words, congressional gridlock has simply pushed some

192. By some measures, the 112th Congress was the least productive in history, and the 113th is on track to be even less productive. See Ezra Klein, *Congressional Dysfunction*, VOX (Aug. 5, 2014, 12:43 PM), available at <http://www.vox.com/cards/congressional-dysfunction/is-congress-less-productive-than-is-used-to-be> (reviewing the research on congressional polarization and dysfunction).

193. See APSA Task Force, *supra* note 172; McCarty, *supra* note 173; Pildes, *supra* note 175.

194. See generally SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE? FILIBUSTERING IN THE U.S. SENATE* (1997).

195. See APSA Task Force, *supra* note 172, at 38; Klein, *Congressional Dysfunction*, *supra* note 192.

196. Congressional gridlock and its impact on environmental law and policy has been the focus of much scholarly study; see, e.g., Carol A. Casazza Herman et al., *The Breaking The Logjam Project*, 17 N.Y.U. ENVTL. L.J. 1, 1 (2008) (introducing a symposium focused on the political and environmental impacts resulting from the environmental “logjam” and some of the “portaging” strategies that can be taken around it).

197. See Sandra Zellmer, *Treading Water While Congress Ignores the Nation’s Environment*, 88 NOTRE DAME L. REV. 2323, 2323 (2013).

198. See generally CHRISTOPHER MCGRORY KLYZA & DAVID SOUSA, *AMERICAN ENVIRONMENTAL POLICY, 1990-2006* (2008) (assessing the state of environmental policy since 1990).

policy issues and disputes onto alternative decision-making paths: planning processes, appropriations, executive branch intervention, and the courts take up the slack left by a Congress that is increasingly unable to move.¹⁹⁹ This is a theme characterizing American environmental policy writ large, and wilderness politics exemplifies the trend.²⁰⁰

We suspect that gridlock in Congress will continue to push wilderness politics onto these alternative pathways. For example, if Congress fails to act in protecting wilderness-eligible lands, a wilderness-friendly executive branch may likely use its powers to do so. And these powers are multi-faceted, such as the President using the Antiquities Act to designate national monuments. Consider, for example, the campaign to designate a national monument in Idaho to protect the Boulder and White Cloud Mountains, one of the largest roadless areas in the lower forty-eight states. A collaborative yet controversial wilderness bill championed by Idaho Representative Mike Simpson—the Central Idaho Economic Development and Recreation Act (CIEDRA)—lingered in Congress for nearly a decade. That a bill with so many controversial concessions could not move legislatively eventually led to the national monument campaign, which some people see as the logical portage around a log jammed Congress.²⁰¹

If congressional gridlock persists, another pathway that might be taken more often is provided by the Secretary of Interior's power, as granted by FLPMA, to withdraw areas "from settlement, sale, location, or entry" or to "reserv[e] the area for a particular public purpose."²⁰² FLPMA's withdrawal provisions are cumbersome and controversial, but they have been used in the past as a way to forestall mineral development on lands that might be

199. See MARTIN NIE, *THE GOVERNANCE OF WESTERN PUBLIC LANDS: MAPPING ITS PRESENT AND FUTURE* (2008) (analyzing these alternative pathways in the context of national forest politics).

200. See CHRISTOPHER MCGRORY KLYZA & DAVID SOUSA, *AMERICAN ENVIRONMENTAL POLICY: BEYOND GRIDLOCK* (2013) (analyzing how legislative gridlock has pushed a number of environmental issues onto alternative policy pathways).

201. See Central Idaho Economic Development and Recreation Act, S. 3294, 111th Cong. (2010); see generally IDAHO CONSERVATION LEAGUE, http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=42165f67-eb29-e8f1-4df6-57cc4d34a1b4 (June 16, 2010); see generally Rick Johnson, *Maybe it's time for a new national monument in Idaho*, IDAHO STATESMAN (July 14, 2013) http://infoweb.newsbank.com.ezproxy2.library.arizona.edu/iw-search/we/InfoWeb?p_product=AWNB&p_theme=aggregated5&p_action=doc&p_docid=147890ADD6D71390&p_docnum=5&p_queryname=5.

202. 43 U.S.C. § 1702(j) (2014).

protected in some fashion in the future.²⁰³ Of course, these alternative pathways can be used to protect lands—but they do not result in the designation of wilderness.

B. Compromise and Collaboration

We believe that congressional polarization and gridlock will push wilderness politics into more collaborative forums in the future, and that this alternative pathway will influence the shape of future wilderness laws. Though the ultimate impact of the collaborative movement is yet to be determined, collaboration has been a game changer on federal lands because in many cases it now offers an alternative venue for politics and conflict resolution.²⁰⁴ As we explain below, collaboration offers some potential in moving wilderness designations forward, but we are fearful that those collaborating may make deals that threaten the integrity of the Wilderness System.

1. The collaborative turn in wilderness politics

Some wilderness advocates believe that collaboration will become increasingly essential to advance wilderness in the future, especially given the polarization and stalemate in Congress.²⁰⁵ For a deeply divided Congress to act on a wilderness bill, the thinking goes, the bill must be supported by a broader base of interests with stronger grassroots local support.²⁰⁶ For this reason, several conservation groups are now engaged in various collaborative efforts having a wilderness *and* economic development component, with the

203. In 2012, Secretary of the Interior Salazar withdrew almost one million acres from new mineral development north of the Grand Canyon for twenty years. *See* DEP'T OF THE INTERIOR, Secretary Salazar Announces Decision to Withdraw Public Lands near Grand Canyon from New Mining Claims, Press Release Jan. 9, 2012, <http://www.doi.gov/news/pressreleases/Secretary-Salazar-Announces-Decision-to-Withdraw-Public-Lands-near-Grand-Canyon-from-New-Mining-Claims.cfm> (last accessed Nov. 30, 2013).

204. *See generally* Caitlin A. Burke, *Who Litigates and Who Collaborates? Evidence from Environmental Groups Influencing National Forest Management*, 2 INTEREST GROUPS & ADVOCACY 163 (2013); Martin Nie, *Managing the National Forests through Place-Based Legislation*, 37 ECOLOGY L. Q. 1 (2010); Matthew McKinney and Patrick Field, *Evaluating Community-Based Collaboration on Federal Lands and Resources*, 21 SOC'Y & NATURAL RES. 419 (2008) (evaluating the growing interest in community-based collaboration).

205. *See infra* note 228; John Adams, *Collaboration conundrum: wilderness advocates sharply divided on "consensus" proposals*, GREAT FALL TRIB. (Dec. 16, 2013).

206. *Id.*

latter designed to gain the support of rural communities.²⁰⁷ As discussed below, some of these initiatives are controversial, but they have also changed the dynamics of wilderness politics.

Two other issues help explain the move towards collaboration in contemporary wilderness politics. First is the nature of the remaining wilderness-eligible lands managed by the USFS and BLM. Though simplified, many wilderness battles of the past were focused on protecting so-called “rocks and ice,” high altitude alpine environments with fewer pre-existing uses than found on lower elevation lands.²⁰⁸ Many current wilderness proposals, however, now aim to protect lower elevation landscapes—and thus places with more historic extractive uses and entrenched interests associated with them.

The second factor pertains to the growing use of motorized vehicles on USFS and BLM lands and how this transformation has impacted the conflicts, litigation, and politics surrounding federal lands management.²⁰⁹ As discussed above, motorized use on wilderness-eligible lands will figure into agency decisions about whether to recommend areas for wilderness and whether Congress will designate them as such. Some wilderness advocates fear that these machines will increasingly intrude into potential wilderness areas and make their protection more difficult in the future because of associated impairments and purported evidence of “historic use.” A sense of urgency is apparent among some wilderness advocates who are willing to make concessions now rather than risk losing these lands altogether.²¹⁰ This perspective holds that we do not have the time or luxury of waiting for the perfectly clean and unblemished large-scale wilderness law. Those stars are unlikely to align, so we must get on with more politically feasible protection strategies, and this means sitting down and cutting deals with motorized interests.

