

America’s Public Lands:

What History Suggests about Their Future

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INTRODUCTION

I recently published a comprehensive political history of America's public lands,¹ those owned by the national government and managed by four agencies—the National Park Service, the U.S. Forest Service, the U.S. Fish & Wildlife Service, and the Bureau of Land Management (“BLM”).

Most people know something about these lands, often through occasional, headline-making events, like then-President Trump's drastic 2017 downsizing of the Grand-Staircase Escalante and the Bear Ears National Monuments, two large, protected areas of public lands in southern Utah.²

But what is not well-known is this: The United States owns almost one-third of the nation's land—more than 600 million acres of public forests, plains, mountains, wetlands, deserts, and shorelines—generally holds them open to all, and manages them primarily for conservation, recreation, and education.³ They are, I believe, one of America's great institutions.

The reach of public land surprises many, given that our culture has always celebrated private property and distrusted government, particularly the national government. Indeed, the typical response upon hearing these facts is, “I had no idea—how did that happen?” I wrote the book to answer that question.

Of course, it didn't just happen. It came about because of a long series of decisions made by our representatives in the government—political decisions. What those decisions were, and how they came to be made, are the core of *Our Common Ground*.

¹ JOHN D. LESHY, *OUR COMMON GROUND: A HISTORY OF AMERICA'S PUBLIC LANDS* (2022) [hereinafter LESHY]; This essay is drawn from remarks I delivered at the University of Colorado Law School on April 21, 2022. Portions have appeared in my articles, John D. Leshy, *Public Land Policy After the Trump Administration: Is This a Turning Point?*, 31 COLO. NAT. RES., ENERGY & ENV'T L. REV. 471 (2020); John D. Leshy, *America's Public Lands—A Look Back, A Look Ahead*, 67 ROCKY MT. MIN. L. INST. 1-1 (2021); and John D. Leshy, *America's Public Lands: A Sketch of Their Political History and Future Challenges*, 62 NAT. RES. J. 341 (2022);

² Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017); Proclamation No. 9682, 82 Fed. Reg. 58,089 (Dec. 4, 2017).

³ LESHY, *supra* note 1, at 37.

The heart of the story begins around 1890. It was then that Congress began making a series of key decisions to hold onto and safeguard the public lands mostly for broad conservation purposes.⁴

This was after, usually long after, the United States acquired title to these lands in the first place, from Indigenous Peoples and from foreign governments.⁵ Acquisition from Native Americans began as settlers invaded from Europe, more than two centuries before the United States was formed.⁶ Usually, Native Nations lost title through a sequence of events beginning when they were dispossessed through duress, chicanery, and sometimes violence by an evolving cast of characters—trappers, miners, speculators, squatters, and other developers—often backed by the military force of European nations and their successor, the United States.⁷ Acquisition of formal title usually came through arrangements that, while providing Native Nations some compensation, would never fully make up for injustices perpetuated or the enormity of their loss.⁸

Our Common Ground does not address in any detail how the United States acquired title from Indigenous Peoples and foreign governments. That process was generally completed well before 1890. It has also been the subject of many books.⁹ The latter part of *Our Common Ground* does discuss in some detail efforts by Native Nations in the modern era to gain greater influence over public lands to which they have ancestral ties, efforts that have had considerable success.¹⁰

This essay outlines some major ideas that emerge from *Our Common Ground*, and offers some reflections about what may lay ahead for these lands.

I. THE MAJOR THEMES OF PUBLIC LAND POLITICAL HISTORY

These themes demolish some common fictions that have grown up about these lands. Because these fictions continue to complicate the politics of crafting constructive solutions to the challenges facing public

⁴ LESHY, *supra* note 1, at 163–76.

⁵ LESHY, *supra* note 1, at 37

⁶ *Id.* at 38

⁷ *Id.*

⁸ *Id.*

⁹ See, e.g., RICHARD KLUGER, *SEIZING DESTINY: HOW AMERICA GREW FROM SEA TO SHINING SEA* (2007); see also, e.g., STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (2005).

¹⁰ LESHY, *supra* note 1, at 563–74.

lands, exposing them may help make forward progress somewhat easier to achieve.

The first and perhaps most notorious fiction is that the public lands have generally been a divisive force in American politics. In fact, the opposite is true; from the nation's very beginning, the public lands have tended to unite rather than divide.¹¹

Our Common Ground opens with the story of a bitter dispute that for years thwarted the very formation of the first national government after the thirteen colonies had declared their independence from the British. It erupted between colonies like Virginia and New York that had extensive claims to so-called "western lands" (across the Appalachian crest), and colonies like Maryland and New Jersey that lacked such claims.¹² The latter feared domination by the states that had western claims.¹³ To end the dispute, an agreement was struck—the new national government would take control of those western lands and use them to keep the nation together.¹⁴

These were the nation's first public lands, and the national government proceeded to use them, and other lands it acquired from foreign governments and Native Nations, to do just that—to build and hold the nation together as Euro-American settlement extended across the continent, and new states were admitted to the union.¹⁵ Gifts of these lands were, for example, instrumental in creating a system of public education, including higher education, and in building infrastructure like canals and railroads.¹⁶

The second myth is that public lands tend to divide Americans along partisan lines. While today many tend to view all issues of public policy through a red/blue, Republican/Democratic lens, since the Civil War, politicians have time and time again joined hands regardless of political party to hold and protect more and more lands in U.S. ownership. Over this time, the vast majority of Americans of all persuasions have come to agree on the importance of protecting these lands so that all may have opportunities to be inspired by and learn from their rich cultural and scientific resources.¹⁷

Our Common Ground provides many examples of this. The stellar contributions of the two presidents Roosevelt—Theodore, a Republican,

¹¹ *Id.* at 3–13.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 40.

¹⁶ *Id.* at 31–34, 55–56.

¹⁷ *Id.* at 293.

and Franklin, a Democrat—are well known.¹⁸ But my book brings deserved attention to many less-than-household names from both parties who played important roles. One was Fred Seaton, who had been a Republican Senator from Kansas before Dwight Eisenhower named him Interior Secretary in the late 1950s.¹⁹ Once there, he put more than 11 million acres of public lands in Alaska into national wildlife refuges, the most notable of which was the iconic Arctic National Wildlife Refuge.²⁰

The third myth is that these decisions to hold and protect more and more lands have been mostly a land grab by the national government, carried out over local and state opposition. This claim was on full display in 2016 when armed extremists took over the Malheur National Wildlife Refuge in eastern Oregon for several days, acting on the theory that the U.S. government did not own the lands.²¹ The claim was bogus; in fact, the United States had purchased those particular lands in the 1930s, paying cash to a very willing seller, a company that was operating a failing agricultural enterprise.²² The sections that follow provide many more illustrations of why the land grab description is a myth.

II. HOW THE NATIONAL FOREST SYSTEM CAME ABOUT

A pivotal episode in public land history was how most of the national forest system was assembled between 1891 and 1909.²³ Congress laid the basis for it in early 1891 by giving the president broad power to “set apart and reserve, in any State or Territory,” public lands as “public reservations”—putting them off limits to the many laws then on the books allowing their transfer out of federal ownership.²⁴

Congress's decision to give the president this reservation authority culminated a campaign that had begun more than a decade earlier, one that had several roots.

¹⁸ *Id.*

¹⁹ *Id.* at 515.

²⁰ *Id.*

²¹ See Jedediah Purdy, *The Bundys and the Irony of American Vigilantism*, THE NEW YORKER (Jan. 5, 2016), <https://www.newyorker.com/news/news-desk/the-bundys-occupy-oregon>; see also John D. Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U.C. DAVIS L. REV. 317 (1980).

²² LESHY, *supra* note 1, at 425.

²³ *Id.* at 295–96.

²⁴ Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095, 1103.

