OUR COMMON GROUND: AN APPRECIATIVE ESSAY ON JOHN LESHY'S PUBLIC LAND LAW HISTORY

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ABSTRACT

John Leshy, one of the foremost scholars and practitioners of public land law, has written a magnum opus on the subject and its long history. Public land law's origins date back before the founding of the United States, as Leshy's history makes clear. The book carefully traces this long history through two-and-a-half centuries and some six hundred pages of splendid analysis. There are some surprises along the way, such as Leshy's emphasis on the importance of section 24 of the 1891 Forest Service Creative Act, which he considers among the most important public land laws; his reference to the 1911 Weeks Act, authorizing purchase of eastern cutover lands for new national forests as the nation's first environmental restoration statute; and his contention that the Wilderness Act of 1964 has had a much greater influence on public land law than its current 111 million acres might suggest. The book highlights the collaborative nature of the executive and the courts with Congress—which possesses the ultimate constitutional authority—in making public land policy. Leshy also emphasizes the important political role played by the states in shaping public land law and policy. His prescriptions for the future are mostly optimistic if Congress would supply adequate funding for land managers and successful implementation of a program of buying out federal land graziers, the most dominant extractive use in an era that now emphasizes the recreational, ecological, and inspirational values of public lands. Leshy's masterful account is sure to become a standard reference for public land practitioners and scholars for years to come.

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INTRODUCTION

John Leshy's bona fides concerning federal public lands and resources law are unquestioned. A long-time law professor and accomplished scholar, he wrote the definitive study of the 1872 Mining Law in 1987, is a co-author of a leading casebook, now in its eighth edition, and was the longest-serving Interior Solicitor, the federal government's chief lawyer for public lands, in the department's 170-year history.[1] He has now written what will surely become the standard public land history: *Our Common Ground: A History of America's Public Lands*.[2] Drawing on earlier histories, like those of Paul Gates, Benjamin Hibbard, and Louise Peffer,[3] Leshy's book—he refers to it as a "political history"[4] —goes far beyond those efforts and will prove to be indispensable to policymakers and future historians.

[1] Leshy has been on the law faculties of Arizona State University (1980–1992) and the University of California-Hastings (2001–present), where he is now Professor Emeritus. He was the long-serving Interior Solicitor during the entire Clinton administration, from 1993–2001. He authored the definitive study on federal mining law, *The Mining Law: A Study in Perpetual Motion*, in 1987. His public lands casebook is JOHN D. LESHY, ROBERT L. FISCHMAN & SARAH KRAKOFF, COGGINS AND WILKINSON'S FEDERAL PUBLIC LANDS AND RESOURCES LAW (8th ed. 2022).

[2] *See generally* JOHN D. LESHY, OUR COMMON GROUND: A HISTORY OF AMERICA'S PUBLIC LANDS (2022) [hereinafter COMMON GROUND]. Leshy penned a short overview of the book and its themes in John D. Leshy, *America's Public Lands—A Look Back, A Look Ahead,* 67 ROCKY MT. MIN. L. INST. 1-1 (2021).

[3] *See* PAUL W. GATES, PUB. LAND L. REV. COMM'N, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968); BENJAMIN HORACE HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES (1924); LOUISE E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN: DISPOSAL AND RESERVATION POLICIES, 1900–50 (1951).

[4] COMMON GROUND, *supra* note 2, at xiii.

The book traces in considerable detail how a country committed to private property and which exhibits a skeptical attitude toward government has maintained some six hundred million acres of land—about thirty percent of the nation's land surface—in federal ownership.[5] Although some of these lands produce economic commodities like mining, logging, and grazing, today they are largely managed for recreation, conservation, species protection, and cultural preservation.[6]

Leshy's history is much more comprehensive than earlier public lands' histories, discussing the constitutional, statutory, regulatory, and judicial interpretations of public land laws from the founding to the present.[7] He is particularly adept at explaining the significance of legislative history and context to statutory interpretation.[8]

Among the themes Leshy emphasizes is the role of bipartisanship in the formulation of public land policy,[9] a history worth

[5] *See id.*

[6] *See id.; see also id.* at xvi ("Increasingly, public lands have come to be regarded as an effective way to protect ecosystems, following principles developed through the emerging science of conservation biology.").

[7] *See generally* GATES, *supra* note 3; HIBBARD, *supra* note 3; PEFFER, *supra* note 3.

[8] *See, e.g.*, COMMON GROUND, *supra* note 2, at 155–57 (legislative history on forest reserves), 193–95 (legislative history of the National Forest Organic Act), 221–24 (legislation and legislative history leading to the 1902 Reclamation Act), 357 (legislation preceding and influencing the Stock-Raising Homestead Act), 447–48 (legislative history of the Multiple-Use Sustained-Yield Act). Leshy also adeptly uses election results to criticize some judicial interpretations. *See, e.g.*, *id.* at 232 (criticizing Justice Rehnquist's invocation of John Ise's *United States Forest Policy,* which had overlooked election results in both 1896 and 1900 in erroneously concluding that the 1897 Forest Service Organic Act caused "anguish" throughout the West in *U.S. v. New Mexico,* 438 U.S. 696, 706 (1978)).

[9] *See, e.g.*, *id.* at 99 (bipartisan agreement on anti-monopoly policy), 175 (bipartisanship in the reservation of public forest lands), 224 (bipartisan credit for enacting the 1902 Reclamation Act), 311–14 (bipartisanship in the enactment of the Weeks Act of 1911), 365 ("both political parties claimed credit for the Mineral Leasing and Federal Water Power Acts"), 435–36 (bipartisan agreement on public lands during the New Deal), 464, 471 (bipartisan support for the Wilderness Act), 480 (bipartisan support for the Wild and Scenic Rivers Act), 484 (bipartisan support for the Endangered Species Act), 492 (bipartisan participation in the Public Land Law Review Commission), 544 (bipartisanship in the enactment of the Redwood Park National Park Act).

remembering in an era in which bipartisanship is increasingly rare. Another persistent theme is the importance of executive actions to reserve specific lands from dispossession under generic congressional authorizations, despite the Constitution's assigning plenary authority over public land policies to Congress.[10] While Congress retains the ultimate authority over public lands policy, the executive has played an outsized role and has been at least an active partner with Congress in public land management, with the ability to react to events on the ground with greater expediency than the bicameral legislature.[11]

Other noteworthy contributions include the book's contention that section 24 of the General Revision Act of 1891—which authorized the president to "set apart and reserve . . . public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations"[12]—"is perhaps the single most important law that has produced today's public lands."[13] A somewhat surprising observation is Leshy's claim that the relatively obscure Weeks Act of 1911, the foundation of federal acquisition of some twenty million acres for eastern national forests, "could be said to be the first significant environmental-restoration program ever undertaken by the national government."[14]

These forestland measures, coupled with the founding of the National Park Service in the Interior Department in 1916 to supervise a system of national parks, created a rivalry with the Agriculture Department's Forest Service that persisted through the years. This rivalry was especially evident during the long tenure of Interior

[10] *See id.* at 66 (citing Wilcox v. Jackson, 38 U.S. 498 (1839) as the landmark Supreme Court ratification of executive reservations), 300 (citing United States v. Midwest Oil, 236 U.S. 459 (1915)).

[11] An example of the alacrity with which the executive can take action is President Carter's use of his Antiquities Act authority to designate fifteen national monuments on 56 million acres of land in Alaska, which protected those lands pending congressional consideration of what became the Alaska National Interest Lands Conservation Act. *See id.* at 523–27.

[12] General Revision Act of 1891, ch. 561, 26 Stat. 1095, 1103 (repealed 1976).

[13] COMMON GROUND, *supra* note 2, at 174.

[14] *Id.* at 314. The Weeks Act authorized federal purchases of roughly 20 million acres for over 50 national forests and grasslands in 41 states and Puerto Rico. *See id.*

Secretary Harold Ickes, who sought to reverse the 1905 Transfer Act, which Gifford Pinchot had orchestrated to remove the national forests from the Interior Department.[15]

Another trenchant observation by Leshy concerns the understated effect of the Wilderness Act. While the Act has protected some 111 million acres in the wilderness system, Leshy maintains that an equal amount of public land outside the system is similarly protected as de facto wilderness.[16] He cites congressional directives to protect conservation values of land in natural preserves, reserves, conservation areas, recreation areas, and scenic areas as examples of wilderness-like protections of these areas.[17] He claims that, combined with the designated wilderness areas, "about one-third of all public lands . . . are under some form of wilderness-like protection."[18] Perhaps he would agree that, in light of these facts, the effect of the Wilderness Act rivals the importance of the 1891 Creative Act in importance to modern public land law.[19]

These generic observations are packed into some six hundred pages of analysis, of which this review can only give highlights. From the Founding era through the nineteenth century to the eventful Roosevelt administrations, Leshy paints on a broad canvas. When he turns to the modern era of the last half-century, he includes incisive analyses and makes specific recommendations. The book provides valuable and sometimes surprising conclusions that will influence how public land and resources law is taught, studied, and practiced for years.

Our Common Ground is a considerable achievement and will give public land policymakers an invaluable context in which to examine future measures to privatize public lands or resources or devolve them to the states, which seem as likely to be pursued in the

[15] *See id.* at 348–55 (explaining the competition between the Forest Service and the Interior Department), 228–33 (on Pinchot's successful efforts to obtain jurisdiction over forest reserves), 407, 426 (on Ickes's efforts to regain the national forest lands).

[16] *See id.* at 472.

[17] *See id.* These designations seem to raise less political opposition than wilderness designation.

[18] *Id.* at 475–76.

[19] In comments on this review, Leshy agreed that the Wilderness Act's significance is the equal of that of the Weeks Act. *See* Email from John Leshy, Professor, Univ. of Cal. Coll. Of L., S.F., to author (Sept. 3, 2022) (on file with author).

future as they have been in the past. Leshy also suggests that understanding the long history of public land policies may help to redress some of the injustices in the past[20] and perhaps provide examples of long-term thinking that may be useful for other nations with publicly owned lands and resources.[21] But his book contains quite a bit of analysis of short-term thinking that persisted as a counterweight throughout public land history and still does.

I. THE REVOLUTIONARY ERA

What Leshy refers to as "the formative era" of 1776–89 was inaugurated by Philip Schuyler, representative of New York in the Continental Congress, whom Leshy anoints as "the political father of the nation's public lands," for his compromise that helped settle a dispute among the states over the western land claims of half of the states.[22] Leshy avers that the resolution of the western land claims issue "was a pivotal episode in establishing the first government of the United States."[23] Schuyler—father-in-law of Alexander Hamilton—and his colleague, Robert Livingston, proposed to enable the states with western land claims to fix their western borders and cede the rest, the unsettled lands to the west, to the federal government.[24] They convinced the New York state assembly to cede the state's western lands "to facilitate the confederation and perpetual union" of the states.[25] The other landed states eventually went along with New York.[26] Consequently, Congress gained control over the western lands to fulfill promises of land for veterans, to pay

[20] *See* COMMON GROUND, *supra* note 2, at xv ("Although Native Americans, women, and people of color were largely excluded from participating in many of the key decisions that produced America's heritage of public lands, the future promises to be much different. This is part of the beauty of this national institution. Because these lands are in public hands, they remain subject to the will of the people—as defined more broadly than ever before.").

[21] *See id.* at xvii ("[P]olitical decisions about public lands offer some of the best examples of long-term thinking the American political system has ever produced. Public land grants early on helped establish a tradition of public education and build an infrastructure that knit the nation together.").

[22] *Id.* at 3, 8.

[23] *Id.* at 7.

[24] *See id.* at 8.

[25] *Id*.

[26] *See id.* at 8–10.

off war debts, and to establish policies for the management of the vast resources of the West.[27]

The Continental Congress has been widely judged to be a failure, but it did produce some foundational public land policies. The Land Ordinance of 1784 stipulated that no states would interfere with "the primary disposal" of those lands and prohibited states from taxing those lands, and the Land Ordinance of 1785 adopted the Jeffersonian principle of surveying lands before sale.[28] Leshy explains that the use of the term "disposal" meant—in the view of the leading dictionary of the eighteenth century—to "regulate,"[29] which is what the 1785 ordinance did. Its effect can be seen today by those flying across the rectangular land ownership that dominates rural areas of the middle of the country.