207. See, e.g., Martin Nie, *Place-Based National Forest Legislation and Agreements: Common Characteristics and Policy Recommendations*, 41 ENVTL. L. REP. 102, 29 (2011).

208. See, e.g., J. Michael Scott et al., *Nature Reserves: Do They Capture the Full Range of America's Biological Diversity?* 11(4) ECOLOGICAL APPLICATIONS 999 (2001).

209. See GOV'T ACCOUNTABILITY OFFICE, FEDERAL LANDS: ENHANCED PLANNING COULD ASSIST AGENCIES IN MANAGING INCREASED USE OF OFF-HIGHWAY VEHICLES, GAO-09-509 (2009); Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68,264 (Nov. 9, 2005); Adams & McCool, *supra* note 65; Jan G. Laitos & Rachael B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENVTL. L. 1091(2004); Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L. Q. 140 (1999).

210. See, e.g., Rick Johnson, *Wilderness Bill is a Test for Common-Sense Conservation in Idaho*, HIGH COUNTRY NEWS (Oct. 24, 2005).

The Owyhee Public Land Management Act provides a reference point for how these factors are already shaping wilderness politics. Enacted in 2009 as part of the Omnibus Public Land Management Act, the Owyhee legislation is the first wilderness law to be passed for areas in Idaho in thirty years.²¹¹ Years of conflict and grazing-related litigation preceded the initiation of a collaborative endeavor between wilderness advocates, ranchers, motorized vehicle users, Owyhee County elected officials, members of the Shoshone-Paiute Tribe, and others.²¹² Some conservationists believed that “[t]he primary threat to Owyhee wildlands” was “the dramatic increase in illegal and inappropriate off-road vehicle use,” and that the designation and management of some areas as WSAs was doing little to limit or protect these places from escalating motorized use.²¹³

Within this context, and with leadership provided by Idaho Senator Mike Crapo, the group worked over eight years in developing an agreement that could be translated into legislation. The multifaceted law designates roughly 517,000 acres of wilderness and 316 miles of wild and scenic rivers while also releasing approximately 200,000 acres of BLM wilderness study areas.²¹⁴ The collaborative process used to find agreement among some of these traditional adversaries helps explain some of the law’s more non-traditional provisions, many of which concern both the removal of livestock from certain wilderness areas and the accommodation of such use in others.²¹⁵ This includes language pertaining to the voluntary relinquishment and retirement of grazing permits,²¹⁶ a provision that concerned the BLM because of its long-standing belief that “grazing is a compatible use within wilderness and there is a long history of legislation accommodating grazing within wilderness designations.”²¹⁷ But the agency acquiesced on this issue, citing the value of collaboration and cooperation in its testimony on the proposed bill.²¹⁸

211. Omnibus Public Land Management Act §§ 1501-08.

212. *See generally* S. REP. NO. 110-374, at 7-8 (2008) (providing background on the Owyhee Initiative).

213. *Miscellaneous Public Lands Bills: Hearing Before the S. Subcomm. on Pub. Lands and Forests of the S. Comm. on Energy and Natural Res.*, 110th Cong. (2008) (statement of Craig Gehrke, Regional Director, The Wilderness Society), at 41-42 [hereinafter *Owyhee Hearing*].

214. Omnibus Public Land Management Act §§ 1503-04.

215. *See, e.g., id.* § 1503(b)(3).

216. *Id.*

217. *Owyhee Hearing, supra* note 213, at 16 (statement of Julie Jacobson, Deputy Assistant Secretary, Dep’t of Interior).

218. *Id.*

The Owyhee law also includes provisions related to the disposal and acquisition of selected lands, which includes a creative effort to acquire inholdings and private parcels within or adjacent to the newly established wilderness areas²¹⁹—an approach that may become more common as wilderness designations move into lower elevation lands with more mixed ownership patterns. Also included in the law are required planning processes related to tribal cultural resources and recreational travel management, the latter intended to expedite a more comprehensive approach to motorized use in the area.²²⁰ The Owyhee law, and the process used to write it, has generated a lot of attention because of its collaborative and far-reaching approach to wilderness.²²¹ It involved both political “gives” and “takes,” but it also broke a long stalemate in Idaho wilderness politics. The law certainly provides a contrast to simpler wilderness legislation of the past that focused on higher elevation lands with relatively fewer conflicts associated with them.

The collaboration leading to the formation of the Owyhee law has also impacted its subsequent implementation. After the BLM released a draft Wilderness Management Plan for the Owyhee wilderness areas, the self-identified “conservation representatives for the Owyhee Initiative, Inc.” objected to certain provisions of the standard grazing management policy language²²² in the Plan. Representatives of the Wilderness Society, Idaho Rivers United, Idaho Conservation League, and the Nature Conservancy called for the BLM to allow two grazing permittees to herd their livestock on motorcycles or ATVs because “the negotiated agreement on wilderness with livestock permittees was made with the expectation that [their] existing uses of motorized equipment . . . would continue post-wilderness designation.” Continuing, they asserted, “It is important that the BLM recognize and accommodate the unique process which produced” this legislation.²²³ The collaborative

219. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 1503(b)(4).

220. *Id.* §§ 1506-07.

221. *See, e.g.*, Idaho Public Television, *Dialogue: Owyhee Initiative*, <http://www.youtube.com/watch?v=MCecDI8-EY0> (May 2, 2009); Idaho Public Television, *Wilderness in the 21st Century*, <http://video.idahoptv.org/video/1622555196/> (Oct. 21, 2010).

222. Bureau of Land Mgmt., Bureau of Land Mgmt. Manual 6340, Management of Designated Wilderness Areas § 1.6.C.8.e (2012) (“The use of motor vehicles, motorized equipment, or mechanical transport is not allowed for herding animals or routine inspection of the condition of developments or the condition of the range.”).

223. E-mail from Gehrke et al. Owyhee Wilderness livestock management to Neil Kornze, Principle Deputy Director, Bureau of Land Management (July 19, 2013) (on file with author).

process, it seems, became more valued to the “conservation representatives” than the law itself.

Currently, routine use of motor vehicles to herd livestock is not allowed in any wilderness, and is inconsistent with the so-called Congressional Grazing Guidelines²²⁴ referenced in the Owyhee Public Land Management Act (as well as the majority of wilderness bills designating BLM wildernesses with pre-existing grazing since the current version of these Guidelines was first referenced in the Arizona Desert Wilderness Act of 1990). The Owyhee legislation did not include an explicit override of this prohibition, but subsequent bills backed by some of the same conservation organizations do.²²⁵ In the final version of the Wilderness Management Plan for the Owyhee wilderness areas, the BLM deleted the prohibition of motorized herding which had been included in the Draft.²²⁶ Apparently, the BLM agreed with the “conservation representatives” by valuing the collaborative process more than the law or its own policy.

224. See H. R. REP. NO. 101-405, APPENDIX A. “The use of motorized equipment should be based on a rule of practical necessity and reasonableness” and not “where such activities can reasonably and practically be accomplished on horseback or foot.” Except for the maintenance of facilities (or other management actions such as placing large quantities of salt) where there are no practical non-motorized alternatives, motor vehicle use is limited to emergencies. “This privilege is to be exercised only in true emergencies, and should not be abused by permittees.”

225. A controversial example of this is provided by the original version of the Forest Jobs and Recreation Act. S. 1470, 111th Cong., 1st Sess. (2009), § 202(n)(3)(B); see also *infra* note 246 and accompanying text. This version of the bill allowed “historical motorized access to trail sheep” and unlimited “motorized access to water infrastructure for cattle” “to preserve historic access for other ranching activities” in the Snowcrest Wilderness. This level of motorized access, agreed to by the “conservation” partners who helped craft the bill, would be far beyond that envisioned in the Congressional Grazing Guidelines.

226. Compare BUREAU LAND MGMT., OWYHEE CANYONLANDS WILDERNESS AND WILD & SCENIC RIVERS MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT, at 99 (Apr. 2014) (“The Minimal Management Alternative would prohibit the use of motorized or mechanized vehicles for livestock monitoring, herding, and gathering. The Proposed Action will provide for case-specific authorization following a [Minimum requirements analysis].”), with BUREAU LAND MGMT., OWYHEE CANYONLANDS WILDERNESS AND WILD & SCENIC RIVERS DRAFT MANAGEMENT PLAN AND ENVIRONMENTAL ASSESSMENT, at 47 (Feb. 2013) (“Routine livestock management activities in wilderness areas, including project inspection and maintenance (e.g. minor fence repairs or small quantity salt distribution) would normally be accomplished by non-motorized, non-mechanized means.”).