—One was increasing awareness that the traditional policy of fostering Euro-American settlement by granting public land to promote farming—the model embodied in various so-called homestead acts—would not work in the more rugged and arid parts of the West.²⁵

—Another was the idea, supported by most westerners, of keeping lands in the upper reaches of these arid watersheds in public ownership to safeguard water sources for growing populations.²⁶ Even then, the arid West was the nation's most urban region—Denver's population had grown from less than 5000 in 1870 to more than 100,000 in 1890.²⁷

—Another was the growing belief that the national government needed to rein in the well-known appetite of large industrial enterprises like railroad, mining, and logging companies for taking control of vast amounts of land for private profit, pushing common folk aside. An influential promoter of this idea was a self-taught political economist named Henry George, who had spent years in the West, and whose masterpiece *Progress and Poverty* outsold every book in this era except the Bible.²⁸ His warning that public lands not suitable for farming were likely to fall into a few hands reverberated with a populace increasingly dissatisfied with the garish corruption and high income and wealth inequality that marked what Mark Twain dubbed the “Gilded Age.”²⁹

—Then there was the idea that Congress had already put in effect at Yosemite in 1864 and Yellowstone in 1872; namely, that government preservation of iconic American landscapes for public inspiration and enjoyment could, by nurturing national pride and unity shattered by the Civil War, help heal the nation.³⁰

What happened next showed how deeply public land reservations reflected mainstream opinion in the West as well as nationally. Within four weeks of enactment, President Harrison used this new authority to reserve

²⁵ LESHY, *supra* note 1, at 158.

²⁶ *Id.* at 154–57

²⁷ *Id.*; *Denver, Colorado*, ENCYCLOPEDIA OF THE GREAT PLAINS, <http://plainshumanities.unl.edu/encyclopedia/doc/egp.ct.018> (last visited Oct. 30, 2022).

²⁸ LESHY, *supra* note 1, at 98

²⁹ *Id.* at 97–99.

³⁰ *Id.* at 100; *see also* Act of June 30, 1864, ch. 184, 13 Stat. 325 (current version at 16 U.S.C. § 48 (2018)) (Yosemite); *see also* Act of Mar. 1, 1872, ch. 24, 17 Stat. 32 (current version at 16 U.S.C. § 21 (2018)) (Yellowstone).

one million acres of public land in the state of Wyoming.³¹ The very next day, he appointed Montana congressman, Thomas Carter, to head the Interior Department's General Land Office—the executive branch agency then in charge of all the public lands.³² The politically ambitious Carter, who would later represent Montana in the U.S. Senate for two terms, was the first westerner to hold this post.³³ Carter promptly directed his staff to launch a systematic inventory looking to “reserve all public lands in mountainous and other regions” that produced water flows for the use of “communities and settlements” downstream—yes, he said “reserve all” such public lands.³⁴

Six months later, Harrison established what is now called the White River National Forest on more than a million acres west of Denver.³⁵ Today, it attracts more visitors than any other national forest in the nation. Local response, in Colorado and elsewhere, was very positive. Indeed, a memorial from the Colorado State Forestry Association, signed by several state officials, the chambers of commerce of Denver and Colorado Springs, and 500 leading citizens, recommending reserving “all public lands” along six miles either side of the crests of mountain ranges across the entire state.³⁶ In 1892, Harrison established three other reserves in Colorado, including one around Pikes Peak. Following a visit to that reserve the following year, Katharine Lee Bates was inspired to write of “purple mountain majesties” in her stirring composition “America the Beautiful.”³⁷

Before Harrison left office in March 1893 he had, responding to westerners' requests, established fifteen reserves covering more than thirteen million acres in five western states and three territories.³⁸ Although Harrison was defeated for reelection by Grover Cleveland in 1892, his reserves were not an issue in the contest; in fact, in that election Coloradans awarded their electoral votes to James Weaver, the populist candidate who ran to the left of both Harrison and Cleveland in seeking to curb the influence of big business on public policy.³⁹

³¹ LESHY, *supra* note 1, at 177.

³² *Id.* at 178.

³³ *Id.*

³⁴ *Id.* at 177–78 (quoting ANNUAL REPORT OF THE COMMISSIONER OF THE GENERAL LAND OFFICE FOR THE YEAR 1891 331 (1891)).

³⁵ *Id.* at 179.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 179–80.

³⁹ *Id.*

The next three presidents, Democrat Grover Cleveland and Republicans William McKinley and Theodore Roosevelt, continued to vigorously exercise the reservation authority, setting aside most of what we know today as the national forest system.⁴⁰ With a couple of relatively minor exceptions, Congress went along without complaint.⁴¹

One of the minor hiccups in the process involved an obscure, one-term Senator from Oregon, Charles Fulton. In March 1907, claiming that Theodore Roosevelt was threatening to use the reservation authority to lock up lands suitable for farming, Fulton attached a rider to a key agriculture funding bill that forbade the president from putting any additional public lands into reservations in six western states (Oregon, Washington, Idaho, Montana, Colorado, and Wyoming) without Congress's approval.⁴² Fulton's rider left undisturbed existing reservations in those six states and did not curb the president's authority elsewhere.⁴³

Before Roosevelt signed the bill containing Fulton's rider into law, he signed proclamations putting sixteen million more acres of public land into forest reserves in the six states named in Fulton's rider.⁴⁴ In taking this seemingly bold step, Roosevelt was making a shrewd political calculation. As he himself had earlier told Congress, the "forest reserve policy can be successful only when it has the full support of the people of the West" because the people "who live in the neighborhood of" these reserves will ultimately "determine whether or not [they] are to be permanent."⁴⁵

Roosevelt's political instincts were, as usual, excellent. Almost immediately, the Colorado governor called a "public lands convention" in Denver to consider whether to protest the new reserves. While dominated by livestock interests from Colorado and Wyoming, the convention adjourned without advocating abolition of the Roosevelt reserves.⁴⁶ Indeed, not long after this, livestock operators in northwest Colorado petitioned Congress to extend the boundaries of a nearby reserve to include public lands on which their livestock grazed, so as to shield them from competition from large itinerant cattle outfits.⁴⁷

⁴⁰ *Id.* at 180-93, 227-33, 269-78.

⁴¹ *Id.*

⁴² *Id.* at 274-75

⁴³ *Id.*

⁴⁴ *Id.* at 276.

⁴⁵ *Id.* at 276-77; Theodore Roosevelt, Fourth Annual Address (Dec. 6, 1904); Theodore Roosevelt, *OUTDOOR PASTIMES OF AN AMERICAN HUNTER* 311 (1908).

⁴⁶ LESHY, *supra* note 1, at 277-78.

⁴⁷ *Id.*

In fact, far from setting back the cause of expanding the amount of public land safeguarded in national ownership, the events of early 1907 significantly advanced it. No serious effort was made to undo these new Roosevelt reserves, nor to disestablish the many more reserves he made in other states in his remaining time in office.⁴⁸

Another part of that same 1907 legislation paved the way for extending this idea of forest reserves across the nation. It ordered the Agriculture Department to study and recommend whether the United States ought to acquire lands to establish similar reserves in New England and the Southeast.⁴⁹ The resulting study supported the idea, and in 1911 Congress enacted the so-called Weeks Act, which launched a program that eventually resulted in the purchase of more than twenty million acres and the establishment of fifty-two reserves in more than two dozen states in the East, South, and Midwest.⁵⁰ The purchases were made only in states that consented to them and were almost all from willing-seller private owners.⁵¹ It was, therefore, entirely fitting that this same 1907 legislation decreed that all such reserves “shall be known hereafter as *national* forests.”⁵²

III. OTHER LAND ACQUISITION PROGRAMS

Our Common Ground also describes how, early in the twentieth century, the first national wildlife refuges were established on public lands by President Theodore Roosevelt. Congress was quick to follow the executive into that space.⁵³ Then in the depths of the Great Depression Congress inaugurated a major program, concentrated in the middle of the country, to acquire prime wildlife habitat for national ownership in order to reverse a sharp decline in the population of migratory birds.⁵⁴ A key mechanism for funding the purchases, one supported by sport hunters, was the sale of so-called Duck Stamps.⁵⁵ The purchases were done with the approval of state governments and were only made from willing sellers.⁵⁶

⁴⁸ See *id.* at 289–93.