Another enduring effect of the Continental Congress was the Northwest Ordinance, referred to by Leshy as a road map to statehood.[30] This remarkable law, originally the brainchild of Jefferson, not only outlawed slavery north of the Ohio River, but also promised both fair dealings with Indian tribes[31] and the admission of new states "on an equal footing with the original States, in all respects whatever."[32] Although the former promise would be honored mostly in the breach, the second promise meant that the western lands would not be colonized like England did to its United States colonies. Importantly, that promise was accompanied by a significant caveat: the new states could not interfere with the management of public lands within their borders by the federal government.[33]

The U.S. Constitution included a Property Clause ratifying the Northwest Ordinance,[34] which Leshy indicates reflected Alexander Hamilton's concern that the national government have the power to

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[27] *See id.* at 9. Georgia, the last state to cede its western lands, did not do so until 1802, until after a fraudulent land sale scheme was settled. *See id.* at 10.

[28] *Id.* at 15–16 (quoting the Land Ordinance of 1784, https://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field(DOCID+@lit(bdsdcc13401))).

[29] *Id.* at 11.

[30] *See id.* at 18.

[31] *See infra* notes 46–49 and accompanying text.

[32] COMMON GROUND, *supra* note 2, at 18.

[33] *See id.* at 23. Congress included the non-interference caveat and the equal footing language in nearly every ensuing statehood act. *See id.* at 24.

[34] *See* U.S. CONST. art. IV, § 3, cl. 2.

resolve land disputes among the states and others.[35] Leshy contrasts the Property Clause, which has been consistently interpreted by the Supreme Court to be "without limitations,"[36] with the obscure Enclave Clause, which has never played a significant role in public land policy.[37] On the other hand, the broad authority the Property Clause gave Congress over public lands was the vehicle by which the nation would pursue its "manifest destiny" in pursuit of continental control during the nineteenth century.[38]

II. PUBLIC LAND POLICY IN THE NINETEENTH CENTURY: THE DIVESTMENT ERA

After a claim by Tennessee—which entered the Union in 1796—that the state owned all public lands within its boundaries—a claim not settled for a half-century—Jefferson's Secretary of the Treasury, Albert Gallatin, convinced Congress to be more explicit concerning public lands in ensuing statehood acts, beginning with Ohio in 1803.[39] Gallatin influenced Congress to grant Ohio one section of land in each thirty-six-section township—about three percent of the lands in the state—for public education, provided that the state government not take action "repugnant" to the Northwest Ordinance's promise that new states would not interfere with federal management of public lands.[40] The Ohio statehood act would become a model for other states going forward, as Congress granted

[35] *See* COMMON GROUND, *supra* note 2, at 23 (citing THE FEDERALIST NO. 7 (Alexander Hamilton), in which Hamilton "put the importance of resolving disputes regarding the vast western territory at the top his list of reasons to have a robust central government, ahead of the need to address war debts, to reduce trade barriers, and to discourage discriminatory tax policies among the states.").

[36] Kleppe v. New Mexico, 426 U.S. 529, 530 (1976) (quoting United States v. San Francisco, 310 U.S. 16, 29 (1940)) ("The [Property] Clause must be given an expansive reading, for '(t)he power over the public lands thus entrusted to Congress is without limitations.'"); Cal. Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987).

[37] *See* U.S. CONST. art. I, § 8, cl. 17 (Enclave Clause); COMMON GROUND, *supra* note 2, at 26 ("The U.S. Supreme Court has never applied [the Enclave Clause] to restrict the authority of Congress over public lands in any consequential way. The clause has, therefore, played no meaningful role in public land policy.").

[38] COMMON GROUND, *supra* note 2, at 27, 35.

[39] *See id.* at 32–34.

[40] *Id.* at 32.

new states significant amounts of land for schools and other public purposes but retained the lion's share of public lands under federal control.[41]

The most consequential action of the new republic was Jefferson's purchase of the vast Louisiana Territory from France, the single largest land acquisition in American history. To double the size of the United States,[42] Jefferson overcame his own constitutional qualms over whether he had the authority to undertake the purchase when Napoleon indicated he might pull out of the deal and sent the treaty containing the sale to the Senate for ratification, which promptly approved it.[43]

Leshy catalogs the federal land acquisitions following the Louisiana Purchase from the Texas annexation to treaties with Great Britain and Mexico that completed the country's manifest destiny of a continental nation.[44] He reports that between 1845 and 1853 the United States grew by some eight hundred million acres, three-quarters of which the federal government eventually owned.[45]

Gaining ownership of the new lands was complicated by the fact that Native Americans had what the Supreme Court interpreted to be a legal right of possession and inherent sovereignty over the lands, through a concept it created called Indian title or aboriginal title.[46] Extinguishing the native property interest required federal negotiations with the Indigenous tribes, which the Court referred to

41 *See id.* at 34.

42 *See id.* The sale was a response to a surprising defeat the French suffered in Haiti in a slave revolt and the need of France for money to fight one of its seemingly never-ending wars with Britain.

43 *See id.* at 34–35; *see also* FRANK FREIDEL & HUGH SIDEY, THE PRESIDENTS OF THE UNITED STATES OF AMERICA 13 (2006).

44 *See* COMMON GROUND, *supra* note 2, at 35–37 (explaining that the term "manifest destiny" was coined by the political commentator John L. O'Sullivan in 1845).

45 *See id.* at 37.

46 *See id.* at 37–38. The case that established Indian title was *Johnson v. M'Intosh,* 21 U.S. 543 (1823) (deciding that natives could transfer land title only to the federal government). Aboriginal title is a concept that has been misunderstood. *See generally* Michael C. Blumm, *Why Aboriginal Title is a Fee Simple Absolute,* 15 LEWIS & CLARK L. REV. 975 (2011).

as "domestic dependent nations."[47] Leshy explains that although the "U.S. government did many other things that were not justified by principles of law or fair dealing," the great Indian scholar Felix Cohen found in his 1947 study that the government, to quiet Indian title, paid tribes more than twenty times the $15 million it paid Napoleon for sovereignty over the Louisiana Territory.[48] Still, as Leshy laments, "[d]espite the optimistic words of the Northwest Ordinance, the failure of the United States to prevent the forcible dispossession of Indians by miners, settlers, loggers, livestock operators, and others was all too common for many decades during the nineteenth century."[49]

Leshy includes a provocative chapter on early nineteenth century explorations and science and nature that emphasizes the relevance of pre-Civil War art and literature, often overlooked in natural resources histories.[50] Featured was Jefferson's famous admonition that "Earth belongs in usufruct to the living generation," signaling a concern for future generations not often evident in nineteenth century public land policy.[51]

Jefferson and his successor, Madison, exhibited keen interest in the resources and artifacts produced by the western explorations, which Leshy suggests was a reflection of a "'glorification of the

[47] COMMON GROUND, *supra* note 2, at 38. The case coining the phrase "domestic dependent nations" was *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

[48] COMMON GROUND, *supra* note 2, at 38; *see* Felix Cohen, *Original Indian Title,* 32 MINN. L. REV. 28, 35 (1947).

[49] COMMON GROUND, *supra* note 2, at 38. The forcible dispossession of Natives in pursuit of conservation is well told in MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS (1999); *see also* DINA GILIO-WHITAKER, AS LONG AS GRASS GROWS: THE INDIGENOUS FIGHT FOR ENVIRONMENTAL JUSTICE FROM COLONIZATION TO STANDING ROCK (2019). Leshy also reports that the federal policy of recognizing property rights granted by foreign sovereigns prior to United States acquisition required hundreds of cases and took decades to sort out. *See* COMMON GROUND, *supra* note 2, at 39–40.

[50] *See* COMMON GROUND, *supra* note 2, at 41–48.

[51] *Id.* at 41. A usufruct is a term derived from Roman law that is a use right so long as the property is not depleted or damaged. Concern over the effects on future generations of fossil-fuel dependence is at the center of a youth campaign to restrain greenhouse gas emissions. *See* Michael C. Blumm & Mary Christiana Wood, "*No Ordinary Lawsuit": Climate Change, Due Process, and the Public Trust Doctrine*, 67 AM. U. L. REV. 1 (2017).

wilderness' that imbued 'the American landscape with patriotism.'"[52] Among the era's achievements was Vermont congressman George Perkins Marsh's sponsorship of a bill to establish the Smithsonian Institution in 1846; the Smithsonian would become "a center of the nation's scientific world" in the latter half of the nineteenth century.[53] The book explains the "scenic nationalism" of artists like Thomas Cole—founder of the Hudson River school of painting—Frederic Church, and George Catlin, as well as the contributions of others like the landscape architect, Frederick Law Olmstead, and the transcendental authors, Ralph Waldo Emerson and Henry David Thoreau.[54]

While public land scenery was the focus of artists, public land policies focused on privatizing the public lands. Divestment to states, veterans, farmers, speculators, and others proceeded throughout the nineteenth century, sometimes through sales, but often by gift through statehood acts and, later, homestead grants.[55] Leshy explains that preemption laws—essentially legitimizing squatters' possession—were commonplace, as the government was always behind the individual movement westward.[56] Less reactive but more extensive were grants to railroads, which expanded dramatically

[52] COMMON GROUND, *supra* note 2, at 42 (quoting ANDREA WULF, FOUNDING GARDENERS: THE REVOLUTIONARY GENERATION, NATURE, AND THE SHAPING OF THE AMERICAN NATION 157 (2011)).

[53] *See id.* at 44.

[54] *See id.* at 45–48.

[55] *See id.* at 49–51. Leshy states that nearly half of the divested acreage prior to 1830 was by a method other than sale, so land sales were not a significant part of federal revenues. *See id.* at 51. He also mentions a movement for what was then called "cession" in the late 1820s, in which proponents sought to convince Congress to cede the public lands to the states, *id.* at 52–53, an effort that would be repeated unsuccessfully many times in the future. Leshy indicates that the political establishment of the 19th century rejected cession because public lands operated as an "agent of national unity rather than division." *Id.* at 53.

[56] *See id.* at 55. Leshy notes that preemption grants were limited to small tracts of surveyed land where "Indian title had been extinguished," and where the lands were not subject to a government reservation, nor containing "known salines or mines." *Id.* at 54. *See also* LESHY, FISCHMAN & KRAKOFF, *supra* note 1.

once the South was out of the Union during and after the Civil War.[57] The grants made the railroads real estate barons for years to come.[58]

The Swampland Acts, perhaps the greatest excess of the divestment era, led to the loss of some sixty-five million federal acres, the largest single program of grants to states other than school lands.[59] They also led to the widespread destruction of wetlands—now recognized as some of the most biologically productive ecosystems on Earth and subject to federal and state preservation efforts.[60] The establishment of the Department of the Interior at the end of the Polk administration in 1849 would eventually signal that the federal government would begin to manage the lands, not simply oversee their divestment.[61]

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[57] *See* COMMON GROUND, *supra* note 2, at 55–58 (asserting that railroad grants provided a constitutional rationale for federal support of so-called "internal improvements"). The South largely resisted federal funding of internal improvements on the theory that if the federal government was powerful enough to fund them, it could also abolish slavery. *See also* LESHY, FISCHMAN & KRAKOFF, *supra* note 1, at 101–03 (transcontinental railroad routes were first authorized during and after the Civil War).

[58] Because the railroad land grants were for every other section, their legacy is a nightmare of land management that persists to this day, often the motivating force for large-scale land exchanges. *See* COMMON GROUND, *supra* note 2, at 87–91, 595. Leshy notes that railroad grants "hastened the subjugation and dispossession of Native Americans and their confinement to reservations." *Id.* at 89.

[59] *See id.* at 59.

[60] *See Wetland Functions and Values*, EPA, https://www.epa.gov/sites/default/files/2016-02/documents/wetlandfunctionsvalues.pdf (last visited Feb. 20, 2023) ("Wetlands are among the most productive ecosystems in the world, comparable to rain forests and coral reefs" and "are a source of substantial biodiversity"); *see also Threats to Wetlands,* EPA (Sept. 2001), https://www.epa.gov/sites/default/files/2021-01/documents/threats_to_wetlands.pdf (describing how "[w]hen a wetland functions properly, it provides water quality protection, fish and wildlife habitat, natural floodwater storage, and reduction in the erosive potential of surface water," but that "[t]wenty-two states have lost at least 50 percent of their original wetlands," and "many remaining wetlands are in poor condition and many created wetlands fail to replace the diverse plant and animal communities of those destroyed."); *see generally* LAURA GATZ & MEGAN STUBBS, CONG. RSCH. SERV., RL 33483, WETLANDS: AN OVERVIEW OF ISSUES (2017) (providing a survey of federal and state wetlands preservation efforts).