Issues pertaining to collaboration and compromise will also play out in future debates over roadless lands managed by the USFS. As discussed in Part I, outside of Idaho and Colorado, these lands are subject to the provisions of 2001 roadless rule. But this rule can be viewed in two different ways: one as providing a permanent baseline administrative protection and the other as a more temporary measure designed to keep the roadless pieces in place until their permanent status and management can be negotiated in future wilderness bills. What is clear is that any weakening of protection provided by the 2001 rule will be controversial and likely litigated by those viewing the rule as non-negotiable. On the other hand, and as discussed above, roadless areas are clearly not protected to the same degree as wilderness areas; all of this meaning that political choices will have to be made in the future.

The Idaho Roadless Rule provides an example of what sort of politics may be in store for the future. Advocates of the Idaho rule laud its substance and the collaborative process used to write it, which included a broad-based fourteen member Roadless Area Conservation National Advisory Committee (RACNAC) that was used to provide advice to the USFS and review state petitions.²²⁷ Ray Vaughan, a well-known former environmental litigator and “gladiator” and member of the RACNAC, views the partnership between the Committee, USFS, and State of Idaho as leading to the most successful collaborative solution to a public lands management issue ever in our country’s history.²²⁸ This big claim is based on the roughly nine million acres covered by the rule and how far Idaho moved its position on roadless since the State’s initial litigation of the 2001 rule. Vaughan was one of several conservationists that supported the Idaho roadless rule, but others viewed the State’s rule and the process used to write it as setting a dangerous precedent and backsliding on the protections provided in the national-level roadless rule.²²⁹ For these and other reasons, the Idaho Rule was legally challenged by several conservation groups, though it was eventually upheld by the Idaho District Court and Ninth Circuit Court of Appeals.²³⁰ The politics and litigation surrounding the Idaho rule provide a glimpse of the controversy that will come along with any future wilderness negotiation that lessens protections provided by the 2001 roadless rule.

227. Idaho Roadless Rule, 70 Fed. Reg. 25,654 (May 13, 2005).

228. Declaration of Ray Vaughan, *Jayne v. Sherman*, at 3, 780 F. Supp. 2d 1099 (2010) (Case No. CV-09-015-BLW).

229. Steven Benson, *Risch Roadless Plan Shocks Conservationists*, IDAHO MOUNTAIN EXPRESS & GUIDE, Dec. 1, 2006, available at http://www.mtexpress.com/index2.php?issue_date=12-01-2006&ID=2005113334#.VB-Lpml0x-Y.

230. *Jayne v. Rey*, 780 F. Supp. 2d 1099 (D. Idaho 2011) *aff’d sub nom. Jayne v. Sherman*, 706 F.3d 994 (9th Cir. 2013).

2. *Compromise in wilderness politics: past, present, and future*

The movement towards collaboration sharpens several questions pertaining to the nature and scope of compromise in wilderness politics. There has long been an enduring tension in wilderness politics between idealists and pragmatists in the movement, with the latter more comfortable than the former in making deals and playing politics in order to designate additional wilderness.²³¹ Of course, compromise is woven into the Wilderness Act itself, as its eight year journey through Congress left it subject to numerous exceptions and special provisions, from mining to grazing to water development to fire.²³² Compromise is also evident in subsequent laws designating particular wilderness areas, with much of the debate centered on how much land to designate as wilderness, how much to release to other multiple use management, and where to draw the boundaries. More controversial are some wilderness laws that include special management provisions and non-conforming uses that go well beyond those provided in the Wilderness Act, such as allowing motorboat use, airplane landings, or motorized access for livestock management.²³³

That compromise is part of wilderness, as it is for politics more generally, is not the dispute. What is disputed is whether these compromises regarding how the area is managed (as opposed to where its boundary is drawn) have gone too far in recent years and what precedent they set for the future of the Wilderness System. While the first “special management provision” appeared in legislation in 1969,²³⁴ and the first so-called “quid-pro-

231. See John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RESOURCES & ENVTL. L 1, 3 (2005).

232. See 16 U.S.C. § 1133(d).

233. See, for example, The Central Idaho Wilderness Act, Pub. L. No. 96-312, 94 Stat. 948 §§ 7, 9 (1980), for motor boat and aircraft language, and the California Wilderness Act of 1984, Pub. L. No. 98-425, 98 Stat. 1619 § 101 for livestock provision language. For a comprehensive review, see Gorte, *Wilderness Laws*, *supra* note 9; NATURAL RESOURCES LAW CTR., SPECIAL USE PROVISIONS IN WILDERNESS LEGISLATION (2004), available at <http://www.wilderness.net/toolboxes/documents/MSP/Spec.%20Use%20Provisions%20in%20Legislation.pdf>. For a more critical examination, see GEORGE NICKAS & KEVIN PROESCHOLDT, KEEPING THE WILD IN WILDERNESS: MINIMIZING NON-CONFORMING USES IN THE NATIONAL WILDERNESS PRESERVATION SYSTEM (2005), available at <http://www.wildernesswatch.org/pdf/Special%20Provisions.pdf>.

234. See An Act of Oct. 10, 1969, Pub. L. No. 91-82, § 3, 83 Stat. 31 (requiring that the Desolation Wilderness is to be managed in accordance with the Wilderness Act “except that the owners and operators of existing federally licensed hydroelectric facilities shall have the right of reasonable access to the areas for purposes of operating and maintaining such facilities in a manner that is consistent with past practices without prior approval of the Secretary.”).

quo” wilderness bill was passed in 1978,²³⁵ both tactics to get a bill passed have become more common in recent years. In some cases, the deal making has become more complicated and multi-faceted, with more actors seeking legislative assurances for how a public land unit will be managed, inside and outside of the federally designated wilderness.

Some critics consider the Steens Mountain Cooperative Management and Protection Area Act of 2000 as a turning point in wilderness politics.²³⁶ Among other provisions, this complex legislation provides for several land exchanges in the area, designates about 175,000 acres of wilderness, and a much larger “Cooperative Management and Protection Area.”²³⁷ The Act mandates how both areas are to be managed, while also creating an advisory council to oversee management and make recommendations to the BLM.²³⁸ Depending on one’s perspective, the Steens Act provides either a positive model of how legislative packages might be crafted in the future or “a new breed of compromise” posing a serious threat to public lands management.²³⁹ According to some critics, the trend they identify as beginning with the Steens Act has negative implications for public lands policy and wilderness:

These deals create a quid pro quo situation wherein wilderness protection is essentially “paid for” with balancing provisions in the same piece of legislation that facilitate development, privatization, and intensified land use—even in the very “wilderness” set aside in the deals. If this trend continues, the days of the

235. See Endangered American Wilderness Act, Pub. L. No. 95-237, § 4(a)(3), 92 Stat. 40, 43-44 (1978) (requiring that, in addition to designating the Gospel-Hump Wilderness, “[c]ertain other contiguous roadless lands which comprise about forty-five thousand acres, as generally depicted on [the accompanying] map as ‘Development Areas’ shall be immediately available for resource utilization.”). Interestingly, Section 4(b) created the first wilderness citizen advisory committee to counsel on the management of the Gospel-Hump Area. “The Committee shall be comprised of two members of the timber industry . . . two members from organizations who are actively engaged in seeking the preservation of wilderness lands, and three members from the general public who otherwise have a significant interest in . . . the Gospel-Hump Area.” In contrast to subsequent similar committees, the Advisory Committee was to be terminated 150 days after the completion of the multipurpose resource development plan required by the legislation.

236. Steens Mountain Cooperative Management and Protection Area Act of 2000, Pub. L. No. 106-399, § 101, 114 Stat. 1655, 1658 (2000) (codified at 16 U.S.C. § 460nnn-11 (2006)).