⁴⁹ *Id.* at 277; Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1269, 1281.

⁵⁰ LESHY, *supra* note 1, at 291–292.

⁵¹ *Id.* at 312–13, 342–43, 429.

⁵² *Id.* at 277; Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1269, 1281 (emphasis added).

⁵³ LESHY, *supra* note 1, at 248–49, 251.

⁵⁴ *Id.* at 251.

⁵⁵ *Id.* at 387, 423.

⁵⁶ Act of Mar. 16, 1934, ch. 71, 48 Stat. 451–53.

The resulting acquisition of more public lands worked to reverse the bird decline.⁵⁷ There are eight national wildlife refuges in Colorado.⁵⁸

As all this shows, far from being a land grab by a domineering national government, most of the protected public lands now found in the national parks, wildlife refuges, and forests in the East, South, and Midwest were acquired from willing-seller private owners, with the support of the relevant states.⁵⁹ Indeed, most of the once-private lands that form the large national parks at Everglades in Florida and Big Bend in Texas were acquired by the states themselves, paid for by the state's taxpayers, and then donated to the United States so they could become national parks!⁶⁰ Colorado's first two national parks, Mesa Verde (1906) and Rocky Mountain (1915) were both established after campaigns led by local activists and supported by an array of local groups.⁶¹

Congress launched another major acquisition program in the New Deal era, this one aimed at rehabilitating grasslands. It authorized the purchase of lands that had passed out of U.S. ownership under various Homestead Acts, where attempts at farming had failed because of Dust Bowl conditions.⁶² Two of these "national grasslands" are found in eastern Colorado, Comanche and Pawnee.⁶³ The former has the longest known stretch of dinosaur tracks in the world as well as rock art; the latter is known as a birder's paradise.⁶⁴

IV. RESERVING THE REMAINING PUBLIC LANDS IN THE 1930S

Our Common Ground also sets the facts straight on another commonly misunderstood public lands story—namely, how in the early 1930s the United States decided to keep some 150 million acres of

⁵⁷ LESHY, *supra* note 1, at 423-424, 427.

⁵⁸ *Our Facilities*, U.S. FISH & WILDLIFE SERV., https://www.fws.gov/our-facilities?type=%5B%22National%20Wildlife%20Refuge%22%5D&state_name=%5B%22Colorado%22%5D (last visited Dec. 14, 2022).

⁵⁹ LESHY, *supra* note 1, at 592.

⁶⁰ *Id.* at 411, 413.

⁶¹ *Id.* at 254-55, 264, 328.

⁶² *Id.* at 429, 588.

⁶³ *See Visit Us: Forests and Grasslands*, U.S. DEP'T OF AGRIC. FOREST SERV., <https://www.fs.usda.gov/visit/forests-and-grasslands?state=39> (last visited Dec. 14, 2022).

⁶⁴ *Picket Wire Canyonlands*, U.S. DEP'T OF AGRIC. FOREST SERV., <https://www.fs.usda.gov/recarea/psicc/recarea/?recid=77620#:~:text=Today%2C%20the%20Comanche%20National%20Grassland,create%20150%20million%20years%20later!> (last visited Dec. 14, 2022).

remaining *unreserved* public lands in the western states in national ownership.⁶⁵ Livestock operators had grazed most of these lands for many decades with the government's passive acquiescence, but Dust Bowl conditions had plunged the industry in deep depression.⁶⁶

President Hoover proposed giving all these lands to the states on certain conditions.⁶⁷ Congress responded by calling for a committee, known as the Garfield Committee after its chair, to consider Hoover's idea.⁶⁸ Most of its twenty members were Republicans from the West, including a well-known party activist from Montrose, Colorado, named Charles Moynihan.⁶⁹ The committee recommended, with no dissents, that this vast acreage be put under what it called "responsible administration or regulation for the conservation" as well as the "beneficial use of its resources," and that the states be given the option to accept that responsibility.⁷⁰

But the committee specified that, before the United States extended that offer to the states, it should reserve in national ownership all unreserved public lands deemed "important for," among other things, "national forests, national parks, national monuments, and migratory-bird refuges."⁷¹ The committee emphasized the importance of protecting "wilderness," "wildlife," "archaeological and ethnological remains," and "unusual wonders of nature."⁷² Only after that would the remaining lands be offered to the states, and then only with significant strings attached; for example, states would have a trust responsibility to rehabilitate any lands they received.⁷³

Neither the states nor the major interest groups could agree on how to respond, and legislation to carry out the committee's recommendations went nowhere. At that point veteran Congressman Edward Taylor of Colorado, a Democrat, stepped in.⁷⁴ Building on a proposal crafted in the preceding Congress by Congressman Don Colton of Utah, a Republican,

⁶⁵ LESHY, *supra* note 1, at 359.

⁶⁶ *Id.* at 405.

⁶⁷ *Id.* at 374.

⁶⁸ *Id.*

⁶⁹ See *The Committee on the Public Domain*, DEP'T OF THE INTERIOR, https://www.nps.gov/parkhistory/online_books/doi/interior-conservation/chap12.htm (last updated July 20, 2009).

⁷⁰ LESHY, *supra* note 1, at 373–76 (quoting REP. OF THE COMM. ON THE CONSERVATION AND ADMIN. OF THE PUB. DOMAIN 4–5 (1931)).

⁷¹ *Id.* at 375.

⁷² *Id.* at 375 (quoting REP. OF THE COMM. ON THE CONSERVATION AND ADMIN. OF THE PUB. DOMAIN 2, 6 (1931)).

⁷³ *Id.*

⁷⁴ *Id.* at 378.

Taylor introduced legislation requiring the United States to control livestock grazing on these lands in order to rehabilitate them and stabilize the floundering livestock industry that depended on them.⁷⁵

Taylor had represented Colorado in the House since 1909, and his evolution on this issue is instructive.⁷⁶ While in his first term, he called the Weeks Act (which launched the program to buy land and establish national forests in the East) an “outrage,” and he condemned as “un-American” the idea that the U.S. should hold large amounts of public lands in the West.⁷⁷ But he gradually changed his mind in the 1920s as the region’s farm and ranching industries fell into deep depression with the Dust Bowl.⁷⁸ In his words, the “overuse” and “abuse” of the public lands threatened the “basic economy of entire communities,” and so he pursued reform with, as historian Louise Peffer put it, the “zeal of a convert.”⁷⁹ Enacted with strong bipartisan support, the Taylor Grazing Act of 1934 assigned this task to the Interior Department, which eventually, in 1946, established the BLM to carry forward its implementation.⁸⁰

The events of this era brought much attention to the fact that these previously unreserved public lands contained many places worthy of special protection. Popular interest in safeguarding natural scenery, recreational opportunities, wildlife habitat, and historic, archaeological, and other cultural resources found in abundance on public lands had not slackened in the Great Depression. Herbert Hoover himself had protected large amounts of formerly unreserved public lands at places like Great Sand Dunes and Black Canyon of the Gunnison in Colorado, as well as Death Valley in California and White Sands in New Mexico, using the authority Congress had given the president in the Antiquities Act of 1906.⁸¹ Over succeeding decades, as appreciation of their values steadily grew, many millions more acres would be protected, given names like Bears Ears, Cascade-Siskiyou, Chiricahua, Grand Canyon-Parashant, Grand Staircase-Escalante, Great Basin, Hart Mountain, Joshua Tree, King Range, Missouri Breaks, Organ Mountains-Desert Peaks, Organ Pipe Cactus, Red Rock Canyon, Rio Grande del Norte, and Steens Mountain.⁸²

⁷⁵ *Id.* at 378, 399, 401.

⁷⁶ *Id.* at 357.

⁷⁷ *Id.* at 358.

⁷⁸ *Id.* at 399.

⁷⁹ *Id.* at 298, 400–01, 438; E. Louise Peffer, *THE CLOSING OF THE PUBLIC DOMAIN* 216–18 (1951).

⁸⁰ Act of June 26, 1934, ch. 805, 48 Stat. 1269–75; LESHY, *supra* note 1, at 438.