[61] *See* COMMON GROUND, *supra* note 2, at 61. The Interior Department was the fifth cabinet department, formed partly out of the transfer of the General Land Office from the Department of Treasury and the Indian Affairs Bureau from the Department of War.

The 1850s saw several mineral rushes in western lands, highlighted by the California gold rush and the Comstock Lode silver rush in Nevada.[62] Congress, paralyzed by the debate over slavery, was unable to react, rejecting a mineral leasing system.[63] Homestead laws were also rejected until the South left the Union, as were transcontinental railroads.[64] The slavery issue spilled over into public lands jurisprudence, with Justice Taney's infamous decision in the *Dred Scott* case, interpreting the Property Clause to be inapplicable to lands that were not within territory of the United States in 1789.[65] Those western lands were the lion's share of the nearly one billion acres of lands in federal ownership on the eve of the Civil War in 1860.[66]

The divestment era quickened during and after the Civil War, with railroad grants, a homestead law, changes to the Preemption Act, a land-grant college program, a federal mining statute that enabled miners to divest federal ownership, a standing grant of highway rights-of-way for roads built on public lands, and grants for timber and stone.[67] The Mining Law of 1872, still on the books a century-and-a-half later, was particularly destructive, as hydraulic mining destroyed thousands of acres of agricultural lands and caused damaging flooding without paying royalties or rent.[68] The 1872 law's legacy today, as Leshy notes, includes thousands of abandoned mines, some of which have become Superfund sites.[69]

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62 *See id. at* 73–77.

63 *See id.* at 76.

64 *See id.* at 77.

65 *See id.* at 79–81 (discussing Dred Scott v. Sandford*,* 60 U.S. 393 (1857)). Leshy also explains the Supreme Court's inconsistent results in *U.S. v. Gratiot,* 39 U.S. 526 (1840), unanimously upholding federal authority to lease lead mines and declaring the Property Clause to be "without limitation," and *Pollard v. Hagan,* 44 U.S. 212 (1845), suggesting that federal authority over public lands in states was temporary and ignoring *Gratiot,* decided only five years earlier. *See id.* at 71–72, 79.

66 *See id.* at 78.

67 *See id.* at 85–97, 114, 126–27.

68 *See id.* at 120–22.

69 *See id.* at 122. Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA or Superfund), 42 U.S.C. §§ 9601–75, for the clean up contaminated waste sites, known as Superfund sites. The statute requires the parties responsible for the contamination to

The divestment era continued into the twentieth century, with another homestead act in 1916; and homestead patents continued to be issued regularly into the 1920s.[70] What Leshy describes as the "pillaging" of public lands for wood, grass, and minerals continued largely unabated during the post-Civil War era.[71] The divestment era came to an end, somewhat inadvertently, with the enactment of the Taylor Grazing Act in 1934, which put most of the remaining unreserved public lands into grazing districts.[72] After a century-and-a-half, the predominant policy of divesting federal land ownership was over.[73]

III. THE DAWN OF THE RESERVATION ERA: THE FIRST ROOSEVELT ADMINISTRATION

Well before the end of the dispossession era, Congress and the executive began reserving select lands, like Yosemite (1864) and Yellowstone (1872) for "inspiration," as Leshy puts it.[74] Although these reservations were pathbreaking and eventually would become jewels of the national park system, the more consequential congressional action that signaled a substantial change in federal land policy was section 24 of the 1891 legislation known as the General Revision Act.[75] The statute created an open-ended grant of authority to the President to reserve forest lands in the higher reaches of

clean up the site, reimburse the government for cleanup work, or, when no responsible party can be located, gives EPA the authority and the funds to clean up contaminated sites. *See What is Superfund?*, EPA, https://www.epa.gov/superfund/what-superfund (last updated Nov. 1, 2022).

[70] *See* COMMON GROUND, *supra* note 2, at 356–59 (explaining the Stock-Raising Homestead Act of 1916 as well as the surprising fact that more than twice as many public land acres were homesteaded in 1913 than any previous year).

[71] *See id.* at 112–22.

[72] *See id.* at 399–404.

[73] Although the Taylor Act and accompanying executive orders effectively ended the dispossession era, Congress did not officially declare its end until the enactment of the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–87.

[74] *See* COMMON GROUND, *supra* note 2, at 100–11 (discussing the Yosemite and Yellowstone reservations).

[75] *See* General Revision Act of 1891, ch. 561, 26 Stat. 1095, 1103 (repealed 1976); *see* COMMON GROUND, *supra* note 2, at 175.

watersheds to preserve hydrological conditions and avoid downstream flooding.[76]

Leshy traces the evolution of this measure in some detail, explaining that it was the product of a conference committee, probably the handiwork of House Public Lands Committee Chair William Holman, who had been involved in similar congressional reservation efforts.[77] But there is no written record of the committee's reasoning, and Leshy reports that neither the authorship nor the reasoning has ever been conclusively established.[78] Nevertheless, the two decades following the Act's delegation of authority to the president saw the national forest system grow to over 150 million acres.[79]

The architects of this expansion of federal forests are widely attributed to Theodore Roosevelt and his Forest Service Chief, friend, and political ally, Gifford Pinchot.[80] But Leshy diligently reports on the first use of this presidential authority by Presidents Harrison and Cleveland.[81] He then discusses the five-year gestation of what became known as the National Forest Organic Act in 1897, originally the brainchild of Congressman Thomas McRae and the product of a compromise structured by Congressman John Lacey.[82] That act not only ratified the then-existing forest reserves, it provided the foundation for the management of national forests for eight decades.[83] The statute delegated broad authority to the executive to regulate the "use and occupancy" of forest reserves to "preserve the forests . . . from destruction."[84] Leshy examines the Organic Act's

[76] *See* COMMON GROUND, *supra* note 2, at 170.

[77] *See id.* at 156–57, 159, 171–72.

[78] *See id.* at 171.

[79] *See id.*

[80] *See generally* DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA (2009).

[81] *See* COMMON GROUND*, supra* note 2, at 177–81. Harrison reserved over 13 million acres, including the Grand Canyon. *See id.* at 179. Cleveland, on Washington's birthday in 1897 created 21 million acres of forest reserves in seven states, prompting an unsuccessful attempt by a Wyoming senator to rescind them. *See id.* at 188. Interestingly, most of the first forest reserves were due to local petitions. *See id.* at 179. On the eve of Theodore Roosevelt's presidency in 1901, nearly 50 million acres of federal land had already been reserved. *See id.* at 212.

[82] *See id.* at 177–91.

[83] *See id.* at 191.

[84] *See id.* at 195.

regulation of timber harvesting in light of the statutory commitment to preserve watersheds, livestock grazing—the most intensive use of the reserves—and mining—left largely unregulated.[85]

Leshy claims that the commonplace distinction between national forests—as areas for economic activities—and national parks—set aside for nonuse—is oversimplistic since the Organic Act authorizes action "to improve and protect" the forests, and national parks were sometimes established for economic reasons, as evidenced by the support of the railroad lobby.[86] Leshy traces the origins of what became a decades-long interagency turf battle to the efforts of Gifford Pinchot to wrest control of the forest reserves from the Interior Department, which he regarded as corrupt, and put them under his jurisdiction in the Agriculture Department.[87]

After the ascendency of Theodore Roosevelt, Pinchot campaigned for three years to convince Congress to transfer the forest reserves to the Agriculture Department. It finally did so in 1905, enacting the Forest Transfer Act[88] after Roosevelt's landslide victory in the 1904 election, a scandal involving the Interior Department's land giveaways, and Pinchot's persistent courting forest reserve graziers, a key constituency.[89]

Once in charge, Pinchot wasted little time in building a professional Forest Service that would become one of the most admired bureaucracies in the federal government for seven decades or so.[90]

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[85] *See id.* at 196–99.

[86] *See id.* at 200. Leshy explains that the 1899 Mount Rainier National Park legislation enabled the Northern Pacific Railroad to exchange its lands within the park with rich timber land in Oregon. *See id.* at 202–03.

[87] *See id.* at 205–07. Pinchot's autobiography described his efforts as "the chief object in [his] life." *Id.* at 205.

[88] *See id.* at 228–33. Leshy considers the 1905 Transfer Act to be "the high-water mark of Gifford Pinchot's political influence." *Id.* at 232. Among the scandals of the early twentieth century was one involving a railroad land grant whose conditions about selling land only to bona fide settlers were ignored, and the lands, known as the Oregon and California Lands, were reacquired by the federal government, and are now managed by BLM under the first federal "sustained yield" statute, enacted in 1937. *See id.* at 407–08, 430–31*; see also* Michael C. Blumm & Tim Wigington, *The Oregon and California Railroad Lands' Sordid Past, Contentious Present, and Uncertain Future: A Century of Conflict,* 40 B.C. ENV'T. AFFS. L. REV. 1, 2 (2013).

[89] *See* Forest Transfer Act, Pub. L. No. 58-36, 33 Stat. 628 (1905).

[90] *See* COMMON GROUND*, supra* note 2, at 237–38.

Under Pinchot, graziers were charged a permit fee, timber harvests increased tenfold, and mining continued largely without regulation.[91] The Forest Service pursued Pinchot's utilitarian philosophy of what it viewed as the "greatest good of the greatest number in the long run."[92] Wildlife in the forests was not initially a part of the philosophy. Nor was recreation.

Wildlife was of considerable interest to Theodore Roosevelt, however. In 1903, he boldly reserved Pelican Island in Florida for a bird refuge, citing no legal authority.[93] It was the first refuge of what is now a 567-unit National Wildlife Refuge system that encompasses ninety-five million acres.[94] He proceeded to reserve dozens of bird refuges, seventeen on the week before he left office; he also established game ranges in more arid locations, including a bison range.[95]

The federal government now had lands managed for utilitarian purposes—soon to be described as "multiple use"—as well as lands designated principally for wildlife management. It would soon have national parkland designated for preservation and for public access. Most of these lands would be managed by agencies of the Department of Interior, but the national forests would continue to be under the control of Pinchot's Forest Service in the Agriculture Department.[96]

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[91] *See id.* at 240–43. Leshy also explains that as far back as 1906, Congress directed the Forest Service to share any revenues it obtained with states and local governments, a revenue-sharing scheme never applied to national parks. *See id.* at 238–39. Arguably, the revenue-sharing encouraged the states to lobby the agency to favor commodity production which generated revenues for them.

[92] *Id.* at 234.

[93] *See id.* at 248.

[94] *See Celebrating 115 Years of the National Wildlife Refuge System*, DEP'T OF THE INTERIOR: BLOG (March 3, 2018), https://www.doi.gov/blog/celebrating-115-years-national-wildlife-refuge-system; *see also* ROBERT L. FISCHMAN, THE NATIONAL WILDLIFE REFUGES: COORDINATING A CONSERVATION SYSTEM THROUGH LAW 35 (1963).

[95] *See* COMMON GROUND, *supra* note 2, at 248–52. The bison range is now co-managed by local tribes. *See id.* at 250.

[96] Pinchot was fired by President Taft over his criticism of the Interior Secretary, encouraged Roosevelt to unsuccessfully attempt to regain the presidency in 1912, went on to serve two terms as governor of Pennsylvania, and wrote a valuable memoir on his experiences in government, published posthumously. *See generally* GIFFORD PINCHOT, BREAKING NEW GROUND (1947).