237. *Id.* §§ 101, 201.

238. 16 U.S.C.A. § 460nnn-51 (West 2014).

239. Janine Blaeloch & Katie Fite, *Quid Pro Quo Wilderness: A New Threat to Public Lands* (2006), http://westernlands.org/publications/preview/quid_pro_quo_wilderness/.

stand-alone wilderness bill, along with the strict observance of the letter and spirit of the Wilderness Act, may be relics of the past.²⁴⁰

It can be argued that most legislation has some quid-pro-quo aspect to it, such as coupling crop subsidies with food stamps in the Farm Bill. In the past, perhaps with more trust and reciprocity between members of Congress, the trade-offs were understood, but the concessions did not need to be packaged in the same law. Representative Morris Udall, for example, could move the Central Arizona Project and later, in separate pieces of legislation, champion the most complete wilderness designations of any state to date. But Congress, as described earlier, is increasingly polarized, and the Steens Act ushered in an era of a number of controversial wilderness laws²⁴¹ and proposed bills²⁴² in the 2000s that conveyed or proposed to convey selected federal lands to private and state ownership in exchange for wilderness designation in other areas. Federal land exchanges and conveyances are controversial in their own right, but they become even more so when part of an omnibus bill that includes wilderness and various provisions related to economic development for communities adjacent to federal lands.

Given how difficult it is to find agreement among stakeholders, and then move legislation in a divided and increasingly polarized Congress, there is an incentive to bundle multiple provisions that go beyond wilderness into a single omnibus bill.²⁴³ But some congressional leaders find the increasingly complex nature of wilderness bills to be a “troubling trend,” partly because they signify the willingness of some Congress members to sweeten wilderness deals with special provisions and to increasingly micromanage federal

240. *Id.*

241. *See* Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282, 16 Stat. 1994 (2002) (codified at 16 U.S.C. § 460qqq (2006)); Lincoln County Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424, 118 Stat. 2403 (2004) (codified at 16 U.S.C. § 1241 (2006)); White Pine County Conservation, Recreation, and Development Act of 2006, Pub. L. No. 109-432, tit. III, § 301, 120 Stat. 2922, 3028-30 (2006) (codified at 16 U.S.C. § 1241 (2006)); Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, tit. I, subtit. O, 123 Stat. 991, 1075 (2009).

242. *See, e.g.*, Central Idaho Economic Development and Recreation Act, H.R. 222, 110th Cong. (2007).

243. According to Kai Anderson, Staff for Nevada Senator Harry Reid, this is part of the reasoning behind the controversial Nevada wilderness bills. COLLABORATIVE CONSERVATION STRATEGIES: LEGISLATIVE CASE STUDIES FROM ACROSS THE WEST: A WESTERN GOVERNOR’S ASS’N WHITE PAPER (2006) (on file with author); *see also* Kai S. Anderson and Deborah Paulus-Jagric, *A New Land Initiative in Nevada*, 17 N.Y.U. ENVTL. L. J. 398 (2008).

lands outside of designated wilderness.²⁴⁴ Others, however, view the deal-making of the 2000s as a continuation of the give-and-take politics that has always characterized the wilderness movement. One recent assessment of wilderness politics concludes that “[t]he engagement with local stakeholders and the political pragmatism of the 2000s did not abandon the values embodied by the Wilderness Act; instead, it marked a return to it.”²⁴⁵

These omnibus laws then set the stage for equally controversial “place-based” forest legislation, such as the proposed Forest Jobs and Recreation Act, which is focused on three national forests in Montana.²⁴⁶ Senator Tester’s bill garnered national attention because of its approach to dealing with wilderness and a range of forest management issues in a single legislative package.²⁴⁷ Though the bill would designate roughly 677,000 acres as wilderness, thus potentially ending the “wilderness drought” in Montana, it also includes a mandate that 100,000 acres on two national forests be placed under contract and be “mechanically treated.”²⁴⁸ Other provisions of the bill detail how forest management and restoration

244. Dan Berman, *Bush Administration, Senator Bingamin Skeptical of Idaho, Ore. Wilderness Bills*, ENERGY & ENVIRONMENT DAILY (Sept. 28, 2006). Chairman of the House Committee on Natural Resources, Rep. Nick Rahall (D-WV), called for cleaner wilderness legislation in 2005:

Wilderness designations should not be the result of a quid pro quo. They should rise or fall on their own merits We all understand that compromise is part of the legislative process, yet at the same time, I would submit that wilderness is not for sale. Simply put, I believe we should not seek the lowest common denominator when it comes to wilderness and saddle a wilderness designation with exceptions, exclusions and exemptions.

Greg Stahl, *CIEDRA Begins Legislative Journey*, IDAHO MOUNTAIN EXPRESS, Oct. 28, 2005, available at <http://www.mtexpress.com/index2.php?ID=2005106024>.

245. JAMES MORTON TURNER, *THE PROMISE OF WILDERNESS: AMERICAN ENVIRONMENTAL POLITICS SINCE 1964*, at 398 (2012) (“[T]o criticize the commitment to negotiation and compromise as an abandonment of a more pure or principled wilderness tradition is to overlook more than four decades of wilderness politics.”).

246. S. 268, 112th Cong. (2011).

247. See, e.g. Martin Nie & Michael Fiebig, *Managing the National Forests through Place-Based Legislation*, 37 *ECOLOGY L. Q.* 1 (2010); Ray Ring, *Taking Control of the Machine*, HIGH COUNTRY NEWS (July 20, 2009); Noelle Straub, *Sen. Tester’s Plan for Wilderness, Logging Roils Big Sky Country*, N.Y. TIMES (Dec. 14, 2009); Phil Taylor, *Senate Plan Mixes Wilderness, Timber Harvests in Bid to Rescue Mont. Ecosystem*, N.Y. TIMES (Sept. 14, 2011).

248. “Mechanically treated” is defined as “an activity that uses a tool to remove fiber that has commercial value to local markets in the vicinity of the area treated.” S. 268, § 102.

activities will be implemented by the USFS and the decision making process that must be used to do so.

Much of the debate over Tester's bill focuses on his novel approach to legislating wilderness in the same law that includes what is essentially a timber harvest mandate. This sort of deal, according to its critics, signifies a dangerous trend in contemporary wilderness politics.²⁴⁹ The appropriate role, and definition, of collaboration is another central theme running through the debate.²⁵⁰ Its supporters frame the bill as an exemplary case of vision and collaboration, of "transcending partisanship to find common ground" and bringing people together "to find workable solutions to big problems."²⁵¹ It is this type of collaborative approach, they insist, that will finally break Montana's wilderness stalemate. Critics, on the other hand, worry about the precedent the bill sets for future wilderness designation and national forest management more generally. Some also question the nature of this collaboration, seeing the process used as "closed door negotiations between self-appointed agents from a few carefully screened special interest groups"²⁵²

We suspect that these sorts of multi-faceted negotiations, in which wilderness is but one part of a larger deal, will increase in scale and complexity in the future. The next frontier in this regard may involve negotiations pertaining to wilderness designations and energy development on BLM lands. The backdrop here is significant given the current pace and future projections for energy development on federal lands, both renewable and non-renewable.²⁵³ Consider, for instance, the possible development of oil shale in the Green River Formation that lie beneath parts of Colorado, Utah, and Wyoming: it contains the world's largest deposit, an amount that could equal the entire world's proven oil reserves—

249. See Nie, *Managing the National Forests through Place-Based Legislation*, *supra* note 247.

250. See, e.g., John Adams, *Collaboration conundrum: wilderness advocates sharply divided on "consensus" proposals*, GREAT FALL TRIB. (Dec. 16, 2013).

251. *Public Lands and Forests Legislation Hearing Before the Subcomm. On Public Lands and Forests of the S. Comm. On Energy and Natural Resources*, 111th Cong. (2009) (statement of Tim Baker, Director Montana Wilderness Association).

252. *Id.* (statement of Stewart M. Brandborg, former Executive Director of the Wilderness Society).