⁸¹ *Id.* at 380.

⁸² *Id.* at 381.

V. CONGRESS RECLAIMS AUTHORITY FROM THE EXECUTIVE

There is a fourth myth about public land history; namely, that most decisions to conserve lands in U.S. ownership have been made by executive fiat, by people like Theodore Roosevelt, over the opposition of many in Congress. The facts are mostly otherwise. As *Our Common Ground* shows, Congress not only gave the executive that power, but almost always subsequently approved how the executive exercised it.⁸³ A good example is how often Congress eventually made presidentially established national monuments into national parks.⁸⁴

Indeed, in the 1960s, Congress began a systematic effort to reclaim from the executive primary authority to decide what kinds of uses ought to be allowed on particular tracts of public land.⁸⁵ It was led by a conservative Democrat from Colorado's Western Slope, Wayne Aspinall.⁸⁶

His first big success was in the Wilderness Act of 1964.⁸⁷ There, Congress created a new, very protective category of public lands, providing detailed instructions regarding what was permitted and what was not.⁸⁸ Lands given "wilderness" designation must generally remain free not only from extractive activities like logging and mining, but also from roads and motorized vehicles.⁸⁹

Aspinall was not a big fan of limiting intensive industrial uses of public lands, but more important to him was that Congress should make those basic decisions.⁹⁰ To that end he insisted that Congress make itself the gatekeeper of the wilderness system.⁹¹ This has had a significant, if not very well-appreciated, effect on public land policy; namely, it has enhanced the influence of the individual Senators and House members who represent particular areas of public lands.⁹² This is because of a powerful, long-standing custom in Congress that gives members an

⁸³ See generally *id.*

⁸⁴ See, e.g., THE UNIV. OF ARIZ. PRESS, THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION (David Harmon et al. eds., 2006).

⁸⁵ LESHY, *supra* note 1, at 469.

⁸⁶ *Id.*

⁸⁷ Wilderness Act, Pub. L. No. 88-577, 78 Stat. 890 (1964).

⁸⁸ LESHY, *supra* note 1, at 467.

⁸⁹ *Id.*

⁹⁰ *Id.* at 469.

⁹¹ *Id.*

⁹² *Id.*

effective veto over legislation that applies particularly to their states or districts.⁹³ Regardless of party or ideology, members are very uncomfortable dictating how public lands in other members' districts are to be managed, for fear the tables could be turned on them.⁹⁴

Aspinall seriously underestimated the support that would develop at the grassroots for limiting such industrial uses.⁹⁵ Since 1964 Congress has enacted many dozens of individual pieces of legislation that have together put more than 100 million acres of public land in the National Wilderness Preservation System.⁹⁶

This has been a decidedly bipartisan enterprise. More than half of the 54 million acres of public land in the wilderness system outside of Alaska were the result of acts of Congress signed into law by Republican presidents.⁹⁷ More than a quarter moved through congresses where Republicans controlled at least one chamber.⁹⁸

Beginning around the same time, the mid-1960s, Congress enacted numerous other statutes that zoned or delineated permitted uses on particular areas of public land, usually giving them labels like national recreation area, conservation area, or preserve.⁹⁹ Congress wrote management specifications into law for each that resemble the Wilderness Act, if somewhat less strict and more variable.¹⁰⁰ Each statute makes conservation and recreation the primary objectives of management, and each statute limits agency discretion by ruling out or strongly discouraging roadbuilding, mining, timber harvesting, and the like.¹⁰¹ Besides adding protections, the statutes bring more visibility to natural and cultural qualities of particular areas.¹⁰²

Congress established the first national recreation area in 1964.¹⁰³ There are now more than three dozen, including two in Colorado (Arapahoe and Curecanti).¹⁰⁴ Congress established the first national conservation area in 1970; there are now seventeen, including three in

⁹³ *Id.* at 175.

⁹⁴ *Id.* at 469.

⁹⁵ *Id.* at 469.

⁹⁶ *Id.* at 471.

⁹⁷ *Id.*

⁹⁸ *Id.* at 471 72.

⁹⁹ *Id.* at 472.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 479–80, 493.

¹⁰³ *Id.* at 478.

¹⁰⁴ See generally *id.*; see also *Colorado National Recreation Areas*, UNCOVER COLO., <https://www.uncovercolorado.com/national-recreation-areas/> (last visited Dec. 14, 2022).

Colorado—Dominguez-Escalante, Gunnison Gorge, and McInnis Canyons, all managed by the BLM.¹⁰⁵ Congress established the first two national preserves in 1974 in Texas and South Florida; there are now nearly two dozen, including the Great Sand Dunes National Park and Preserve in Colorado.¹⁰⁶ Beginning in the 1960s, Congress established nearly a dozen national seashores and lakeshores.¹⁰⁷ It has also established national scenic areas, and a National Wild and Scenic Rivers System on the Wilderness Act model. Colorado has one segment in the system, seventy-six miles of the Cache la Poudre River.¹⁰⁸

In using these different labels and providing more direction to how particular areas of public lands should be managed, Congress generally did not discriminate among the four land management agencies. Today, for example, each looks after millions of acres in the wilderness system, and each manages numerous segments of the Wild and Scenic River System.¹⁰⁹

Congress also asserted its authority in a more generic way, by enacting new or reforming existing management charters, or “organic acts,” as they are known, for all four agencies.¹¹⁰ The BLM and the Forest Service got theirs in 1976,¹¹¹ the Fish & Wildlife Service in 1997,¹¹² and the National Park Service in 1998.¹¹³ In each, Congress provided more specificity in management objectives, a more detailed process for making decisions, and clear marching orders to pay close attention to science and the environment.¹¹⁴

In doing all this, Congress has substantially blurred distinctions among the four agencies. This, in turn, has elevated in public

¹⁰⁵ LESHY, *supra* note 1, at 493; *National Conservation Lands*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/national-conservation-lands> (last visited Dec. 14, 2022); *Colorado National Conservation Lands*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/national-conservation-lands/colorado> (last visited Dec. 14, 2022).

¹⁰⁶ LESHY, *supra* note 1, at 542.

¹⁰⁷ *Id.* at 540.

¹⁰⁸ *Id.* at 478–82; *Cache la Poudre FACTS*, NAT'L PARK SERV. HIST. ELEC. LIBR. & ARCHIVE, <http://www.npshistory.com/brochures/calala/undated2.pdf> (last visited Dec. 14, 2022).

¹⁰⁹ LESHY, *supra* note 1, at 471, 481.

¹¹⁰ *Id.* at 549.

¹¹¹ Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 301, 90 Stat. 2762 (BLM); National Forest Management Act of 1976, Pub. L. No. 94-588, 90 Stat. 2949 (Forest Service).

¹¹² National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 11 Stat. 1252.

¹¹³ National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497.

¹¹⁴ LESHY, *supra* note 1, at 588–89.

consciousness the idea that, regardless of which agency is in charge, public lands are generally managed for open space conservation and recreation more than anything else. In this context, “one of the most important developments in public land policy in the last half century,” as *Our Common Ground* puts it, is how the BLM, which was long derided as the “Bureau of Livestock and Mining,” has—with the strong, bipartisan encouragement of Congress—made conservation, protection of cultural resources, and recreation a major focus of its management.¹¹⁵

Congress’s reclaiming of authority over public lands has also operated to enhance the durability of these protections. Indeed, the fact is that, for more than a century, once protections for public lands have been installed, Congress almost never weakened, much less rescinded them.¹¹⁶

It is also important to note that, while the Democrats controlled both Houses of Congress from the mid-1950s through 1980, Republicans like John Saylor of Pennsylvania played key roles in crafting key pieces of public lands legislation like the Wilderness Act.¹¹⁷ Although he voted against the final version, Republican Senator Ted Stevens of Alaska had a huge influence on what, by some measures, is the biggest public land conservation bill in American history, the Alaska National Interest Lands Conservation Act (“ANILCA”) that Jimmy Carter signed into law in 1980.¹¹⁸ Almost all of this legislation, including ANILCA, had strong bipartisan support; indeed, the final votes were usually nearly unanimous.¹¹⁹ Moreover, Republican Presidents Nixon and Ford were generally as supportive as their Democratic counterparts.¹²⁰ In 1976, for example, Ford signed into law the landmark Federal Land Policy and Management Act, crafted largely by western members of Congress, which played an important role in “greening” the BLM.¹²¹ As the next section shows, this bipartisan tradition on public land policy largely survived the polarization of the body politic that began to emerge on many important issues in the 1970s.