Wildlife was also of considerable importance to states—and had been for decades before the Roosevelt administration.[97] Leshy makes no real attempt to connect the state wildlife preservation efforts in the decades before the later federal conservation efforts.[98] This failure could lead readers to think that the federal conservation efforts during the Progressive Era were more innovative than they were. The conservation ethic that characterized the Roosevelt administration was built on the state conservation efforts in the decades earlier.[99]

The Progressive era of Theodore Roosevelt also included the enactment of the Antiquities Act of 1906, which Leshy considers to be "a landmark in public land policy comparable to section 24 of the General Revision Act of 1891."[100] He does so because the statute enabled the executive to reserve lands for conservation purposes on all public lands without congressional approval.[101] These included the Grand Canyon and Mount Olympus National Monuments.[102]

Roosevelt's forest reservations eventually attracted congressional attention; by 1907, "over 100 million acres" were under active

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[97] *See* ERIC T. FREYFOGEL ET AL., WILDLIFE LAW: A PRIMER 23–25 (2d ed. 2019).

[98] *See id.* (explaining how wildlife law in the United States developed from English common law, with states owning wild animals with "a duty to manage them for the benefit of the many" and citing many examples of states upholding this public trust type doctrine, eventually leading to the case of *Geer v. Connecticut*, 161 U.S. 519, 521 (1896) in which the Supreme Court affirmed the state-ownership doctrine). On state wildlife protection efforts in the nineteenth and early twentieth centuries, see KIMBERLY K. SMITH, THE CONSERVATION CONSTITUTION: THE CONSERVATION MOVEMENT AND CONSTITUTIONAL CHANGE, 1870–1930 (2019).

[99] *See* Geer v. Connecticut, 161 U.S. 519, 532–35 (1896) (deciding that the states "owned" the wild animals within their borders and could therefore regulate their management and harvests).

[100] COMMON GROUND, *supra* note 2, at 257.

[101] *See id.* at 257–58.

[102] *See id.* at 259–62. The Supreme Court unanimously affirmed the Grand Canyon proclamation in *Cameron v. United States*, 252 U.S. 450 (1920), in a challenge by soon-to-be Senator Ralph Cameron. Justice Van Devanter described the canyon as one of great scientific interest, affording "an unexampled field for geologic study, [and] is regarded as one the great natural wonders," attracting thousands of tourists. *See id.* at 455–56; COMMON GROUND, *supra* note 2, at 260. Roosevelt also established a few national parks, like Crater Lake, Mesa Verde, and Yosemite Valley. See COMMON GROUND, *supra* note 2, at 264–66.

government control, which limited homesteading and unregulated livestock grazing, and also constrained opportunities for land speculators.[103] Congressional opposition to his proposal to extend livestock regulation to unreserved lands and other reforms led to an appropriations bill sponsored by Senator Charles Fulton (R-Or.) forbidding further forest reservations in six western states without congressional approval.[104] Faced with a money bill the President did not want to veto, Pinchot went into action, and within days of the bill's passage—and before he signed it—Roosevelt established a dozen new forest reserves and enlarged fifteen others creating sixteen million acres of what the bill now named "national forests" in the six affected states.[105]

Leshy explains that while Theodore Roosevelt is best known for his national forest and monument reserves, he also helped to revolutionize energy policy on the public lands, reserving dam sites and mineral lands to keep them under government control. His efforts, and those of his successors, imposed an effective moratorium on public lands energy development and eventually spurred Congress to pass landmark legislation in the form of the Mineral Leasing and Federal Water Power Acts in 1920, over a decade after he left office.[106] The leasing and licensing systems these statutes created put the federal government in charge of oil, gas, coal, and hydropower development and secured to the public royalty fees from developers, which helped to fund western irrigation projects.[107]

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103 *See* COMMON GROUND, *supra* note 2, at 272.

104 *See id.* at 273–76.

105 *See id.* at 276–77. After signing the bill, Roosevelt proceeded to establish new national forests and monuments outside the six states now subject to congressional control. *See id.* at 277, 289–90 (proclaiming reservations until his next-to-last day in office).

106 *See id.* at 279–88. The amended Federal Power Act is now providing significant environmental restoration in the form of widespread dam removal. *See* Michael C. Blumm & Andrew B. Erickson, *Dam Removal in the Pacific Northwest: Lessons for the Nation,* 42 ENV'T L. 1043 (2012) (including the largest dam removal project in the world); *see also* Michael C. Blumm & Dara Illowosky, *The World's Largest Dam Removal: The Klamath River Dams*, 101 OR. L. REV. 1, 5–6 (2022).

107 *See* COMMON GROUND*, supra* note 2, at 287. The Mineral Leasing Act "extended leasing to all fossil fuels," ending the national policy of conveying full title, putting the government into a regulatory position (as with public lands grazing and logging), limited the acreage leased to individual applicants to prevent monopoly and imposing diligence requirements to require development or risk forfeiture. *Id.*

Leshy considers Roosevelt's public land legacy to be "enormous," more than tripling the acreage in federal land reservations, bringing regulation to livestock grazing on the reserves, prompting a wholesale revision in public lands energy policy, and helping to popularize the myth of the cowboy and rancher in the American imagination.[108] But he was unable to get Congress to authorize regulation of livestock grazing on unreserved public lands, perhaps due to the growing unpopularity of Pinchot's ambitions and the ongoing turf battle between the Interior and Agriculture Departments.[109] Roosevelt showed little or no sensitivity to the ongoing breakup of Indian lands under the 1887 Dawes Allotment Act, once describing the effect of the statute as a "mighty pulverizing engine" breaking up tribal lands.[110]

The legacy of Roosevelt's great ally, Pinchot, is also somewhat mixed. Under his leadership the Forest Service exhibited a high degree of professionalism, a model for other agencies.[111] He also promoted what Leshy refers to as "the long view" of public lands and natural resources policy, including a concern for future generations.[112] But he undervalued preservation championed by the likes

at 360–62. The Federal Water Power Act adopted the Forest Service's Pinchot approach of limited-term licenses, upheld by the Supreme Court in *Utah Power & Light v. United States*, 243 U.S. 389 (1917), extending licensing requirements beyond public lands. *See* COMMON GROUND, *supra* note 2, at 362–63. Leshy explains that the best sources of water power were on public lands, and a large portion of licenses issued under the Act during its first two decades were on national forest lands. *See id.* at 363. The statute required licenses to not interfere with purposes of reserved lands. Although at first the Act did not prevent licenses in national park systems, Congress later added an amendment which included a restriction on such licenses and directed that half of licensing revenues go to build Reclamation Act projects. *See id.* at 363–64.

108 *See* COMMON GROUND, *supra* note 2, at 291–93.

109 *See id.* at 292.

110 *See id.* at 290. Leshy notes that the Dawes Act was the product of an "unholy alliance of greed and idealism" (quoting historian William deBuys on the "unholy alliance") (meaning its supporters were both land speculators and Christians who wanted to convert the Indians and end the communal ownership of tribally owned lands) and quotes Roosevelt in the late 1880s to the effect that the "settler and the pioneer have at bottom justice on their side: This great continent could not have been kept as nothing but a game preserve for squalid savages." *Id*.

111 *See id.* at 295–96.

112 *See id.* at 296.

of John Muir, and he largely overlooked wildlife concerns.[113] Nevertheless, Pinchot remains, in Leshy's estimation, an "inspirational figure," asking in 1908 whether the public will "accept or ignore our responsibilities as trustees of the nation's welfare, our children and our children's children for uncounted generations will call us blessed, or will lay their suffering at our doors."[114]

The post-Roosevelt years were consequential not merely for the Mineral Leasing and Federal Power Acts of 1920, but also for additional reservations proclaimed by Roosevelt's successor, William Howard Taft,[115] and for Congress's enactment of what became known as the Weeks Act, a statute that authorized the purchase of lands for eastern national forests on cutover lands which had been harvested on an industrial scale with attendant erosion, water pollution, and flooding problems.[116] Leshy celebrates the Weeks Act as perhaps the national government's first significant environmental restoration program, pointing out that it has authorized the purchase "of some twenty million acres . . . in more than fifty national forests and national grasslands in 41 states and Puerto Rico."[117]

Leshy does not overlook the significant Supreme Court decisions of the era. In 1915, in *United States v. Midwest Oil Co.,* a

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[113] *See id.*

[114] *Id.*

[115] Leshy considers Taft's conservation record to be "undervalued," although he established only one national forest during his tenure. But he adjusted the boundaries of several, got Congress to create Glacier National Park, proclaimed ten national monuments, and, on the day before he left office, reserved nearly three million acres of bird refuges on Alaska's Aleutian Islands. *See id.* at 301–05.

[116] *See id.* at 306, 312. The statute's namesake, Congressman John W. Weeks (R-Mass.), convinced the Speaker of the House, Joe Cannon (R-Ill.) that if Weeks could frame a forestry bill that would observe sound business principles, Cannon would let the bill come to the House floor for a vote. When it did, it passed, on a 157–147 vote, over western opposition because revenues from public land management would fund the eastern acquisitions, a provision that was later dropped. *See id.* at 203, 309–11.

[117] *See id.* at 312–14. Due to budget limitations, many of the purchases were for less-than-fee interests, in which sellers often reserved the mineral estate. *See id.* at 313. These split-estate lands, which Leshy observes is "an increasingly common feature" of public land management, can produce conflicts and litigation between mining and the purposes of the acquired national forests. *Id.* at 313–14. Weeks Act forests return 40 percent of the revenue they generate to the states. *Id.* at 314.

divided Court upheld Taft's unprecedented withdrawals of about three million acres of oil lands in California and Wyoming.[118] The Court decided, 6-3, that Taft's non-statutory withdrawals were lawful because there had been a long history of such withdrawals, especially for Indian reservations and bird refuges, and that Congress had never objected to any, thus creating a doctrine of congressional acquiescence.[119]

The Supreme Court earlier handed down two other landmark public lands cases in 1911 concerning public land grazing that affirmed the federal authority to regulate livestock in national forests. The Court unanimously rejected a shepherd's argument that Congress unconstitutionally delegated legislative power to the executive to regulate and charge fees to graziers in national forests because the Forest Service had the authority to "fill up the details" of the express congressional directive to the agency to regulate "the use

[118] *See id.* at 300 (discussing United States v. Midwest Oil Co., 236 U.S. 459 (1915)). Leshy points out that the Taft withdrawals "went considerably beyond what Roosevelt had done, because while Roosevelt's withdrawals had protected oil companies from…homesteaders, they had not protected the lands themselves from being privatized under the Mining Law." *Id.* at 297.

[119] *See id.* at 300 (discussing United States v. Midwest Oil, 236 U.S. 459, 470–71 (1915)). In 1910, a year after the Taft withdrawals at issue in *Midwest Oil,* Congress passed the Pickett Act, authorizing the president to withdraw "any" public lands from dispossession "temporarily" (until a successor or Congress decided otherwise), which seemed to nearly nullify the 1907 restriction imposed by Congress concerning reservations outside national forests in six western states. *See supra* note 104 and accompanying text. Leshy considers the Pickett Act to be a powerful congressional statement that reversed the pre-existing general presumption of public land law favoring privatization. *See* COMMON GROUND, *supra* note 2, at 300. But he acknowledges the Pickett Act did not end the dominant notion that the federal government's principal role was to promote divestment and produce family-sized farms. *See id.* at 301. In fact, the two decades following the 1910 statute, "well over 100 million acres of public lands were privatized" in the continental United States. *Id.* at 301. The doctrine of congressional acquiescence has been criticized by some, including the late Justice Antonin Scalia, because it relies on interpreting statutes based on the current Congress instead of the law itself, and serves as poor indicia of legislative intent. *See, e.g.*, Johnson v. Transp. Agency, 480 U.S. 616, 671–72 (1987) (Scalia, J., dissenting) ("Vindication by congressional inaction is a canard."); *see also* William N. Eskridge Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67–68, 71–78, 95–108 (1988) (describing the evolution of the doctrine of congressional acquiescence and arguing that there are formalist, realist, and systemic problems with it).

and occupancy" of the forests.[120] The same day, the Court rejected an argument of a cattle grazier in Colorado that section 24 of the General Revision Act was an unconstitutional interference with state authority to control grazing because "[a]ll the public lands of the nation are held in trust for the people of the whole country," so Congress had authority to preempt contrary Colorado law.[121]

Leshy concludes that these Supreme Court decisions made clear that Congress had "unqualified" authority to regulate public lands, and that it could delegate broad authority to executive agencies to regulate public land users.[122] But political restraints remained: "[i]n both mining and grazing tradition and expectations played a huge role," since their presence was evident before the onset of regulation.[123] Still, an effort to require the federal government to transfer public lands to willing states received no support in 1912, which Leshy concludes "spoke volumes about the dominant mood of Congress and the country as the age of Roosevelt drew to a close."[124]

IV. THE INTERIM YEARS (BETWEEN THE ROOSEVELTS)

After the Theodore Roosevelt era, public lands issues did not recede although they were not as politically prominent. After Wilson prevailed over both Roosevelt and Taft in the 1912 election, Wilson signed the law that authorized the drowning of Hetch Hetchy valley in Yosemite over the impassioned opposition of John Muir.[125]

Just a few years later, perhaps partly as a response to the loss of Hetch Hetchy, Wilson signed the National Park Service Organic Act in 1916 after several years of congressional consideration.[126] The Act consolidated existing parks like Yellowstone and Yosemite into a national system and established the system's purpose "to

120 COMMON GROUND, *supra* note 2, at 316–17 (discussing Grimaud v. United States, 220 U.S. 506 (1911)).

121 *Id.* at 317–18 (discussing Light v. United States, 220 U.S. 523 (1911)).