253. See, e.g., Marc Humphries, *U.S. Crude Oil and Natural Gas Production in Federal and Non-Federal Areas* (Washington, D.C. 2013); GOVT. ACCOUNTABILITY OFFICE, RENEWABLE ENERGY: AGENCIES HAVE TAKEN STEPS AIMED AT IMPROVING THE PERMITTING PROCESS FOR DEVELOPMENT ON FEDERAL LANDS (2013).

and the federal government controls two percent of this land.²⁵⁴ The tensions between energy and conservation are becoming more acute in several places in the West that wilderness advocates believe are “too wild to drill.”²⁵⁵ In some cases, agreements have been struck between wilderness advocates and the energy industry, such as in Utah’s Nine Mile Canyon. In this case, the Southern Utah Wilderness Alliance and the Bill Barrett Corporation—without significant participation from the public or the managing agency, the BLM—found agreement on where to drill in the region while also protecting some of the area’s wilderness qualities.²⁵⁶

The scope of deal making is much wider now in Utah where Congressman Rob Bishop has proposed a “grand bargain” amongst various interests in the state as a way to “establish greater certainty about the way our public lands may be used.”²⁵⁷ The “Utah Public Lands Initiative” hopes to find resolution on several intractable land disputes in Utah. As viewed by Bishop, wilderness and other land designations act as currency in the negotiations—providing something to trade in return for more certain economic development on non-wilderness federal lands.²⁵⁸ This means the negotiations, as they are currently unfolding, center around how much wilderness to designate in exchange for more economic development elsewhere, such as the designation of more certain and predictable “energy zones,” state or local control over disputed roads, the transferring of federal lands to local control for various purposes, and the swapping of some hard-to-access school trust lands.

The move towards collaboration in wilderness politics will influence not only what lands are designated as wilderness but also how they are managed in the future. The trend in collaboration may lead to increased demands for non-conforming uses and special provisions in newly designated wilderness areas. As discussed earlier, several wilderness laws contain special provisions and allow uses that are generally proscribed by the Wilderness

254. See U.S. GOV’T. ACCOUNTABILITY OFFICE, GAO-13-189, UNCONVENTIONAL OIL AND GAS PRODUCTION: OPPORTUNITIES AND CHALLENGES OF OIL SHALE DEVELOPMENT (2012) (statement of Anu K. Mittal), at 3-4, 8.

255. See, e.g., THE WILDERNESS SOCIETY, TOO WILD TO DRILL, <http://wilderness.org/too-wild-drill-report-spotlights-12-priceless-wild-places-most-threatened-drilling> (last visited Nov. 17, 2013).

256. Robert B. Keiter & Kirstin Lindstrom, *Lessons from Nine Mile Canyon: Achieving Consensus Over Energy Development on the Public Lands*, 57 ROCKY MTN. MIN. L. INST. 3-1 (2011).

257. Rob Bishop, *The Utah Public Lands Initiative*, http://robbishop.house.gov/uploadedfiles/web_op-ed.pdf.

258. See Greg Hanscom, *Red Rock Resolution?* HIGH COUNTRY NEWS (July 22, 2013).

Act.²⁵⁹ This has been a long-standing issue that has troubled some wilderness advocates and managers because these compromised laws collectively threaten the integrity of the wilderness system.²⁶⁰ Precedent is also a concern in this context because of how often special provisions are replicated in wilderness laws. Once used, provisions related to such matters as water rights, buffer areas, overflights, and grazing are regularly stamped onto future wilderness bills as a matter of course. One study, for example, finds that not only are wilderness-specific special provisions increasing over time, but that “once included as a legislative provision they often appear in subsequent legislation with a related concern or situation.”²⁶¹ Whereas it was once believed that the compromises necessary to designate an area as wilderness were made in the eight-year struggle to pass the original Wilderness Act, it is increasingly apparent that many players will call for further concessions from wilderness in order to gain designation—leading to what others might call a “WINO”—Wilderness In Name Only.

C. Wilderness Manipulation

The last issue we wish to discuss pertains to what we believe will be increasing demands to control and manipulate wilderness in contravention of the law’s mandate to preserve wilderness areas as untrammelled. Such demands will likely be made in the context of ecological restoration and efforts to mitigate and adapt to various environmental changes, such as threats posed by climate change and invasive species. We suspect that future wilderness designations and the politics surrounding them will increasingly focus on issues such as water supply, fire, insects, disease, and invasive species.

259. See Gorte, *Wilderness Laws: Statutory Provisions and Prohibited and Permitted Uses*, *supra* note 48; NATURAL RESOURCES LAW CTR., SPECIAL USE PROVISIONS IN WILDERNESS LEGISLATION (Boulder, CO, University of Colorado, 2004).

260. See, e.g., George Nickas & Kevin Proescholdt, *Keeping the Wild in Wilderness: Minimizing Non-Conforming Uses in the National Wilderness Preservation System* (2005), available at <http://www.wildernesswatch.org/pdf/Special%20Provisions.pdf>. (“[E]ach non-conforming use violates the ideal and integrity of Wilderness and diminishes the wilderness character and symbolic value of all Wilderness areas in the system [and] the cumulative impact of hundreds of non-conforming uses is not small.”); see also George Nickas, *Preserving an Enduring Wilderness: Challenges and Threats to the National Wilderness Preservation System*, 76 DENV. U. L. REV. 449 (1998-99).

261. Chad P. Dawson, Blake Propst, & John C. Hendee, *Special Provisions of Wilderness Legislation in the United States, 1964 to 2009*, 16(2) INT’L JOURNAL OF WILDERNESS 32, 33 (2010).

The purpose of the Wilderness Act is to preserve the “wilderness character” of areas included in the wilderness system.²⁶² Though the term is not explicitly defined as such in the law, wilderness character is comprised of four required qualities (and one optional quality) that are expressed in the statute.²⁶³ Two of these qualities are particularly relevant to the issue of human manipulation: the direction to manage wilderness areas as “untrammeled” while also preserving their “natural conditions.”²⁶⁴ The Wilderness Act states that wilderness is “an area where the earth and its community of life are untrammeled by man,” and “generally appears to have been affected primarily by the forces of nature”²⁶⁵ The meaning here is simple: untrammeled equals wild. It means that wilderness areas are to be free of restraint, unencumbered, unhindered and free from human control and manipulation.²⁶⁶ On the other hand, the Wilderness Act also states that wilderness is “protected and managed so as to preserve its natural conditions.”²⁶⁷ Wilderness areas, in other words, are to be substantially free from the effects of modern civilization.

There has been some debate over the years regarding the tensions between these two qualities of wilderness character, with some people believing that human intervention is often necessary in wilderness to ensure the preservation of natural conditions.²⁶⁸ Proposals to intervene will become more frequent as federal land agencies and other actors seek to mitigate and adapt to various environmental changes.²⁶⁹ We suspect that some of these changes will also be debated in the context of whether or not to designate future wilderness

262. 16 U.S.C. § 1131(a).

263. PETER LANDRES, ET AL., U.S. DEPT OF AGRIC. FOREST SERV., GEN. TECHNICAL REP. NO. 212 KEEPING IT WILD: AN INTERAGENCY STRATEGY TO MONITOR TRENDS IN WILDERNESS CHARACTER ACROSS THE NATIONAL WILDERNESS PRESERVATION SYSTEM (2008).

264. 16 U.S.C. § 1131(c).

265. *Id.*

266. For a discussion of this often misunderstood word see SCOTT, THE ENDURING WILDERNESS, *supra* note 164, at 126-29.

267. 16 U.S.C. 1131(c).

268. See, e.g., Michael McCloskey, *Changing Views of What the Wilderness System is All About*, 76 DENV. U. L. REV. 369 (1998-1999). For a more contemporary examination see Peter Landres, *Let It Be: A Hands-Off Approach to Preserving Wildness in Protected Areas*, in DAVID N. COLE & LAURIE YUNG, BEYOND NATURALNESS: RETHINKING PARK AND WILDERNESS STEWARDSHIP IN AN ERA OF RAPID CHANGE (2010), Ch. 6; see also Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L. J. 62 (2010).