¹¹⁵ *Id.* at 501–02.

¹¹⁶ *See id.* at 512.

¹¹⁷ *Id.* at 464.

¹¹⁸ *Id.* at 522–27; Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

¹¹⁹ *See generally* LESHY, *supra* note 1.

¹²⁰ *See generally id.*

¹²¹ *See id.* at 492–98; Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2743.

VI. PUBLIC LAND POLICY FROM REAGAN TO TRUMP

Ronald Reagan's rise in the late 1970s marked the emergence of a powerful conservative trend in national politics.¹²² But it did not, *Our Common Ground* makes clear, significantly affect the overall direction of public land policy. This can be shown in a quick tour of presidential administrations beginning with Reagan's.¹²³

In June 1979, during Jimmy Carter's presidency, the so-called "Sagebrush Rebellion" erupted.¹²⁴ This was the label given to legislation adopted by a handful of western states (not including Colorado) that formally claimed state ownership of BLM lands.¹²⁵ It was promoted primarily by holders of public land grazing permits unhappy with the direction of federal policy.¹²⁶ This so-called "rebellion" was not, as I put it in *Our Common Ground*, a "serious political movement aimed at divesting the United States of ownership of public lands."¹²⁷

It quickly faded. The states enacting the legislation claiming ownership never asked the courts to examine their claim, nor took any concrete step to enforce it.¹²⁸ Congress never took the claim seriously.¹²⁹ Neither did the executive branch.¹³⁰ And neither did the American people, including the people in the states that were ostensibly "rebelling."¹³¹ Underneath this blast of hot air, the long tradition of bipartisan consensus supporting more protection for more public lands endured.¹³²

That bipartisan consensus easily survived a hiccup when, early in Ronald Reagan's first term as president, libertarian economists talked him into proposing the sale of some thirty-five million acres of so-called "surplus" public land to help balance the federal budget.¹³³ The idea triggered much grassroots opposition and found no support among Republicans or Democrats in Congress.¹³⁴

¹²² See generally RICK PERLSTEIN, *REAGANLAND: AMERICA'S RIGHT TURN 1976-1980* (2020).

¹²³ LESHY, *supra* note 1, at 577-84.

¹²⁴ *Id.* at 498.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 499.

¹²⁸ *Id.*

¹²⁹ *Id.* at 500.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 499.

¹³⁴ *Id.* at 499-500.

Around the same time, Reagan's first Interior Secretary, James Watt, sought to issue oil and gas leases on submerged public lands off every coast and in wilderness areas onshore (the Wilderness Act had contained a 20-year window for leasing in wilderness areas and it was about to close).¹³⁵ Watt's proposals were quickly beaten back by a strong bipartisan coalition in the affected states and in Congress.¹³⁶

After Watt became a serious political liability and left office, Reagan, a skillful politician, moved swiftly to the center on public lands issues, working with Congress to follow the well-worn path to protect more public lands.¹³⁷ In 1984, with the Senate in Republican control, Reagan signed legislation adding more than eight million acres to the National Wilderness Preservation System, the largest addition in any single year since the Wilderness Act was enacted in 1964 (except for the special case of Alaska).¹³⁸ Indeed, before he left office, Reagan signed legislation putting more acreage in the lower 48 states in the wilderness system than any president before or since.¹³⁹

In 1985, the then-governor of Arizona, Bruce Babbitt, nicely captured what was happening in a speech. The last few years, he said, would be remembered as a time when public land protection advocates broadened their base, sharpened their message, and mounted a strong grassroots campaign to replace the idea of "multiple use"—a well-worn catch-phrase used to suggest that public lands managed by the Forest Service and the BLM were fully open to logging and mining and other forms of intensive development—with the idea of "public use."¹⁴⁰ The latter, Babbitt said, recognizes "the new reality that the highest, best, and most productive use of western public land will usually be for public purposes—[protecting] watersheds, wildlife and recreation."¹⁴¹

Babbitt had it right and Republicans as well as Democrats got the message. Today, in fact, industrial uses like mining, drilling, and large-scale commercial logging take place on a relatively small proportion of Forest Service and BLM lands.¹⁴²

¹³⁵ *Id.* at 471.

¹³⁶ *Id.* at 470-71.

¹³⁷ *Id.*

¹³⁸ *Id.* at 577.

¹³⁹ *Id.* at 577-78.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 578. Babbitt's speech is quoted in Frank Gregg, *Public Land Policy: Controversial Beginnings for the Third Century*, in *GOVERNMENT AND ENVIRONMENTAL POLITICS: ESSAYS ON HISTORICAL DEVELOPMENTS SINCE WORLD WAR TWO* 171, 176-77 (Michael J. Lacey ed., 1989).

¹⁴² See LESHY, *supra* note 1, at 598-99.

The pattern held through subsequent administrations. For example, although the “Contract with America” that Newt Gingrich used in leading a Republican takeover of the House of Representatives in 1994 bristled with anti-government rhetoric, it was utterly silent on public lands.¹⁴³ This was not really a surprise. The contract had been extensively poll-tested, and its principal drafter, Republican messaging guru Frank Luntz, put the matter bluntly in a later memo, advising the GOP to resist making a head-on challenge to what he called “[t]he most popular federal programs today”—specifically, “conservation of public lands and waters through parks and open spaces.”¹⁴⁴

In 1996, less than two months after President Clinton stirred up a fuss by establishing the Grand Staircase-Escalante National Monument in southern Utah, he signed into law an omnibus public lands protection bill that had been guided through the Republican-controlled Congress by Alaska Republican Don Young.¹⁴⁵ Before Clinton left office, he signed into law bipartisan bills strengthening the statutory management charters of the park and wildlife refuge systems.¹⁴⁶ And he did the same with a bill approving a very large land swap the state negotiated with the U.S. to clear state-owned inholdings from protected areas of public lands in exchange for public lands mostly of industrial value elsewhere in Utah.¹⁴⁷

Much the same thing happened when the so-called “Tea Party” insurgency led to a Republican recapture of control of the House in 2010.¹⁴⁸ Although Republican Party platforms in the last couple of decades have sometimes included, as a dog-whistle to the far-right fringe of the Party, planks calling for divesting some public lands, no serious effort was ever made to put any of those planks in practice.¹⁴⁹

Instead, Congress has continued to enact bipartisan legislation adding protections to more and more public lands.¹⁵⁰ At the same time, it has often

¹⁴³ *Id.* at 578.

¹⁴⁴ *Id.* at 578–79; Memorandum from Frank Lutz to Bush White House on The Environment: A Cleaner, Safer, Healthier America (2002).

¹⁴⁵ Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, 110 Stat. 4093–4281. See *H.R. 4236 – Omnibus Parks and Public Lands Management Act of 1996*, CONGRESS.GOV, <https://www.congress.gov/bill/104th-congress/house-bill/4236?s=1&r=1> (last visited Oct. 30, 2022).

¹⁴⁶ National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252–57; National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497–523. See also LESHY, *supra* note 1, at 532–34, 549–51.

¹⁴⁷ Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139.

¹⁴⁸ LESHY, *supra* note 1, at 580–81.

¹⁴⁹ *Id.* at 579–81.