122 *Id.* at 318.

123 *Id.*

124 *Id.* at 320.

125 *See id.* at 324–25.

126 *See id.* at 326–29 (discussing National Park Service Organic Act, 16 U.S.C. § 1 (1916)).

conserve the scenery and national and historic objects and wildlife therein and provide for the enjoyment of the same . . . as will leave them unimpaired for future generations."[127] A new agency, the National Park Service, would administer the parks and be responsible for resolving the ambiguity in the statute concerning its preservation and public use purposes.[128] But logging like in the national forests, as well as mining, dam building, and livestock grazing, would be sharply curtailed.[129]

The parks would not be managed for commodity production like Pinchot's forests, and the Park Service and Forest Service would become competitive agencies, particularly as the park system grew exponentially over the years.[130] Some of the early growth in the system was due to the far-sighted management of the parks by Stephen Mather, its director for its first dozen years. Mather's efforts to expand the system in the East demonstrated how public lands "could serve democratizing value by being open to all regardless of income or background."[131] Leshy maintains that Mather left a public land legacy "arguably as significant as Gifford Pinchot's."[132]

During Wilson's presidency, privatization continued its brisk pace in the West, even while Weeks Act purchases got underway in the East and South. " [A]bout two million acres of national forests

[127] *Id.* at 326–31 (quoting National Park Service Organic Act, 16 U.S.C. § 1 (1916)). Leshy notes that the landscape architect, Frederick Law Olmstead, was involved in drafting the language of the statute, and claims that the language would come to describe "the role that many public lands, and not just those inside the park system, play in American culture." *Id.* at 329.

[128] *See id*. Leshy observes that the statute "glossed over the tension that lurked between these two objectives." *Id.* The tension would be evident in proposals to build roads in the parks and fish-stocking with non-native species. *See id.* at 334.

[129] *See id.* at 331.

[130] The interagency competition was evident from the outset, as the Forest Service successfully fought off a proposal to transfer all national monuments to the Park Service. *See id.* at 330. But Congress often elevated monuments to park status, fueling the growth of the system. *See id.* at 335 (mentioning the Lassen, Grand Canyon, Zion, and Acadia as examples). Despite the interagency competition, Leshy points to several areas of cooperation between the two agencies in, for example, firefighting, road building, predator control, and combatting insects and diseases. *See id.* at 348–49.

[131] *Id.* at 338.

[132] *Id.* at 341.

were privatized" during the Wilson presidency.[133] Although the Supreme Court made clear that graziers had no vested legal rights, the political prominence for livestock graziers was sufficient to entrench grazing on "two of every three acres of national forest land" by 1918.[134] The Forest Service "rarely if ever" canceled a grazing permit.[135]

Leshy claims that the Forest Service "[became] a 'multiple use' agency" in the post-Pinchot era, incorporating recreation and wildlife concerns.[136] But the predominance of livestock grazing meant the agency had limited ability to significantly address wildlife and wildlife habitat issues. And national forest recreational activities emphasized hunting and fishing, which the states encouraged because they retained licensing revenues generated on national forest lands.[137] Yet by the 1930s, three decades before Congress endorsed multiple-use decision making on national forest land, the agency embraced the concept as at least not inconsistent with its 1897 Organic Act.[138]

The 1920s saw the Teapot Dome affair over federal oil leases in Alaska become a major scandal, probably the biggest public land scandal of the twentieth century.[139] The Secretary of Interior, Albert Fall, was convicted of accepting bribes in return for issuing mineral leases, the first federal cabinet official to serve time in

133 *Id.* at 343 (noting that some 4.5 million acres were acquired under the Weeks Act by 1933).

134 *Id.* at 344.

135 *Id.* at 345 (explaining the Forest Service's preference system favoring nearby property owners). Grazing permits have been especially hard to terminate. *See* Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1004–05 (2014).

136 COMMON GROUND, *supra* note 2, at 346–47.

137 *See id.* at 347.

138 *See id.*

139 *See id.* at 366–68 (explaining that Interior Secretary Albert Fall, a former senator and New Mexico Supreme Court justice, persuaded President Harding to transfer control of naval petroleum reserves in Wyoming (called Teapot Dome) and California to the Interior Department and proceeded to secretly lease without competitive bidding to two oil companies whose owners had "loaned" Fall several hundred thousand dollars; Fall was eventually convicted of bribery, served time in prison, and the leases were canceled).

prison.[140] Despite the scandal, by the end of the decade, oil production from public lands had doubled, causing President Hoover to impose a moratorium on leasing to maintain prices, an action the Supreme Court upheld.[141]

The biggest public land issue of the decade, however, was what to do with unreserved public lands. Homesteading continued apace in the early twentieth century, peaking in 1913.[142] However, the Stock-Raising Homestead Act (SRHA) of 1916, designed to encourage homesteading of rangeland, proved to be a large-scale disappointment; Leshy reports that two-thirds of the SRHA homestead entries failed.[143] Offering ranchers additional public acres was, it turned out, no substitute for water availability. Homesteading was ending due to the aridity of the West.[144] Nonetheless, Leshy surprisingly observes that during the first third of the twentieth century more public land was privatized under various homestead initiatives than during the last third of the nineteenth.[145]

The antidote to aridity was "reclamation" of lands with dams and reservoirs.[146] The federal commitment to reclaim western arid lands began in earnest in the 1902 Reclamation Act,[147] but earlier

[140] *See id.* at 367.

[141] *See id.* at 369 (citing United States *ex rel.* McLennan v. Wilbur, 283 U.S. 414, 419 (1931), describing the Interior Secretary's authority to act as a "guardian" of the people's interest in public lands).

[142] See *id.* at 358.

[143] See *id.* at 370. Paul Gates considered the statute to authorize a "remnant" public land sale. *Id.*

[144] Leshy reports that homesteading and other privatization measures "steadily dwindled throughout the 1920s." *Id.* at 371.

[145] *See id.* at 370. Leshy trenchantly observes that "[i]n the more arid regions, privatization often increased competition for forage," leading some livestock owners to see the merit of government regulation, as on the national forests. *Id.* at 370–71.

[146] *See id.* at 221–22.

[147] *See id.* at 221–26. Leshy discusses events leading up to the 1902 Act, including Carey Act grants to states that largely affected only Idaho and Wyoming because the federal government donated only the land; Congress unrealistically expected states to finance the water projects. *See id.* at 221–22. He also deftly assesses the alignment between the movement for forest reserves and federal funding of irrigation dams downstream, a link Roosevelt seized in his first State of the Union address, describing the forests as natural reservoirs that would fill a water bank account, from which the reclamation dams would store for later withdrawal

Congress had tried offering additional public lands to settlers who could find irrigation water in the 1877 Desert Land Act.[148] Mostly, they could not. Fewer than one-third of entries succeeded, some of which were obtained by fraud.[149]

Meanwhile, an 1877 report by the explorer, John Wesley Powell, then with the Interior Department, called for public land law reform, which led to a commission largely adopting his recommendations that studies of water availability precede settlement and that unreserved grazing lands be sold in four-mile square tracts.[150] The plan went nowhere in Congress because of the opposition of large cattle operators who monopolized the unregulated rangelands and thought they could do better with a continuation of the open range, on which they proceeded to illegally erect fences using the innovation of barbed wire.[151] Rampant overgrazing, coupled with drought and harsh winters, led to a massive livestock die-off in the late 1880s and a consolidation of the livestock industry.[152]

Leshy explains that this considerable downsizing had almost no effect on the market for meat, noting that, for example, in 1880, Illinois had over a half-million more cattle than all the western states

to irrigators. *See id.* This vision was so politically popular that by 1906 the Reclamation Service would have twenty-three projects underway that would irrigate more than two million acres within a couple of decades. At the same time, Roosevelt and Pinchot expanded the national forests threefold in the first seven years after the enactment of the 1902 Act. *See id.* at 225–26.

148 *See id.* at 115–16, 153.

149 *See id.* at 116–17 (quoting General Land Office Commissioner William Sparks, who described "the most unblushing frauds").

150 Powell, "a self-taught polymath" who rafted the Green and Colorado Rivers after losing his right arm in the Battle of Shiloh, headed the U.S. Geological Survey for nearly three decades. *Id.* at 117. In 1888, Congress funded an irrigation survey he headed to identify lands that could be "redeemed by irrigation" and select promising sites for reservoirs. *Id.* at 153–54. But the authorization contained what turned out to be a politically explosive provision putting the lands the survey identified off-limits to homesteading and other entries. A political firestorm ensued, and in 1890 Congress repealed the survey's withdrawals, ratified entries attempted during the survey, and cut the project's funding. *See id.* at 164 (quoting William deBuys as amounting to a "national repudiation" of Powell and his attempt to plan water development in advance of settlement).

151 *See id.* at 117–18.

152 *See id.* at 118–19.

combined—excepting California.[153] He attributes the "turmoil" over grazing lands during the 1880s to a rise in the movement to retain the lands in public ownership.[154] But that was not assured for another half-century. In the interim, unreserved grazing lands continued to be overgrazed, even though beginning with Pinchot, the Forest Service had regulated grazing on its lands.[155]

Efforts to increase western water supplies survived the failure of the Desert Lands Act, turning to federal construction of water projects. In his first State of the Union Address in 1901, Roosevelt linked water project construction to forest reserves, which would store water that would be controlled and diverted by projects for distribution to settlers downstream.[156] Congress quickly agreed, passing the 1902 Reclamation Act—known as "the Newlands Act"—which authorized projects in the eleven western states to irrigate both public land claimants and private landowners who would pay a share of the project costs but were granted ten-year interest-free loans—soon extended— and were limited to 160-acre tracts.[157]

The antimonopoly provisions in the reclamation statutes were often ignored in practice until Congress permanently relaxed them, encouraged by the Reagan Administration in the 1980s.[158] Moreover, the primary beneficiaries of project water, which irrigated some two million acres by the 1920s, were existing private landowners, not public land settlers.[159] Leshy explains that the subsidies in the Newlands Act grew over the years, and some water projects

153 *See id.* at 120 ("In fact, the production of meat from cattle grazed on public land has never been more than a small portion of the national total.").

154 *Id.* at 120.

155 *See id.* at 240; *see also* Michael C. Blumm et al., *Federal Grazing Lands as "Conservation Lands" in the 30 by 30 Program*, 52 ENV'T L. REP. 10279 (2022).

156 *See* COMMON GROUND, *supra* note 2, at 222–23.

157 *See id*. at 224.

158 *See id.* at 225. Antimonopoly provisions were frequent in public lands legislation, although they were not often implemented vigorously or consistently. *See also* Michael C. Blumm & Kara Tebeau, *Antimonolopy in American Public Land Law*, 28 GEO. ENV'T L. REV. 155 (2016).