269. See Sean Kammer, *Coming to Terms with Wilderness: The Wilderness Act and the Problem of Wildlife Restoration*, 43 ENVTL. L. 83 (2013) (analyzing tensions between managing for untrammeled and natural conditions in the context of wildlife restoration in wilderness).

areas. Sandra Zellmer's work is persuasive in this regard, as she details how climate and other environmental changes are already increasing "human pressure to intervene and alter ongoing processes in wilderness areas in hopes of mitigating adverse effects or adapting to them."²⁷⁰ Zellmer reviews multiple initiatives involving deliberate human manipulations, such as the eradication of invasive species with mechanical, biological, or chemical treatments.

1. Manipulating water and wildlife

The relationship between water and wilderness (both existing and potential) is particularly important at the moment. National Forest System lands play a crucial role in providing the nation's water supply, especially in the West where roughly half of the region's water originates on the National Forests.²⁷¹ The healthiest watersheds, as defined by the USFS, are often located in wilderness areas and inventoried roadless areas—both of which are protected from road building and other activities that are associated with water degradation.²⁷² Climate change is obviously a wild card in this story because of all the uncertainties associated with future water supply. This uncertainty is one reason why there is so much interest in building water storage capacity, such as new or expanded dams and other water infrastructure.²⁷³ The Wilderness Act includes a water resources special provision:

[T]he President may . . . authorize prospecting for water resources, the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest, including the road construction and maintenance essential to the development and use thereof, upon his determination that such use or uses in the specific

270. Sandra Zellmer, *Wilderness, Water, and Climate Change*, 42 ENVTL. L. 313, 332 (2012).

271. See U.S. DEP'T AGRIC., USDA FOREST SERVICE WATER AND WILDERNESS BRIEFING PAPER, available at <http://www.wilderness.net/nwps/documents/fs/chiefs-long-water.pdf> (last visited Nov. 17, 2013) (referencing research showing that wilderness areas "provide a disproportionate contribution" to water supplies because "they are often situated in the headwaters of major drainages.").

272. See Mike Anderson, Collene Gaolach, Janice Thomson, & Greg Aplet, *Watershed Health in Wilderness, Roadless, and Roaded Areas of the National Forest System* (The Wilderness Society, White Paper, June 2012); Dominick A. DellaSala, James R. Karr, and David M. Olson, *Roadless Areas and Clean Water*, 66 (3) J. SOIL & WATER CONSERVATION 78 (2011).

273. See Zellmer, *Wilderness, Water, and Climate Change*, *supra* note 270 at 332-36.

area will better serve the interests of the United States and the people than will its denial²⁷⁴

This provision has not yet been used by the President, and some wilderness legislation has blocked its use.²⁷⁵ Congress has used its powers over the years to permit water infrastructure on federal land which became wilderness areas, including roughly 200 dams that are found in the system (built pre-designation).²⁷⁶ It is quite possible, then, that water will play an even more significant role in future wilderness negotiations that will take place against a backdrop of water scarcity. This is an issue, for example, debated in the context of the proposed San Juan Mountains Wilderness Act of 2011. In this case, the USFS opposed the bill's proposal to prohibit new water development projects in an area the legislation set aside for potential designation of wilderness, and suggested it might be advisable to increase the capacity of existing water control structures.²⁷⁷

274. 16 U.S.C. § 1133(d)(4).

275. *See, e.g.*, Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 2405(h)(3)(A), 123 Stat. 991.

276. *See* Nickas, *supra* note 260, at 457; Zellmer, *supra* note 270, at 346.

277. STATEMENT OF LESLIE A. C. WELDON, DEPUTY CHIEF, NAT'L FOREST SYS., U. S. FOREST SERV., USDA BEFORE THE U.S. SENATE COMM. ON ENERGY AND NAT. RES., SUBCOMM. ON PUB. LANDS AND FORESTS. March 22, 2012. (Concerning S. 1635, the "San Juan Mountains Wilderness Act of 2011."). Referenced at http://www.energy.senate.gov/public/index.cfm/files/serve?File_id=facd0d1a-29b5-44ee-8d97-f85125b04e2a. Weldon's prepared testimony included:

With respect to water rights and water development, Section 4(d)(3) would prohibit new water development projects in the special management area. This provision is more restrictive than section 4(d)(4) of the Wilderness Act under which the President of the United States may exercise discretion to authorize such facilities within designated wilderness areas if they are determined to be in the public interest. We support amending this provision so that it is consistent with the discretion authorized by the Wilderness Act.

When Alaska Senator Murkowski asked, "Given this Administration's beliefs about global warming and the drying of the Intermountain West, does the Forest Service think it wise to impose these restrictions on water development in this bill?" Weldon replied: "No, it may not be wise to impose water restrictions because there are existing reservoirs in these areas. Also, in general, it is preferable to expand reservoirs at high elevations (all these lands are above 10,000 feet) because substantially less evaporative water loss occurs at these elevations." *Hearing Before the Subcomm. on Pub. Lands and Forests, & the S. Comm. on [sic] of The Energy and Natural Resources*, 112th Cong., S. 1635, Appendix I. March 22, 2012. Referenced at: <http://www.gpo.gov/fdsys/pkg/CHRG-112shrg77160/html/CHRG-112shrg77160.htm>.

Another way that the water supply issue may manifest itself is through the artificial delivery of water to wildlife populations in wilderness areas. This includes the use of water tanks and structures within wilderness areas, notwithstanding the law's general prohibition on "structure[s] or installation[s]" unless they are necessary to meet the minimum requirements for the purpose of the Wilderness Act.²⁷⁸ For example, in an attempt to reverse the losses of bighorn sheep in the Kofa National Wildlife Refuge, in 2007 the USFWS acquiesced to the State of Arizona's request to build two more artificial wildlife waters within the Kofa Wilderness despite the presence of over sixty such installations already in the area. However, this decision to manipulate the wilderness ecosystem did not go uncontested. In *Wilderness Watch, Inc. v. U.S. Fish and Wildlife Service* (2010), the Ninth Circuit ruled that the USFWS failed to adequately analyze whether these water delivery structures were *necessary* to meet the law's *minimum* requirements.²⁷⁹ According to the Ninth Circuit, "[a] generic finding of necessity does not suffice . . . [b]ut the key question—whether water structures were necessary at all—remains entirely unanswered and unexplained by the record, even though the Service's own documentation strongly suggests that many other strategies could have met the goal of conserving bighorn sheep without having to construct additional structures within the wilderness area (for example, eliminating hunting, stopping translocations of sheep, and ending predation by mountain lions)."²⁸⁰ While the latter remedy from the court would also manipulate the wilderness ecosystem,²⁸¹ it would appear that otherwise the courts will defend the undeveloped nature of an untrammelled wilderness where the agency charged with its stewardship will not.²⁸²

We suspect that agencies will be prone to intervene even more in cases where the individual wilderness laws include their own water and wildlife provisions. Several wilderness laws since 2002 include provisions authorizing "structures and facilities . . . for wildlife water development projects, including guzzlers" if they enhance wilderness values and the "visual

278. 16 U.S.C. § 1133(c).

279. *Wilderness Watch, Inc. v. U.S. Fish & Wildlife Serv.*, 629 F.3d 1024, 1040 (9th Cir. 2010).

280. *Id.* at 1037.

281. Motion-activated cameras at the two artificial wildlife waters in question captured more pictures of mountain lions than bighorn sheep. Perhaps the artificial water sources throughout Kofa have artificially increased the number of mountain lions, and removing the water might result in a "double untrammeling" of the wilderness.