¹⁵⁰ *Id.* at 580.

adjusted land ownership patterns to better meet modern protection objectives, including providing the public better access to public recreational lands that are surrounded by private lands, and better protecting biodiversity while promoting more efficient or productive use of non-public lands.¹⁵¹ In early 2009, for example, President Obama signed the Omnibus Public Land Management Act into law.¹⁵² Among other things, it put millions more acres in the wilderness system, established four new national conservation areas, and added three new units to the national park system.¹⁵³ Most of its parts had been assembled earlier, when Republicans controlled the White House and one house of Congress.¹⁵⁴

VII. THE TRUMP ADMINISTRATION

But what about the Trump Administration, one might ask? Certainly, it made a big splash by severely shrinking (though not abolishing altogether) the size of two large national monuments—the Grand Staircase-Escalante and the Bears Ears—that presidents Clinton and Obama had established on more than three million acres of public land in southern Utah.¹⁵⁵ It also made numerous efforts to bend public land policy away from conservation and toward industrial exploitation, especially by the fossil fuel industry.¹⁵⁶

But I would argue that Donald Trump correctly grasped that most voters who identify as Republicans, in the West as elsewhere, do not support either transferring public lands to states or the private sector, or stripping protections away from most of them. Consider these facts:

—In the campaign leading up to the Nevada Republican caucuses in February 2016, while his rival Ted Cruz was calling it “ridiculous” not to give “full control” of Nevada’s public lands to their “rightful owners, its citizens,” Trump gave a well-publicized interview with *Field and Stream*, a publication promoting hunting, fishing and other outdoor activities, in which he opposed selling off public lands or giving them to the states, arguing instead that the U.S. should, in his words, continue to be “great

¹⁵¹ *Id.* at 591–92.

¹⁵² Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, 123 Stat. 991.

¹⁵³ *Id.*

¹⁵⁴ See LESHY, *supra* note 1, at 580–81, 591–95.

¹⁵⁵ *Id.* at 582.

¹⁵⁶ *Id.* at 581–82.

stewards” of these “magnificent” lands.¹⁵⁷ In the caucuses, Trump won more than twice as many delegates as any other candidate; Cruz finished third.¹⁵⁸

—When the Republican platform committee that year promoted a plank calling for considering possible divestiture of public lands, Montana Republican Congressman Ryan Zinke resigned in protest.¹⁵⁹ This apparently so endeared him to the Trump campaign that, once elected, Trump nominated him Interior Secretary.¹⁶⁰ He was quickly confirmed by the Republican-controlled Senate.¹⁶¹

—Most important, before he left office, President Trump himself signed two major pieces of bipartisan public land protection legislation into law.

The first, in 2019, was another omnibus public lands protection bill.¹⁶² It added more than a million acres in several states to the National Wilderness System and expanded several National Park System units.¹⁶³ Its most noteworthy piece added protections to nearly a million acres of public land in southern Utah.¹⁶⁴ This piece was crafted by the mostly Republican Utah congressional delegation not long after Trump reduced the size of the nearby Bears Ears National Monument.¹⁶⁵

Another component of the 2019 bill ended Congress's fifty-five-year-old practice of putting an expiration date on the Land and Water Conservation Fund that Congress had established in 1964.¹⁶⁶ The Fund is intended to provide a stream of money (derived primarily from oil and gas leases on public lands offshore and onshore) for federal, state, and local

¹⁵⁷ Patrick Svitek, *In Uncertain Nevada Contest, Cruz Tests Message for West*, THE TEX. TRIB. (Feb. 21, 2016), <https://www.texastribune.org/2016/02/21/after-southern-start-cruzs-campaign-turns-west/>; *Q&A: Donald Trump on Guns, Hunting, and Conservation*, FIELD AND STREAM (Jan. 22, 2016), <https://www.fieldandstream.com/articles/hunting/2016/01/qa-donald-trump-on-guns-hunting-and-conservation/>.

¹⁵⁸ *Nevada Caucus Results*, NBC NEWS (Feb. 25, 2016), <https://www.nbcnews.com/politics/2016-election/primaries/nv/>.

¹⁵⁹ LESHY, *supra* note 1, at 581–82.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, 133 Stat. 580.

¹⁶³ *Id.*; LESHY, *supra* note 1, at 583.

¹⁶⁴ John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, 133 Stat. 580.

¹⁶⁵ LESHY, *supra* note 1, at 581–83. *See also Members of the U.S. Congress: 116*, CONGRESS.GOV, <https://www.congress.gov/members?q=%7B%22member-state%22%3A%22Utah%22%2C%22congress%22%3A116%7D> (last visited Oct. 30, 2022).

¹⁶⁶ Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897.

government agencies to buy more land for conservation and recreation.¹⁶⁷ As a result, Congress no longer has to renew the Fund periodically.

The next year, Trump signed into law the Great American Outdoors Act.¹⁶⁸ It has been called the biggest public lands conservation legislation in a generation, because of the even more fundamental change it made in the Land and Water Conservation Fund.¹⁶⁹ Since 1964, Congress had insisted that it decide each year how much money ought to be spent out of that Fund.¹⁷⁰ The result was that, between 1965 and 2019, less than half of the more than forty billion dollars accruing to the Fund had been disbursed.¹⁷¹ With strong bipartisan support, Congress now made it a true revolving fund, permitting its revenues to be spent as they are accrued.¹⁷² This was a major victory for public lands everywhere.¹⁷³

VIII. THE PUBLIC LANDS TODAY

In the fall of 2021, President Biden reversed the Trump action on the two Utah monuments,¹⁷⁴ and is restoring other public land protections Trump sought to undo or weaken.¹⁷⁵ (At Bears Ears, a majority of the newly elected local county commissioners endorsed his action.¹⁷⁶) Despite the Democrats' very thin margins in Congress, he has not run into much opposition in these efforts.¹⁷⁷ Trump's headline-grabbing action on the Utah monuments did not, in other words, reflect a change in public opinion, or significantly alter the direction of congressional legislation.

More broadly, what Congress and the Executive have been doing on public lands for more than a century has been supported by practically every opinion poll taken over the last few decades, in the West as well in the rest of the nation. They show that large majorities of Americans across

¹⁶⁷ LESHY, *supra* note 1, at 584.

¹⁶⁸ Great American Outdoors Act, Pub. L. No. 116-152, 134 Stat. 682-87 (2020).

¹⁶⁹ See LESHY, *supra* note 1, at 584.

¹⁷⁰ See *id.*

¹⁷¹ CAROL HARDY VINCENT, CONG. RSCH. SERV., RL33531, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY, AND ISSUES 2 (2019). See also LESHY, *supra* note 1 at 477, 584.

¹⁷² LESHY, *supra* note 1, at 584.

¹⁷³ See *id.*

¹⁷⁴ Proclamation No. 10285, 86 Fed. Reg. 57,321 (Oct. 8, 2021) (Bears Ears); Proclamation No. 10286, 86 Fed. Reg. 57,335 (Oct 15, 2021) (Grand Staircase Escalante).

¹⁷⁵ See LESHY, *supra* note 1, at xvi.

¹⁷⁶ See Zak Podmore, *San Juan County asks President-elect Joe Biden to immediately restore Bears Ears National Monument*, THE SALT LAKE TRIB. (Dec. 2, 2020), <https://www.sltrib.com/news/2020/12/02/san-juan-county-asks/>.

¹⁷⁷ See LESHY, *supra* note 1, at xvi.

both political parties want more and better protected public lands, to provide open space and recreational opportunities and protect watersheds, wildlife, and cultural resources.¹⁷⁸ They agree, in other words, that holding and protecting large amounts of public land in national ownership, open to all, has been extraordinarily visionary and beneficial.

Because the public lands today reflect what the vast majority of the American people have sought, their story can fairly be regarded as a political success, showing the political process working as it is supposed to work, where Congress responds to and accurately reflects public opinion.

Bringing more attention to political success stories is particularly important in our polarized era where many are skeptical that anything good can come out of the Nation's capital. It was a major reason why I wrote *Our Common Ground*.

This is not creeping socialism. All who live in areas with abundant public lands know that they provide many opportunities for private enterprise. Indeed, tourism and recreation-dependent businesses have become a major economic driver in many smaller communities around the West as well as elsewhere, making the economic contributions of traditional activities like mining, logging, and livestock grazing pale by comparison.¹⁷⁹

IX. CHALLENGES TO PUBLIC LANDS

A. Climate Change and Biodiversity Loss

Now for a brief look at the major challenges that face the public lands. The biggest are the interrelated ones of climate change and biodiversity loss. While both are global problems, both pose countless tests for public lands.