159 *See* COMMON GROUND, *supra* note 2, at 225.

benefited not small landowners but growing western cities, helping the West to become the most urbanized region in the country.[160]

The financing of the reclamation program ran into trouble early, as Congress had to increase funding and subsidies to make projects viable. In both the Mineral Leasing and Federal Power Acts of 1920, Congress stipulated that half the revenue derived from licensees be reserved for reclamation projects, even though in the early 1920s reclamation accounted for only about five percent of irrigated acres in the West, and well over half of project beneficiaries were in default of their repayment obligations.[161] Consequently, new project starts were down significantly, so Congress approved "emergency funds" for four straight years in the early 1920s and also adopted a number of reforms, including requiring locals to assume project operation and maintenance costs.[162]

At the same time that the reclamation program was running into financial difficulties, a movement toward multi-purpose dams—beyond just supplying irrigation water—developed.[163] The first of these dams was located along the Arizona-Nevada border, which would serve flood control, electricity generation, and other purposes beyond irrigation.[164] After the Colorado River Compact of 1922 divided Colorado River waters between the upper and lower basin states, Congress moved forward with what became the Boulder Canyon Project Act of 1928, which authorized the Hoover Dam.[165] Leshy asserts that the project shifted the reclamation program's

160 *See id.* at 226. Reclamation dams have also produced substantial environmental costs. *See, e.g.*, Chris Edwards & Peter J. Hill, *Cutting the Bureau of Reclamation and Reforming Water Markets*, DOWNSIZING THE FED. GOV'T (Feb. 1, 2012), https://www.downsizinggovernment.org/interior/cutting-bureau-reclamation (arguing that although "[t]he era of major federal dam building" has passed, "Reclamation continues to provide water to the western states at artificially low prices. Without reforms, that policy will exacerbate the major water challenges facing the western states. About four-fifths of water supplied by Reclamation goes to farm businesses, and the agency provides the largest subsidies to those users. As a consequence, agriculture must be at the center of efforts to reform federal water policies.").

161 *See* COMMON GROUND, *supra* note 2, at 390.

162 *Id.*

163 *See id.* at 389–94.

164 *See id.* at 391–92.

165 *See id.* at 392.

direction away from privatizing public lands and toward serving multiple purposes, including recreation, open space, and producing electric power.[166] For the next half-century—between 1930 and 1980—the United States built more than one thousand dams, mostly on public lands, transforming the hydrological regimes of nearly all western rivers, "with destructive effects on riverine environments, particularly iconic salmon runs."[167]

The Hoover Dam and the resulting Lake Mead established a model for national recreation areas, managed primarily for recreation by the National Park Service.[168] Leshy observes that this model expanded the reclamation program's purposes to include generating electric power and meeting the recreation needs of the burgeoning urban populations in the West.[169] In the ensuing years, Congress provided more funding for multiple-purpose water projects than it did for "national forests, parks, and all other public lands combined."[170]

V. ROOSEVELT II: THE NEW DEAL AND ITS AFTERMATH

The election of Franklin Delano Roosevelt (FDR) in 1932 led to a revolution in government and the administrative state.[171] In public lands, the first achievement was the creation of the Civilian Conservation Corps (CCC), which Congress authorized in the first month of the New Deal, just ten days after Roosevelt asked for it.[172]

166 *See id.* ("The Boulder Canyon Project Act fundamentally changed the direction of the reclamation program, which ever after had little to do with privatizing public lands, but still had considerable effect on public lands and public land policy."). The book contains a minor error in assigning the construction of Grand Coulee Dam to the U.S. Army Corps of Engineers, not the Bureau of Reclamation. *See id.* at 393.

167 *Id.* For an assessment of effect of dams on the Pacific Northwest's salmon runs, see MICHAEL C. BLUMM, PACIFIC SALMON LAW AND THE ENVIRONMENT: TREATIES, ENDANGERED SPECIES, DAM REMOVAL, CLIMATE CHANGE AND BEYOND (2022).

168 *See* COMMON GROUND, *supra* note 2, at 393.

169 *See id.* at 394.

170 *Id.*

171 *See, e.g.*, K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671 (2018) (book review).

172 *See* COMMON GROUND, *supra* note 2, at 398.

Over the next eight years, the CCC would employ some three million men to plant trees, rehabilitate rangeland, and build roads, trails, campgrounds, and other visitor facilities on public lands.[173]

The long-debated issue of what to do with the 170 million acres of unreserved public lands, used mostly for grazing,[174] was finally resolved due to the imperative of what was called the Dust Bowl, a climatic event caused by severe drought in the southern Great Plains, which—coupled with high winds and choking dust storms from Texas to Nebraska—killed both people and livestock.[175] After western congressmen rejected recommendations by the so-called Garfield Committee in 1931 to parcel off grazing lands for private sale and allow the states to regulate surface rights to grazing lands—but not mineral rights[176]— Congress turned to federal regulation. Led by Congressman Edward Taylor (D-Colo), Congress passed what became known as the Taylor Grazing Act in 1934 because, in the estimation of one western senator, regulation was better than overgrazing and a lack of control.[177]

The Taylor Act aimed to "stop injury to the public grazing lands by preventing overgrazing and soil deterioration" as well as stabilizing the livestock industry by establishing grazing districts which would regulate grazing by establishing a preference system, preventing "unnecessary injury," and charging reasonable fees.[178]

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[173] *See id.* To his dismay, Roosevelt was never able to get Congress to permanently establish the CCC, and the program expired in 1942. *See* DOUGLAS BRINKLEY, RIGHTFUL HERITAGE: FRANKLIN D. ROOSEVELT AND THE LAND OF AMERICA 525–27 (2016).

[174] Theodore Roosevelt and Gifford Pinchot had proposed a regulatory program for these lands administered by the Forest Service in 1906. *See* COMMON GROUND, *supra* note 2, at 372.

[175] *See, e.g.*, Ken Burns, *A Man-Made Ecological Disaster*, PBS LEARNING MEDIA, https://opb.pbslearningmedia.org/resource/ecological-disaster-ken-burns-dust-bowl/ken-burns-the-dust-bowl (last visited Feb. 10, 2023).

[176] The states objected to the lack of mineral rights, believing that jurisdiction only over surface rights would be uneconomical. *See* COMMON GROUND, *supra* note 2, at 376–77. The committee recommended that any conveyances to the states be impressed with a trust requiring the rehabilitation of grazing lands, and that states have a ten-year period in which to decide whether to accept trust oversight over the surface of the conveyed lands. *See id.* at 375.

[177] *See id.* at 401 (Taylor claimed that the statute amounted to no less than the "magna carta of American conservation").

[178] *Id.* at 401–02 (quoting Taylor Grazing Act, 43 U.S.C. §§ 315–315p).

Assigning the regulatory chore to the Interior Department, not the Forest Service, was a major victory for Interior Secretary Harold Ickes, a fierce turf fighter.[179] But the Act's preference system, the first time a grazing preference had been legislated, gave primary rights to obtain federal permits to existing graziers, the same operators who had caused the overgrazing and injury.[180] Giving priority to historic users was a recipe for continued overgrazing, which the Taylor Act did little to stop.[181] The statute did not, however, convey any legal rights to public land graziers, specifying that they "shall not create any right, title, interest, or estate" in their permit lands.[182]

The Taylor Act and accompanying executive orders withdrawing rangelands marked a major milestone in public land history. Establishing the districts and accompanying regulation and withdrawals effectively ended the era of homesteading.[183] Some restoration of rangeland conditions was possible through the efforts of the CCC. But the Interior Department was wholly unprepared for managing the unreserved rangelands.[184] Rancher-dominated "grazing

[179] Ickes, a Pennsylvanian with a law degree from the University of Chicago, was a Progressive Republican who supported Theodore Roosevelt's Bull Moose presidential campaign of 1912. Under FDR, he became the longest serving Interior Secretary in history. A workaholic, described by historian Stephen Fox as having "ferocious integrity," he acknowledged his contentious personality in his 1943 autobiography, *The Autobiography of a Curmudgeon. See id.* at 398–401.

[180] *See id.* at 401–07.

[181] In fact, most federal grazing lands are in an ecologically unsatisfactory condition today, eighty-five years after enactment of the Taylor Act. *See* Blumm et al., *supra* note 155 (recommending against inclusion of most federal grazing lands in the Biden administration's promise to protect 30 percent of the nation's lands and waters by 2030).

[182] Taylor Grazing Act, 43 U.S.C. § 315b.

[183] Leshy explains that the executive orders "spelled the end of large-scale divestitures of the nation's public lands outside of Alaska." COMMON GROUND, *supra* note 2, at 404.

[184] *See id.* at 406 (noting that Interior had one administrator for every 4 million acres of rangelands, and explaining the difficulties in determining who was entitled to the statutory preference, and how many animals should be permitted). The first grazing director, Ferry Carpenter, memorably captured Interior's dilemma: "Well, as the public domain range is less articulate than the stockmen, we have chosen to hammer the public domain." *Id.* at 407. A Forest Service assessment before the enactment of the Taylor Act concluded that "practically none of the grazing lands administered by Interior were in 'reasonably satisfactory condition,'" and Forest Service lands were not in much better condition. *Id. See also*

advisory boards" which, Leshy informs, "included bankers, lawyers, and other urban types," amounted to a private governing body, epitomizing agency capture by livestock owners.[185]

FDR was as much of a conservationist as his distant cousin, Theodore Roosevelt, establishing the first national parks for biological and wilderness resources, creating the concept of national seashores, carrying out congressional approval of historic sites, pioneering the use of scenic easements, and vigorously using the Antiquities Act to designate national monuments.[186] One of his national monuments, the Teton National Monument generated sufficient controversy to induce a cattle drive over monument lands in protest of the proclamation and an unsuccessful lawsuit contesting it by the state of Wyoming.[187] After FDR pocket vetoed a bill that would have overturned the monument, the Truman administration and the state reached a compromise, elevating the monument to national park status and adding acreage, but amending the Antiquities Act to forbid future Presidents from establishing new monuments in Wyoming.[188] That prohibition is still in effect.

FDR's public land legacy includes getting Congress to double the acreage of the national park system, encouraging a six-fold increase in visitations, and leading Leshy to conclude that his park

LESHY, FISCHMAN & KRAKOFF, *supra* note 1, at 799–800 (describing ranchers' "self-rule" and Interior's ill-preparedness to regulate graziers). There is ample evidence that, over eight decades later, most of public rangeland remains in unacceptable environmental conditions. *See* Blumm et al., *supra* note 155, at 10283 (although neither the Forest Service nor BLM keeps up-to-date information on rangeland health, an analysis by Public Employees for Environmental Responsibility of twenty-one thousand BLM grazing allotments found that nearly half—almost fifty-five million acres—were not in compliance with rangeland health standards, as prescribed in BLM's regulations. Of the rangelands in noncompliance, grazing was a "significant cause of failure" of 36%—some forty million acres).

185 COMMON GROUND, *supra* note 2, at 407–08; *see also* S. L. Rundle, *The Once and Future Federal Grazing Lands,* 45 WM. & MARY L. REV. 1803, 1811 (2004); Karl N. Annuda & Christopher Watson, *The Rise and Fall of Grazing Reform,* 32 LAND & WATER L. REV. 413, 421–22 (1997).

186 *See* COMMON GROUND, *supra* note 2, at 412–20. Douglas Brinkley listed 29 national monuments and parks during FDR's administration. *See* BRINKLEY, *supra* note 173, at 610.

187 *See* COMMON GROUND, *supra* note 2, at 420.

188 *See id.*

legacy was greater than that of his cousin.[189] His efforts to increase national wildlife refuges were unprecedented. The widespread filling of wetlands, encouraged by the Swampland Acts of the nineteenth century, led to a dramatic decline in duck populations in the early 1930s.[190] Bird hunters consequently encouraged FDR to establish a Committee on Wildlife Restoration, whose 1934 report led Congress to enact the Fish and Wildlife Coordination Act, requiring wildlife considerations in federal dam building and operations.[191]

Other measures of the FDR era included the Duck Stamp Act, creating money for acquiring and maintaining wildlife refuges, and nearly fifty new refuges by 1936 that were designated by FDR without congressional approval.[192] Leshy reports that "FDR established more than 150 areas" for wildlife conservation, tripling the acreage in wildlife refuges, and helping wildlife populations to quadruple by the end of the Roosevelt administration.[193] Leshy claims that during the Great Depression, FDR's promotion of recreational opportunities on public lands fueled tourism and "provided glue that helped bind the nation together."[194]

VI. THE POST-WAR ERA

The post-war years saw an unsuccessful attempt by Ickes to raise grazing fees, the founding of the Bureau of Land Management (BLM)—combining the old Grazing Service and the venerable General Land Office—rulemaking under the Administrative Procedure Act, and an effort by livestock ranchers to obtain ownership of their

189 *See id.*

190 *See id.* at 421.