282. Nor, apparently, will some conservation organizations. The Wilderness Society painted the *Kofa* decision as merely "a procedural decision," ignoring the substantive findings of the court. See Spittler, *Water Developments for Wildlife in Wilderness Areas - Background Paper*, THE WILDERNESS SOCIETY (2012).

impacts . . . can reasonably be minimized.”²⁸³ Some laws attempt to go further, such as the Owyhee wilderness law that was discussed above. It includes a fish and wildlife management and restoration provision, while also specifying that the State of Idaho “may use aircraft (including helicopters) in the wilderness areas . . . to survey, capture, transplant, monitor, and provide water for wildlife populations, including bighorn sheep, and feral stock, feral horses, and feral burros.”²⁸⁴ Recently introduced legislation goes even further than providing artificial water in the drive to manipulate populations of wildlife for hunting. The proposed Sportsmen’s Heritage Act of 2012 would guarantee that any action proposed by a state wildlife agency would automatically satisfy the “necessary to meet minimum requirements” test mandated by Section 4(c) of the Wilderness Act.²⁸⁵

2. *Wilderness and fire*

Issues pertaining to fire management will also shape future debates over wilderness designation. Fire now dominates most of the discourse and politics surrounding federal

283. See GORTE, WILDERNESS LAWS: STATUTORY PROVISIONS AND PROHIBITED AND PERMITTED USES, *supra* note 9, at 66 (citing the Clark County Conservation of Public Land and Natural Resources Act of 2002, Pub. L. No. 107-282, § 208(d), 116 Stat. 1994).

284. Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, § 1503, 123 Stat. 991 (2009). In practical terms, however, this provision does not increase the state’s ability to use aircraft. The Owyhee law references section 4(d)(1) of the Wilderness Act, which in turn limits use “subject to such restrictions as the Secretary . . . deems desirable.” In this case, BLM Policy Manual section 1.6.C.21.c makes it clear that the use is limited to the use BLM determines is the minimum necessary—exactly the degree allowed under the Wilderness Act’s section 4(c) in any other BLM-managed wilderness. This provision is an example of a trend in recent wilderness bills to obfuscate the clearer language of the original Act in favor of wording more likely to be misinterpreted by managers.

285. See H.R. 4089, 112th Cong., § 104(e) (2nd Sess. (2012)):

(1) The provision of opportunities for hunting, fishing and recreational shooting, and the conservation of fish and wildlife to provide sustainable use recreational opportunities on designated wilderness areas on Federal public lands shall constitute measures necessary to meet the minimum requirements for the administration of the wilderness area. (2) The term ‘within and supplemental to’ Wilderness purposes in section 4(a) of Public Law 88-577, means that any requirements imposed by that Act shall be implemented only insofar as they do not prevent Federal public land management officials and State fish and wildlife officials from carrying out their wildlife conservation responsibilities or providing recreational opportunities on the Federal public lands subject to a wilderness designation.

lands, especially on the national forests. And here too, we see politically polarized tribes having fundamentally different views of the causes, consequences, and possible remedies to large-scale fire events. Wilderness and roadless areas factor into this debate in multiple ways. Most obvious is that some interests believe that fuel reduction work and mechanical treatments should be done in some roadless landscapes, especially those at the wildland-urban-interface. This case is made even more strongly when large-scale fires pose risks to municipal water supplies.

The negotiations involved in creating the Idaho and Colorado roadless rules illustrate the predominant role played by fire in shaping the final outcomes of both rules. The Colorado Rule provides flexibility to cut trees and construct roads in order to minimize the risk of fire in some areas that are near “at-risk” communities.²⁸⁶ Tree cutting is also permitted on some roadless lands (though non-upper tier) “if a significant risk exists to the municipal water supply system or the maintenance of that system.”²⁸⁷ The rule includes a provision and set of exceptions related to linear constructive zones, which would be used to move such resources as water, oil, and gas from inside to outside roadless areas.²⁸⁸ In this context, the rule also “accommodates the development and expansion of reservoirs by the use of road construction” in non-upper tier roadless areas.²⁸⁹ The ability to treat hazardous fuel conditions played an equally large, and contested, role in the negotiation of Idaho’s roadless rule. This rule permits the USFS to reduce hazardous fuel conditions in “backcountry/restoration” areas (covering about 5.3 million acres) within “community protection zones,” and even outside of them “where there is a significant risk that a wildland fire disturbance event could adversely affect an at-risk community or municipal water supply system.”²⁹⁰

We believe that the sorts of negotiations characterizing the Idaho and Colorado rulemakings, in which fire management issues were front-and-center, will similarly shape debates over future wilderness designations and management on the national forests. Some actors will likely argue that an area should not be designated as wilderness because its management as such will hinder efforts in fire management. The Wilderness Act already provides federal land agencies discretion in taking “such measures . . . as may be necessary in

286. 77 Fed. Reg. 39,576 (July 3, 2012).

287. *Id.*

288. *Id.* at 39,580. One exception allows for “the construction, reconstruction, or maintenance of an authorized water conveyance structure which is operated pursuant to a preexisting water court decree.” 36 C.F.R. § 294.44 (2012).

289. *Id.* at 39,587.

290. 73 Fed. Reg. 61,456, 61,491 (Oct. 16, 2008).

the control of fire, insects, and diseases.”²⁹¹ But the precise reach of this provision is still a bit unclear, with questions pertaining to the methods that can be used to control and manage fire in wilderness areas and how this provision is to be balanced with the law’s mandate to manage for wilderness character and its component parts. The question is not one of extinguishing fires that are burning in wilderness areas, as this is often done.²⁹² Instead, the questions revolve around prevention and “pre-suppression” actions—what, in other words, can be done to reduce the risk and severity of fires in wilderness areas?²⁹³ This lack of clarity explains why some wilderness laws include additional language pertaining to fire management in wilderness, all of which gives federal land agencies even more managerial flexibility.²⁹⁴ For example, the Big Sur Wilderness and Conservation Act of 2002 authorizes the USFS “to take whatever appropriate actions in such wilderness areas are necessary for fire prevention and watershed protection consistent with wilderness values, including best management practices for fire presuppression and fire suppression measures and techniques.”²⁹⁵ As with water and wildlife, we believe that there will be increasing demands

291. 16 U.S.C. § 1133(d)(1).

292. David J. Parsons, *The Challenge of Restoring Natural Fire to Wilderness*, in ROCKY MOUNTAIN RESEARCH STATION PUB 276 (U.S. Dep’t of Agric., et al. eds., 2000) (finding that “despite clear policy direction recognizing the importance of natural fire, suppression continues to be the dominant fire management strategy in most wilderness areas.”).

293. See, e.g., Laurie Yung, *Prescribed Fires in Wilderness - Case Study*, available at <http://www.wilderness.net/toolboxes/documents/fire/Prescribed%20Fires%20in%20Wilderness%20-%20case%20study.pdf>; THE WILDERNESS SOCIETY, THE WILDERNESS ACT HANDBOOK 51-54 (BEN BEACH ET AL., ED., 40TH ANNIVERSARY ED. 2004).

294. The Endangered American Wilderness Act of 1978 includes the earliest “special” fire language in designating the Santa Lucia Wilderness and additions to the Ventana Wilderness, both in California. It authorizes the USFS “to take whatever appropriate actions are necessary for fire prevention and watershed protection including, but not limited to, acceptable fire presuppression and fire suppression measures and techniques.” Pub. L. No. 95-237, § 2(c)-(d), 92 Stat. 40, 40-41. The Los Padres Condor Range and River Protection Act of 1992 includes similar language pertaining to fire suppression and presuppression measures. Pub. L. No. 102-301, § 3(b), 106 Stat. 242, 243. The Black Rock Desert-High Rock Canyon Emigrant Trails National Conservation Area Act of 2000 includes specific language allowing “prescribed burns.” Pub. L. No. 107-63, § 135(f), 115 Stat. 414, 443. The Clark County Conservation of Public Land and Natural Resources Act of 2002 specifies that nothing precludes agencies from “conducting wildfire management operations (including operations using aircraft or mechanized equipment) to management wildfires in the wilderness areas designated by this title.” Pub. L. No. 107-282, § 209, 116 Stat. 1994.