A changing climate alters natural qualities of public lands that were usually a major reason why the United States decided to retain or acquire them in the first place. "Your children's Yellowstone," the headline of an

¹⁷⁸ See, e.g., Colorado College: State of the Rockies Project, *With Spike in Concern Over Drought, Wildfires and Climate Change, Westerners Are Eager for Action to Protect Public Lands, New Poll Finds*, COLO. COLL. (Feb. 17, 2022), <https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2022/CC%20Poll%20National%20Release%202022.pdf>.

¹⁷⁹ See e.g., Megan Lawson, *How Outdoor Recreation Supports Rural Economic Development*, HEADWATERS ECONS. (Feb. 19, 2019), <https://headwaterseconomics.org/economic-development/trends-performance/outdoor-recreation/>.

article in the *New York Times* warned not long ago, “will be radically different.”¹⁸⁰ The important reservoirs of biodiversity found on public lands are likewise threatened by what is now being called the sixth great extinction in the planet’s history, a loss that the late eminent biologist E. O. Wilson called the “folly [that] our descendants are least likely to forgive”¹⁸¹ The two are intimately related: degradation of biodiversity is an important driver of climate change, and vice versa.

The history of America’s public lands can help inform how the nation confronts these challenges. For one thing, these lands furnish vivid demonstrations of the effects of climate change and biodiversity loss. The glaciers are rapidly disappearing from Glacier National Park.¹⁸² Florida’s Everglades and numerous other protected areas of public land along the coasts—including nearly one-third of the nation’s 550 national wildlife refuges—face inundation as the seas rise.¹⁸³ These and many other examples found on public lands can help sound the alarm, arouse public opinion, and stimulate needed political action.

We know what we have to do, and technology that can facilitate solutions is rapidly advancing. The primary problem is one of political will. That is, at the most fundamental level, dealing effectively with these challenges requires a frank acknowledgment that society’s collective interest must outweigh shorter-term, narrower interests.

The history of America’s public lands provides, time and time again, examples of how our political system has done exactly that. Indeed, one could argue that the public lands represent some of the best thinking and acting in the interests of future generations the American political system has ever produced.

One of the concrete ways the public lands can continue to play that role is to facilitate the necessary transition to decarbonize the world’s economy. Recall this wise aphorism: The Stone Age did not end because we ran out of stones. It ended because humanity found better ways to meet its needs. In the same way, our dependence on fossil fuels for energy will not end because we have run out of fossil fuels. It will end as we

¹⁸⁰ Marguerite Holloway, *Your Children’s Yellowstone Will Be Radically Different*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/interactive/2018/11/15/climate/yellowstone-global-warming.html>.

¹⁸¹ EDWARD O. WILSON, NATURE REVEALED: SELECTED WRITINGS, 1949-2006 617 (2006).

¹⁸² See Northern Rocky Mountain Science Center, *Status of Glaciers in Glacier National Park*, U.S. GEOLOGICAL SURV. (Apr. 6, 2016), [https://www.usgs.gov/centers/norock/science/status-glaciers-glacier-national-park#:~:text=Glaciers%20of%20Glacier%20National%20Park,representative%20concentration%20pathways%20\(RCP\)](https://www.usgs.gov/centers/norock/science/status-glaciers-glacier-national-park#:~:text=Glaciers%20of%20Glacier%20National%20Park,representative%20concentration%20pathways%20(RCP)).

¹⁸³ LESHY, *supra* note 1, at 596.

collectively realize that weaning ourselves off fossil fuels is likely the only way humanity will avert catastrophe.

The public lands are already involved in that transition. Indeed, the Trump Administration unwittingly provided a dramatic illustration of it. In 2017 it pushed through Congress, on a strict party-line vote, legislation that the state of Alaska and oil companies had been promoting for a half-century—to auction off oil and gas leases on public lands in the Arctic National Wildlife Refuge.¹⁸⁴ But when, in one of its last acts in January 2021, the Trump Administration held a lease sale, the result was a giant bust.¹⁸⁵

Major oil companies stayed away, in part because they feared investor and public disapproval, and in part because development costs in the region are high.¹⁸⁶ (It is no small irony that one reason for the high cost is rapidly melting permafrost, which makes installing the needed infrastructure much more expensive.¹⁸⁷) Rather than raise billions of dollars to reduce the budget deficit as its promoters had promised, the sale yielded a paltry \$14 million in bids, most of them submitted by an agency of the state of Alaska.¹⁸⁸

In many other places on public lands both onshore and offshore, Trump administration efforts to promote more fossil fuel development have been thwarted by bipartisan opposition.¹⁸⁹ At the same time, there has been a huge wave of interest in using public lands as sites for wind and solar energy projects.¹⁹⁰ Indeed, in stark contrast to the auction bust in the Arctic Refuge, an Interior Department auction of leases to produce wind

¹⁸⁴ Tax Cuts and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054, 2236.

¹⁸⁵ See Tegan Hanlon & Nat Herz, *Major Oil Companies Take A Pass On Controversial Lease Sale In Arctic Refuge*, NPR (Jan. 6, 2021), <https://www.npr.org/2021/01/06/953718234/major-oil-companies-take-a-pass-on-controversial-lease-sale-in-arctic-refuge>.

¹⁸⁶ See Juliet Eilperin & Steven Mufson, *Trump auctions drilling rights to Arctic Wildlife Refuge*, WASH. POST (Jan. 6, 2021), <https://www.washingtonpost.com/climate-environment/2021/01/06/trump-arctic-national-wildlife-refuge-polar-bears/>.

¹⁸⁷ See Elizabeth Harball, *Oil Industry Copes With Climate Impacts As Permafrost Thaws*, NPR (June 11, 2018), <https://www.npr.org/2018/06/11/617240387/oil-industry-cope-with-climate-impacts-as-permafrost-thaws>.

¹⁸⁸ *Alaska Oil And Gas Lease Sales*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/alaska> (last visited Oct. 22, 2022); *Trump Administration Conducts First ANWR Coastal Plain Oil And Gas Lease Sale*, BUREAU OF LAND MGMT., <https://www.blm.gov/press-release/trump-administration-conducts-first-anwr-coastal-plain-oil-and-gas-lease-sale> (last visited Oct. 30, 2022).

¹⁸⁹ See LESHY, *supra* note 1, at 582–84.

¹⁹⁰ See *id.* at 561.

energy off the coast of Long Island, New York in late February 2022 attracted over \$4 billion in bids.¹⁹¹

Regarding loss of biodiversity, *Our Common Ground* contains numerous examples of how the public lands have historically helped stem that loss.¹⁹² Indeed, a longstanding goal of public land policy has been to rehabilitate environmental health.¹⁹³

The first major environmental restoration program in American history was the Weeks Act of 1911, which launched a program of buying up lands in the upper reaches of eastern, southern, and midwestern watersheds, many of which had been logged over, in order to restore forests, reduce erosion, and help prevent destructive floods.¹⁹⁴ The legislation was strongly supported by Democratic governors from the South and Republican governors from the North, one of whom noted that it was the first time in American history that governors from the two regions had appeared jointly before Congress “to ask for something for the common welfare of the United States.”¹⁹⁵ Another example, mentioned above, was the successful program that Congress launched in the depths of the Great Depression to acquire prime wildlife habitat to reverse a sharp decline in the population of migratory birds.¹⁹⁶ Such restoration programs produce jobs as well as offset carbon emissions.

Today, a great bulk of the twelve percent of U.S. lands and twenty-six percent of U.S. marine areas whose biodiversity is now generally considered protected are public lands.¹⁹⁷ They are thus playing a prominent role in the Biden Administration’s America the Beautiful program, which aims at conserving thirty percent of the nation’s lands and waters by 2030.¹⁹⁸ Nearly all the world’s nations have endorsed this “30 by 30” goal.¹⁹⁹

It is fitting that public lands play a primary role in this effort, for their protection has long made the United States a world leader in this space.