191 *See id.*

192 *See id.* at 421–23.

193 *Id.* at 425. BRINKLEY, *supra* note 173, at 600–08, lists 140 national wildlife refuges created by FDR. Leshy observes that while a substantial amount of acreage was added to refuges, they were not managed as a system like national parks and forests for another half-century. *See* COMMON GROUND, *supra* note 2, at 425. However, FDR did create the agency which would administer wildlife refuges, the Fish and Wildlife Service in the Department of the Interior, leading to some speculation that Secretary Ickes's plan to create a Department of Conservation that included the Forest Service might succeed. But Congress quashed it. *See id.* at 426. FDR also brought livestock regulation to unreserved public lands and signed into law the Bald Eagle Protection Act in 1940. *See id.* at 425–26.

194 COMMON GROUND, *supra* note 2, at 436.

permit lands.[195] The latter failed, in part due to the rise of conservation voices like the author, Bernard DeVoto, who was opposed to federal land divestment.[196] Although public land graziers lost their ownership bid, Leshy explains they tightened their grip on their permit lands by supporting stingy BLM budgets that inhibited oversight, by the growing strength of grazing advisory boards as a kind of private government on which permittees were well represented, and by various subsidies supplied by Congress.[197]

Timber harvests mushroomed in the post-war era, growing from 3.1 billion board-feet (bbf) in 1945 to six bbf in 1950 to over nine bbf by 1960, to up to twelve bbf in the 1980s.[198] Clearcutting became the harvest practice of choice, and the Forest Service issued a fifty-year harvest contract in southeast Alaska's Tongass National Forest.[199] The timber boom also occasioned what one historian described as a "veritable orgy of road-building;" by 1960, roads on Forest Service lands were three times the size of today's interstate highway system.[200] The emphasis on timber harvesting led to old-growth forest liquidation, a backlog in funding for reforestation, and significant erosion and wildlife habitat damage.[201]

The exponential growth of public land recreation saw a fivefold increase in the first post-war decade, which encouraged Congress to triple the Forest Service's recreation budget.[202] Booming interest in recreation and concerns over wildlife led Congress, under the

195 *See id.* at 437–40.

196 *See id.* at 440–41 (also noting the opposition of westerners who linked federal subsidies for water projects with public land ownership). Leshy observes that "[t]he ineffectual effort to transfer ownership of public lands to livestock interests demonstrated once again the depth of support for keeping these lands in national ownership." *Id.* at 441.

197 *See id.* at 442–44.

198 *See id.* at 444 (also noting that harvests on the BLM's Oregon and California lands more than quadrupled between 1950 and 1970).

199 *See id.* at 445.

200 *Id.* at 445 (quoting PAUL HIRT, A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR TWO 148 (1996)).

201 *See id.* at 446. Industrial timber harvesting led to the so-called "spotted owl timber wars" of the 1980s and 1990s over the application of federal environmental laws to public timber harvests. *See id.* at 506–08; *see also* STEVEN LEWIS YAFFE, THE WISDOM OF THE SPOTTED OWL: POLICY LESSONS FOR A NEW CENTURY (2d ed. 1994).

202 *See* COMMON GROUND, *supra* note 2, at 446.

leadership of Senator Hubert Humphrey (D-Minn.), to enact the 1960 Multiple-Use Sustained-Yield Act (MUSYA) despite the initial opposition of the timber industry, the water project community, and irrigators, as well as the Forest Service and the National Park Service.[203] In Leshy's telling, Humphrey skillfully adjusted the Act to meet these objections, even accommodating wilderness advocates by declaring that wilderness areas—of which none had been legislatively declared—were not inconsistent with the MUSYA.[204] Leshy also explains that the Forest Service introduced language elaborating on "sustained yield" implicit in the 1897 "Organic Act's reference to a 'continuous' supply of timber" and clarifying that some national forest lands will be used for less than all of the potential multiple uses, while preserving maximum agency discretion.[205] By specifically mentioning recreation and wildlife, the MUSYA undeniably raised the priority that land managers gave to those resources.[206]

[203] *See id.* at 447–48. The agencies were largely concerned about interagency turf battles. *See id.*

[204] *See id.*

[205] *Id.* at 448 (quoting Organic Act of 1897, 16 U.S.C. § 475). Leshy claims that MUSYA was the last time Congress granted such broad administrative discretion. *See id.* at 449. MUSYA was followed four years later by the Classification and Multiple Use Act (CMUA), part of a package of laws that included the Wilderness Act and the authorization of the Public Land Law Review Commission (PLLRC). *See id.* at 490. The CMUA extended multiple-use decision making to BLM lands and classified nearly all BLM lands for retention, not divestment. *See id.* at 491. The PLLRC, which had nineteen members, produced numerous reports, took testimony from thousands of people, and produced a 1970 report, *One Third of the Nation's Lands,* calling for wildlife protection on grazing lands, reform of the 1872 Mining Law, and a "dominant use" principal in public land management. *See id.* at 492–93. The latter recommendation was never implemented.

[206] *See id.* at 448. Although MUSYA applied only to Forest Service lands, the Federal Land Policy and Management Act applied multiple use to BLM lands, even elaborating on its definition. *See id.* at 449. Leshy explains that earlier in the post-war era there was a significant conflict between the federal government and coastal states over control over offshore lands. *See id.* at 453–54. Off of Santa Barbara, oil companies began drilling on the ocean floor before the beginning of the twentieth century, and California began leasing tracts in the 1920s. *See id.* at 453. The federal government did not challenge the state's jurisdiction during the Roosevelt administration, but President Truman—who vetoed a joint resolution of Congress in favor of the states' claims to jurisdiction out three miles—sought Supreme Court review. *See id.* at 454. In 1947, the Court sided with the federal government, limiting the states' "equal footing" claims to ownership of submerged

VII. THE MODERN ERA

Leshy traces the beginning of the modern era of public land policy to the controversy over a proposed reclamation dam at Echo Park on the Green River in eastern Utah near the Colorado border and Dinosaur National Monument.[207] The controversy galvanized support from a nascent environmental movement led by Howard Zahniser of the Wilderness Society and David Brower from the Sierra Club, and Congress reacted by removing the Echo Park projects from a 1956 statute that authorized other water projects, including the Glen Canyon Dam.[208] Leshy suggests that "the Glen Canyon dam was a high price to pay for preserving Echo Park because it inundated a much larger and more scenic expanse of public land."[209]

The success in preserving Echo Park encouraged Zahniser to begin to call for legislation to establish a wilderness system on public lands where roads and dams would not be built and logging halted.[210] The proposed legislation, first introduced by Senator Humphrey in 1956 but which enjoyed bipartisan support, had an eight-year journey through Congress before being signed into law by President Johnson in 1964.[211] The Wilderness Act's poetic

lands to inland waters. *See* United States v. California, 332 U.S. 19, 41–42 (1947) (relying on the national interest in defense and international relations). Truman proceeded to veto another joint resolution of Congress, but his successor, President Eisenhower, signed the Submerged Lands Act, Pub. L. No. 99-272, 67 Stat. 29 (1953), recognizing the states' claims to near-shore submerged lands in 1953. However, later that year, Congress passed and the President signed the Outer Continental Shelf Lands Act, Pub. L. No. 95-372, 67 Stat. 462 (1953), which established a federal leasing system beyond the near-shore (either three miles or three marine leagues), asserting United States jurisdiction over some 2.3 billion offshore acres, an area roughly nine times the area Congress granted to the states. *See also* COMMON GROUND, *supra note* 2, at 453–57 (also explaining that Secretary Ickes's long tenure at the Department of Interior came to an end during the coastal dispute, although due to a personnel matter, not over the federal claim to the offshore).

207 *See* COMMON GROUND, *supra* note 2, at 462–63.

208 *See id.* at 461–62.

209 *Id.* at 463.

210 *See id*.

211 *See id*. at 463–66. Leshy notes that support for the proposed statute gained the support of Oregon senators in part because of protests against a Forest Service decision to rescind the designation of a primitive area in the French Pete Valley of central Oregon to "mak[e] it available for logging." *Id.* at 464. He claims that although the Forest Service and Park Service initially opposed the legislation as

language defines "wilderness" as "an area where the earth and its community of life are untrammeled by man, where man is a visitor who does not remain," and which retains "its primeval character and influence without permanent improvements or human habitation."[212] Once designated by Congress, wilderness areas cannot have roads, timber harvests, mining—subject to an exception until 1984—commercial enterprises, or motorized equipment.[213] However, livestock grazing was not prohibited, mining entries enjoyed a grandfather clause until 1984, and there was even presidential authority to site water projects in wilderness areas—although this authority was never utilized.[214]

Congress created about nine million acres of "instant wilderness" in the 1964 Act that was already being protected by land managers, and established itself as the gatekeeper, which Leshy explains required wilderness advocates to organize politically if the system was to expand.[215] The Act established a complicated system of administrative reviews to inform Congress about the suitability of potential wilderness areas. Although cumbersome, the process has led to over one hundred million additional acres being added to the system since 1964.[216] Moreover, the Act forbade the Secretary of the Interior from impairing wilderness values of those lands reviewed

imposing limits on their discretion, they eventually supported it after it became clear that Congress would not "establish a new agency to administer designated wilderness areas." *Id.*

[212] *Id.* at 466. Eligibility criteria included areas (1) where the imprint of man is substantially unnoticeable, (2) with outstanding opportunities for solitude or primitive recreation, (3) have at least 5000 acres or is of sufficient size to preserve in its unimpaired condition, and (4) may contain "ecological, geological, or other features of scientific, educational, scenic, and historical value." *Id.* at 466–67 (quoting Wilderness Act, 16 U.S.C. § 1131(c)).

[213] *Id.* at 467.

[214] *Id*. at 466–70. The exception for mineral entries in wilderness areas until December 31, 1983 appears in 16 U.S.C. § 1133(d)(3).

[215] *Id.* at 468–69. The practical effect of Congress being the wilderness gatekeeper is that the support of local members of Congress is a prerequisite for wilderness designation. *Id.*

[216] *See id*. at 471 (noting that of the more than 111 million acres in the wilderness system, the Park Service manages 44 million acres, the Forest Service manages 36 million acres, Fish and Wildlife Service manages 21 million acres, and BLM manages 9 million acres).

for their wilderness suitability "until Congress provided otherwise," supplying considerable interim protection.[217]

One of the important contributions of Leshy's book is his identification of what he labels as "the penumbra of the Wilderness Act," wilderness-like protection of lands in public lands labeled as "national preserve, reserve, conservation area, recreation area, [or] scenic area."[218] Among those areas are those protected by the Forest Service's "roadless rule," and Leshy recounts the long battle over the agency's various roadless reviews.[219] He claims that "as many as 100 million acres" of public lands—about one-third of the lands reviewed—meet the criteria for inclusion in the wilderness system, have not been designated by Congress, but are managed as if they were.[220] Leshy's insight of the expansive effect of the Wilderness Act underlies his claim that the dominant theme of public lands in the twenty-first century is preservation, not commodity production.[221]

The same day that President Johnson signed the Wilderness Act in 1964, he also signed into law the Land and Water Conservation Act, which remains a principal source of funding for acquisition of recreation lands, including federal funding by state and local governments.[222] In 1964 Congress also approved the first national recreation area (NRA), and NRAs have proliferated in ensuing years.[223] Two years later, in 1968, Congress enacted the Wild and Scenic Rivers Act, establishing a system of free-flowing rivers and adjacent corridors as a kind of antidote to the nation's long dam-building

217 *Id.* at 473.

218 *Id.* at 472.

219 *Id.* at 474–75.

220 *Id.* at 475–476.

221 *See id*. (claiming that "as many as 100 million acres of public lands that meet [wilderness criteria] remain outside it but are in fact managed much as if they were in [the wilderness system]," and that "the Wilderness Act has fundamentally changed the management of a significant portions of the nation's public lands").

222 *See id.* at 477.