295. Big Sur Wilderness and Conservation Act of 2002, Pub. L. No. 107-370, § 4(a), 116 Stat. 3071, 3074 (2002).

to include special provisions regarding fire management in future wilderness laws. Congress has already started down this road with a House Report which accompanied the Endangered American Wilderness Act of 1978, and which has been cited in several subsequent laws:

Section 4(d)(1) of the Wilderness Act permits any measures necessary to control fire, insect outbreaks or disease in wilderness areas. This includes the use of mechanized equipment, the building of fire roads, fire towers, fire breaks or fire pre-suppression facilities where necessary, and other techniques for fire control. In short, anything necessary for the protection of the public health or safety is clearly permissible.²⁹⁶

Later in the Report, referring to the “special language pertaining to the Santa Lucia and Ventana Wilderness areas, the House Committee wrote: “The uses authorized by such special management language should not be construed by any agency or judicial authority as being precluded in other wilderness areas, but should be considered as a direction and reaffirmation of congressional policy.”²⁹⁷ A few years later, the House Committee modified their position: “[Wildfire control] measures should, to the maximum extent practicable, be implemented consistent with maintaining the wilderness character of areas, while at the same time protecting the public health and safety and protecting private property located immediately adjacent to wilderness areas.”²⁹⁸ However, it is the earlier Report that often seems to carry more weight.

The demands to manipulate wilderness ecosystems frequently involve placing structures or installations in areas that are, by law, supposed to be undeveloped. These structures may make the area less natural (for instance, through creating artificial sources of water), though the law calls for the areas to be “protected and managed to preserve [their] natural conditions.”²⁹⁹ And, uniformly, they manipulate areas “where the earth and its community of life are [*supposed* to be] untrammelled.”³⁰⁰ These demands may end up as bargaining chips in the designation process—part of the increase in collaboration and compromise that is the hallmark of recent legislation. Manipulating wilderness ecosystems, which now seems acceptable to some interests, may become a de facto political requirement in an increasingly polarized political climate where it seems one side seems to not care how an area is managed as long as it’s called “Wilderness,” and the other side doesn’t care what it’s called as long as it’s not managed as wilderness.

296. H.R. REP. NO. 95-540 (1977).

297. *Id.*

298. H.R. REP. NO. 98-40 (1983).

299. 16 U.S.C. § 1131(c).

300. *Id.*

So, is “Wilderness” an idea whose time has come and gone?

CONCLUSION

The story of wilderness is far from finished. As we discuss in Parts I and II, the USFS and BLM manage millions of acres that are suitable for inclusion in the Wilderness Preservation System. Whether these lands are protected as wilderness in the future will hinge on forthcoming planning processes, interim management measures, and politics. The latter, as we discuss in Part III, is in many respects more complicated in 2014 than it was in 1964. The next generation of wilderness designations are likely to include increased deal-making around manipulating wilderness ecosystems or otherwise mandating “special provisions” not allowed in the 1964 Act, as well as the increased use of explicit quid-pro-quo trade-offs—all in the name of collaboration to get legislation through an increasingly polarized Congress.

Politics notwithstanding, we ask readers to reflect on the words used by Congress in establishing the National Wilderness Preservation System in 1964:

In order to assure that an *increasing population*, accompanied by *expanding settlement* and *growing mechanization*, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and *future generations* the benefits of an enduring resource of wilderness.³⁰¹

The italicized words are emphasized because they help explain why we believe the reasons for adding to the Wilderness System are stronger in 2014 than they were in 1964. When the Wilderness Act was first introduced in 1956, the U.S. population was roughly 166 million. By the time the law was passed in 1964, it had grown to 192 million; it is now almost 319 million.³⁰² Along with this increasing population has come a staggering expansion of settlement, especially in the American West: the building of roads, the development of open space, the conversion of forest lands to real estate, and the loss of private rangelands to subdivision—and so much of this settlement is taking place on the fringe of federal lands, the so-called wildland-urban-interface.³⁰³ Consider also in this context the *growing*

301. 16 U.S.C. § 1131(a).

302. *U.S. and World Population Clock*, http://www.census.gov/popclock/?intcmp=home_pop.

303. See Martin Nie & Char Miller, *National Forest Management and Private Land Development: Historical, Political, and Planning Considerations*, 23 SOC’Y & NAT. RES. 669 (2010) (reviewing the relationship between private land development and National Forest management).

mechanization since the law's enactment. There has been a phenomenal increase of motorized use on federal lands since 1964, with more users using more sophisticated machines to transport people farther and farther into the backcountry. In short, the values of wilderness become all the more significant when one considers the development and motorized use taking place around these areas.

Beyond serving as an antidote to the physical changes in our country, wilderness also serves as a counter-balance to the societal changes in our country. As Americans become more mechanized, more plugged in, trying to control both the real and artificial worlds around us, wilderness anchors us—and the rest of life—to places where we refuse to let ourselves dominate. Wilderness serves to remind us, with the utmost humility, of our place on the Earth. Wilderness areas, and a strategy of protected lands more generally, are no conservation panacea, nor were they ever intended as such. But the law, and the system it created, remains vital in protecting values that are increasingly rare in modern society.

It is for these reasons why wilderness is more important now than it was in 1964. If all we want to do is restrict rampant OHV use or oilfield development, there are alternative conservation designations that can adequately achieve those goals: national monuments, national conservation areas, national recreation areas, and other classifications.³⁰⁴ These designations are important conservation tools and may serve as more effective designations than wilderness in achieving more limited conservation objectives and values. It is our hope that alternative conservation designations will be used more in the future when the values advocates seek to conserve are not the same as those articulated in the Wilderness Act. But when the American people require an area to be untrammelled, natural, undeveloped, and with outstanding opportunities for solitude or primitive, unconfined recreation,³⁰⁵ then the area must be designated Wilderness. Wilderness is the only designation that mandates all of these qualities by law.

At the time of the twenty-fifth anniversary of the Wilderness Act, Congress passed a short law³⁰⁶ commemorating the contributions of Clinton Anderson, former Secretary of Agriculture and one of New Mexico's Senators at the passage of the Act. The law quotes Anderson from 1963:

304. *See generally* ROSS W. GORTE, CONGRESSIONALLY DESIGNATED SPECIAL MANAGEMENT AREAS IN THE NATIONAL FOREST SYSTEM (Cong. Research Serv., 2010).

305. *See* 16 U.S.C. § 1131(c).

306. Senator Clinton P. Anderson Wilderness Overlook, Pub. L. No. 101-184, 103 Stat. 1334 (1989).

There is a spiritual value to conservation, and wilderness typifies this. Wilderness is a demonstration by our people that we can put aside a portion of this which we have as a tribute to the Maker and say—this we will leave as we found it. Wilderness is an anchor to windward. Knowing it is there, we can also know that we are still a rich Nation, tending our resources as we should—not a people in despair searching every last nook and cranny of our land for a board of lumber, a barrel of oil, a blade of grass, or a tank of water.³⁰⁷

Now, more than ever, we need that transcendent anchor. This is not asking for too much when we consider that roughly 5% of the entire United States is protected as wilderness, and a mere 2.7% when Alaska is removed from the equation.³⁰⁸ Nor is it too much when we consider that the majority of the U.S. has already been converted to agricultural and urban landscapes, with much of the remaining lands networked with roads.³⁰⁹ We are not yet so poor *physically* that we must exploit every last nook and cranny of our wild legacy for perceived gain; we are not yet so poor *spiritually* that we should willingly squander our birthright as Americans for temporary distractions.

This is why we must fight for “Capital W” Wilderness, as originally envisioned, and make a stand for those last remaining roadless areas with wilderness characteristics that deserve our protection. It also means pushing back against the tide of compromising away the very essence of wilderness, and resisting the urge to manipulate wild places as if they were gardens to produce some desired future as if we knew what was always best for the land.

We need Wilderness, real Wilderness. Now, more than ever.

307. *Id.* § 3, 103 Stat. at 1334.

308. THE BEGINNINGS OF THE NATIONAL WILDERNESS PRESERVATION SYSTEM: TRIVIA AT A GLANCE, <http://www.wilderness.net/NWPS/fastfacts> (June 2, 2014). Consider also that of the roughly 109 million acres of Wilderness, about forty percent of these lands are managed by the National Park Service.

309. See Anthony D. Barnosky et al., *Approaching a State Shift in Earth’s Biosphere*, 486 NATURE 52, 54 (2012); see generally Richard T. T. Forman, *Estimate of the Area Affected Ecologically by the Road System in the United States*, 14(1) CONSERV. BIOLOGY 31 (2000) (estimating that nineteen percent of the total area of the U.S. is directly affected ecologically from roads and traffic).