¹⁹¹ *New York Bight*, BUREAU OF OCEAN ENERGY MGMT., <https://www.boem.gov/renewable-energy/state-activities/new-york-bight> (last visited Oct. 22, 2022).

¹⁹² See generally LESHY, *supra* note 1.

¹⁹³ See generally *id.*

¹⁹⁴ Weeks Law, ch. 186, 36 Stat. 961 (1911) (current version at 16 U.S.C. § 563).

¹⁹⁵ LESHY, *supra* note 1, at 310; Charles D. Smith, *The Movement for Eastern National Forests, 1891-1911* (Jan. 1956) (Ph.D. dissertation, Harvard University) (quoting governor’s testimony).

¹⁹⁶ LESHY, *supra* note 1, at 422-23.

¹⁹⁷ *Id.* at 597.

¹⁹⁸ Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021); DEP’T OF THE INTERIOR, *CONSERVING AND RESTORING AMERICA THE BEAUTIFUL* 10 (2021).

¹⁹⁹ Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021); DEP’T OF THE INTERIOR, *CONSERVING AND RESTORING AMERICA THE BEAUTIFUL* 10 (2021).

America's public lands have helped foster global networks of protected lands that today include biosphere reserves (now numbering more than 700 in more than 120 nations, including a dozen in the United States, all on public lands); World Heritage Sites that celebrate nature (now numbering more than 200 in nearly 100 nations, including twenty in the United States, mostly on public lands); and Wetlands of International Importance (now numbering well over 2,000 in more than 150 nations, including forty in the United States that are, by acreage, nearly all on public lands).²⁰⁰

B. An Explosion of Recreational Use

The explosion of recreational use is another major challenge public lands face. As “recreate” means to restore or recover, it is unsurprising that many Americans turned to their public lands for relief and solace during the pandemic, smashing previous visitation records.

It is desirable that people want to recreate on public lands. That opportunity needs to be safeguarded for all, regardless of their bank balances. But it can be challenging to manage large numbers of recreational users while preserving meaningful visitor experiences and not loving the lands to death—destroying the very qualities that attract visitors.

Increasing visitation stresses not only the lands, but also the infrastructure and the personnel and budgets of the managing agencies. And it poses new challenges. Rather than wrestling with questions regarding logging or mining, public land managers are now much more likely to be struggling to balance recreational use with the protection of wildlife and cultural resources, and wrestling with whether and how to accommodate hikers, off-road vehicle users, mountain and e-bikers, birdwatchers, wild horse lovers, target shooters, Instagram “geo-taggers,” sport hunters and anglers, climbers, and a myriad of other enthusiasts.

There is some good news on this front. The Great American Outdoors Act Congress enacted in 2020 with strong bipartisan support took a major step to address the maintenance backlog of the four major public land agencies.²⁰¹ The Legacy Restoration Fund it established for that purpose

²⁰⁰ LESHY, *supra* note 1, at 597.

²⁰¹ See Great American Outdoors Act, Pub. L. No. 116-52, 134 Stat. 682 (2020). Austin Somvichian-Clausen, *The Great American Outdoors Act passes with bipartisan support*, CHANGING AM. (July 24, 2020), <https://thehill.com/changing-america/sustainability/climate-change/508865-the-great-american-outdoors-act-passes-with/>.

has been called the largest single investment in public lands in at least fifty years.²⁰²

C. Paying More Attention to Native American Connections

Our Common Ground explores in some detail how, in the last several decades, Native American Nations have increasingly demanded, and often succeeded in winning, greater consideration of their strong connections to ancestral lands now in public ownership.²⁰³ They have, for example, worked with Congress and the executive with some success to safeguard cultural sites and, in specific locales, to correct historical injustices.²⁰⁴ President Obama broke new ground on this front by creating a special inter-tribal commission to advise the Interior Secretary on the management of the Bears Ears National Monument.²⁰⁵

The United States is also—along with many other nations around the world—drawing more and more on the traditional knowledge of Indigenous Peoples for guidance in protecting biodiversity and dealing with the challenges of climate change; for example, by using fire as a landscape management tool, and in the West, to restore salmon runs so important to Indian culture.²⁰⁶

The nation's public lands offer many opportunities for redressing past injustice and healing societal wounds. In general, Native Nations and peoples strongly support protecting public land areas and values of particular cultural and spiritual significance to them.²⁰⁷ President Biden's naming of Deb Haaland, a member of Congress from New Mexico, to be Interior Secretary—the first Native American to hold a cabinet post in U.S. history—is an important step forward in this regard.

CONCLUSION

Let me come back to where I started, to underscore that the political process ultimately sets public land policy. Because the American people

²⁰² Press Release, Nat'l Parks Conservation Ass'n, NPCA Celebrates Park Victory Decades in the Making (July 22, 2020), <https://www.npca.org/articles/2618-npca-celebrates-park-victory-decades-in-the-making>.

²⁰³ LESHY, *supra* note 1, at xvii, 39, 563, 565, 571.

²⁰⁴ *Id.* at 563–74.

²⁰⁵ Proclamation No. 9558, 82 Fed. Reg. 1139, 1144 (Dec. 28, 2016).

²⁰⁶ LESHY, *supra* note 1, at 572–73; *Indigenous Fire Practices Shape our Land*, NAT'L PARK SERV., <https://www.nps.gov/subjects/fire/indigenous-fire-practices-shape-our-land.htm> (last updated Feb. 4, 2022).

²⁰⁷ See LESHY, *supra* note 1, at 567–74, 584.

have the final word, the future of these lands is going to be determined largely by how Americans, and especially rising generations, react to the changes now underway.

Daunting questions loom. Will voters continue to support protecting public lands as a changing climate takes its toll? As biodiversity suffers? As iconic places on public lands become crowded? What if rejecting rather than respecting the teachings of science becomes a dominant attitude? If partisan rhetoric intensifies? If the American political system becomes more dysfunctional? Will candidates for political office, especially in places where public lands are abundant, continue to believe that protecting these lands enhances the quality of life?

The answers will determine whether the long-standing, bipartisan consensus on the general direction of public land policy will endure or unravel.

For public lands to have a bright future, younger, more diverse generations of people from all walks of life need to engage with them, and with the political system. Good policy doesn't just happen; it comes about because people advocate for it.

So far, for all its imperfections, the American political system has bridged political party, regional, and other divisions to produce a result that most Americans today strongly support. As President Richard Nixon put it in 1971, it has given the nation "breathing space," a vast public asset that nurtures national pride, physical and mental health, and a spirit of community in an increasingly diverse nation.²⁰⁸ It has offered tens of millions of people life-changing encounters with nature, and public lands-related tourism has become the economic anchor of many communities.

Public land policy has also begun, admittedly tardily, to better reflect societal diversity and to acknowledge past injustices. Although Native Americans, women, and people of color were largely excluded from participating in most of the key political decisions that kept these lands in public ownership, that is happily no longer the case. Because these lands remain subject to the will of the electorate—a group defined more broadly than ever before—they can help redress some of the injustices of the past, to again demonstrate our ability as a people to work together and find common ground.

In his seminal work *The Wealth of Nations*, published the same year as the Declaration of Independence, the Scottish philosopher Adam Smith, the champion of free-market capitalism, made a strong case for private ownership of land, but for a single exception. A "great and civili[z]ed"

²⁰⁸ Special Message to the Congress Proposing the 1971 Environmental Program, 1 PUB. PAPERS 135 (Feb. 8, 1971).

nation, he wrote, ought to own and hold lands “for the purposes of pleasure and magnificence” for everyone’s benefit.²⁰⁹

That the national government, responding to public opinion, has heeded Smith’s advice is, as *Our Common Ground* documents in much detail, a bipartisan success story deserving of celebration—a welcome counter to the political polarization and distrust that currently plagues us.

²⁰⁹ 5 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 1102 (1776).