223 *See id.* at 478–79. NRAs are managed under a "dominant use" regime, which allows livestock grazing and mineral development if consistent with recreational use. *Id.* at 478. There are now some forty NRAs "from Alaska to Vermont to Georgia." *Id.* at 480.

era.[224] The statute authorizes river corridor plans which forbid activities that substantially interfere with the "outstandingly remarkable values" for which the river was designated.[225] Congress is the principal gatekeeper, but unlike wilderness areas, the states can designate rivers as well with the approval of the Interior Secretary.[226] There are now 226 rivers in the system.[227]

Leshy passes over the National Environmental Policy Act (NEPA) to focus attention on the Endangered Species Act (ESA) as emblematic of the modern era of environmental law. After discussing influences, including that of Rachel Carson, on popular sentiment, Leshy reviews the legislation leading up to the 1973 amendments to the ESA, which enjoyed widespread bipartisan support.[228] Leshy points out that the amended ESA aims to "conserve" endangered species and does so through two primary mechanisms: 1) a federal consultation process preceding any federal actions affecting listed species, and 2) a prohibition on the taking of listed species without a federal permit.[229] He emphasizes the influence of the ESA's embrace of science—particularly advances in biodiversity—on ESA decision making, the blurring of distinctions among land managers—since the statute applies to all agencies—and the increasing involvement of courts.[230]

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[224] *See id.* at 480–82. Leshy recounts that more than 75,000 dams have been built since the nation's founding. *See id.* at 482.

[225] *See id.* at 481 (quoting Wild and Scenic Rivers Act, 16 U.S.C. § 1271(b)); *see generally* Michael C. Blumm & Max Yoklic, *The Wild and Scenic Rivers Act at 50: Overlooked Watershed Protection,* 9 MICH. J. ENV'T & ADMIN. L. 1 (2020).

[226] *See* COMMON GROUND, *supra* note 2, at 481.

[227] *See* Blumm & Yoklic, *supra* note 225, at 60–75 (listing all designated rivers as of 2018).

[228] *See* COMMON GROUND, *supra* note 2, at 483–84.

[229] *See id.* at 484 (citing 16 U.S.C. § 1539).

[230] *See id.* at 484–85. On the growing role of judicial review, Leshy discusses *TVA v. Hill,* 437 U.S. 153 (1978) (*The Snail Darter Case*), and *Sierra Club v. Morton,* 405 U.S. 727 (1972) (concerning Mineral King Valley and suggesting that esthetic and environmental injuries would be sufficient to obtain standing in federal court). *See id.* at 485–86. However, the Supreme Court has accepted government *inaction* in the face of statutory directives deferentially. *See* Norton v. S. Utah Wilderness All., 542 U.S. 55 (2004) (narrowly construing a statutory directive to not "impair" the resources in wilderness study areas).

Leshy considers generically applicable laws like the ESA and the Wilderness Act to add complexity to public land law, but he concludes that, in the modern era, public land law has centered on protecting natural and cultural resources, encouraging non-motorized recreation, and promoting appreciation of nature.[231] He thinks it significant that Congress has never legislated national systems of public lands devoted to mining, grazing, timber harvesting, or off-road vehicle recreation.[232] Modern public land legislation has been mostly about conservation, not resource development.[233]

A centerpiece of the modern era is the Federal Land Policy and Management Act (FLPMA) of 1976, a fallout of the Public Land Law Review Commission's recommendations, and the BLM's organic act.[234] The FLPMA declares that the BLM lands will be retained in federal ownership and managed under multiple use and sustained yield principles for "the long-term needs of future generations . . . without permanent impairment of the productivity of the land and the quality of the environment."[235] FLPMA's chief contribution is to "[make] 'land and resource' planning a central focus of BLM's management process."[236] Plans must give attention to protecting the environment, avoid taking action that would cause unnecessary or undue environmental degradation, and consider ensuring that public land users pay fair market value.[237]

The FLPMA also restructured land withdrawals, establishing procedures for various types of land withdrawals as well as processes to review existing withdrawals and roadless tracts over five

231 *See* COMMON GROUND, *supra* note 2, at 488–89. Leshy also discusses other conservation measures like the National Trails system (administered by a variety of land managers), the "Rails to Trails" program, and conservation easements (held by both public agencies and nonprofit entities). *See id.* at 486–88.

232 *See id.* at 488–89.

233 *See id.* at 585, 588. Implementation, however, is another matter. *See infra* note 263 and accompanying text.

234 *See id.* at 495.

235 *Id.* FLPMA also called for public lands to be managed "in a manner that will protect . . . atmospheric values," perhaps anticipating climate change problems due to fossil fuel development on the lands. *Id.*

236 *Id.*

237 *See id.* at 496.

thousand acres that might qualify for wilderness designation.[238] The FLPMA did not revoke the Taylor Grazing Act but, in Leshy's words, "adjusted provisions dealing with grazing leases, permits, and advisory boards."[239] Simultaneously with the enactment of the FLPMA, Congress created the Payment in Lieu of Taxes Act, which authorized federal payment to local governments to compensate for the tax immunity of federal lands.[240]

Post-FLPMA political developments saw the rise of the so-called Sagebrush Rebellion, a reaction of some westerners to the threat of increased federal regulation, which Leshy explains was actually "a gesture of discontent rather than a serious political movement aimed at divesting the United States of ownership of public lands."[241] Despite the so-called rebellion, Congress has added some nine million acres of BLM lands to the wilderness system since 1978.[242] Leshy considers "BLM's evolution into an agency that devotes considerable attention to recreation, wildlife, ecological

[238] *See id.* at 496–97 (observing that Congress took the unusual step of expressly disproving the congressional acquiescence to presidential withdrawals the Supreme Court had approved in *U.S. v. Midwest Oil*, 236 U.S. 459 (1915)). FLPMA also established detailed administrative procedures governing the statutory withdrawals it authorized. *See id.*; 42 U.S.C. § 1714.

[239] *Id.* at 497. Although FLPMA continued to recognize existing livestock permittees as having priority in terms of renewed permits, it did make clear that all permits had to be consistent with land plans and in compliance with all applicable permit rules and terms. *See id.*

[240] *See id.*

[241] *Id.* Leshy explains the varied political reactions to the Sagebrush Rebellion from the Carter to the Reagan to the Clinton administrations. *See id.* at 498–500. He also notes the rise of "amenity ranchers" who graze cattle but are not economically dependent on them and the fact that, due to selective breeding, the average cow is bigger and consumes more forage today than in the past. *Id.* at 500.

[242] *See id.* at 500–01 (also explaining that some thirteen million additional acres of BLM lands are protected as wilderness study areas). In 1999, the growing nature of BLM's conservation duties induced Secretary Bruce Babbitt to establish the National Landscape Preservation System, consisting of thirty-four million acres of national monuments and conservation areas as well as wilderness areas. Although livestock grazing is still permissible on most of these lands, other uses, apart from recreation, are usually not. Congress gave statutory sanction to the system in 2009. *See id.* at 501.

protection, and cultural resources" to be "one of the most important developments in public land policy in the last half century."[243]

The day after Congress passed the FLPMA, it enacted the National Forest Management Act (NFMA), a statute which responded to court decisions ruling that the practice of clearcutting, which had become dominant in the national forests by the 1960s, was not authorized by the 1897 Organic Act.[244] Congress amended the 1897 law to authorize clearcutting but subjected it to restrictions based on what were called the "Church guidelines" that had been developed by a Senate committee chaired by Senator Frank Church (D-Id.).[245]

The NFMA also reinforced a commitment to land planning that Congress had imposed on the Forest Service two years earlier in the Renewable Resources Planning Act of 1974; individual forest plans were to employ an interdisciplinary approach based on an "integrated consideration of physical, biological, economic, and other sciences."[246] The Act's commitment to science-based decision making was evident in its creation of a committee of scientists to advise the agency on development of regulations governing land plans.[247] Although all permits, contracts, and other actions had to be consistent with operative land plans, Leshy explains that plans are a statement of priorities and operate more to narrow choices rather than make them.[248]

Leshy claims that the initial forest land plans did little to change forest management, as timber production continued at high levels, despite a small decline in clearcutting.[249] But the NFMA, a statute laced with process, arguably contained one substantive provision: requiring land plans to "provide for diversity of plant and animal

[243] *Id.* at 501–02. Leshy claims that nonextractive uses have become the dominant uses on much of BLM land. *See id.* at 502.

[244] *Id.* at 503–05 (referencing W. Va. Div. of Izaak Walton League v. Butz, 522 F.2d 945 (4th Cir. 1975) and Zieske v. Butz, 406 F.Supp. 258 (D. Alaska 1975)).

[245] LESHY, FISCHMAN & KRAKOFF, *supra* note 1, at 728; *see also* COMMON GROUND, *supra* note 2, at 504–05.

[246] *See* COMMON GROUND, *supra* note 2, at 504–06. Leshy observes that this wholesale commitment to land planning "had some political appeal because it allowed Congress to avoid making hard choices." *Id.* at 505.

[247] *See id.* at 506.

[248] *See id.* (quoting Norton v. S. Utah Wilderness All., 542 U.S. 54, 71 (2004)).

[249] *See id.*

communities," which the applicable regulations interpreted to maintain "viable populations" of existing species, measured by "management indicator species" serving as a proxy for other species.[250]

One such indicator species was the northern spotted owl, inhabiting the ancient Douglas fir forests of the Pacific Northwest. Leshy briefly summarizes the long conflict over the preservation of the owl and its habitat, which engendered numerous legal cases, including a decision that found that the federal government had engaged in a "remarkable series of violations" of environmental laws.[251] The listing of the owl under the ESA prompted Congress to authorize specified old-growth harvests in a 1990 appropriation rider later upheld by the Supreme Court.[252] But Leshy explains that this exemption only served to tighten timber harvest restrictions elsewhere in national forests within the range of the owl.[253]

The Clinton administration, after a remarkable "timber summit" attended by the president, vice president, and cabinet members in Portland, Oregon, developed and implemented a Northwest Forest Plan for twenty four million acres of national forests and BLM lands, most of which would no longer be available for logging.[254] The plan has largely survived for a quarter-century despite numerous attempts by Republican administrations to scuttle or undermine it.[255] Leshy asserts that the plan is a prime example of the important role played by courts in reviewing public land decision making, the consistent public support for endangered species protection, and the role that public lands can play in transitioning to more sustainable natural resource policies.[256]

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[250] *See id.* (citing 16 U.S.C. § 1604(g)(3)(B) (diversity requirement); 36 C.F.R. § 219.19 (2012) (Forest Service regulations); U.S. FOREST SERVICE, FSM 2620, FOREST SERVICE MANUAL (1991) (definition of management indicator species and relevant policies)).

[251] COMMON GROUND, *supra* note 2, at 506–08 (quoting Seattle Audubon Soc'y v. Evans, 771 F.Supp. 1081, 1089 (W.D. Wash. 1991)).

[252] *See id.* at 507.

[253] *See id.*

[254] *Id.* at 507–08.

[255] *See generally* Michael C. Blumm et al., *The World's Largest Ecosystem Management Plan: The Northwest Forest Plan After a Quarter-Century,* 52 ENV'T L. 151 (2022).

[256] *See* COMMON GROUND, *supra* note 2, at 508. He also suggests that the Obama administration's efforts to protect sage grouse habitat mostly on BLM

Leshy does briefly address the growing risk of wildfires, but suggests that public land management has only a limited role in preventing them, indicating that most of the risks to life and property are on nonfederal lands controlled by state and local regulations, although "fuel reduction projects" have been encouraged by streamlining environmental reviews in the interest of creating "healthy forests."[257] He also devotes attention to the evident decline of multiple-use decision making because of the existence of increasing restrictions of conservation designations like national conservation, recreation, and scenic areas in addition to wilderness areas, wilderness study areas, and areas protected by the Forest Service's roadless rule.[258] Although most of these areas, apart from wilderness designations, are protected only by executive action, there are almost two hundred million acres under federal protection, about twice the size of the wilderness system.[259]

The wholesale commitment of Congress to public land planning on the national forests and BLM lands beginning in the 1970s did not reach the national wildlife system until the 1997 National Wildlife Refuge System Improvement Act.[260] After tracing the origins of the refuge system in the 1960s, including the role of the nascent science of conservation biology and species diversity in encouraging expansion of the system,[261] Leshy explains the controversy over the proliferation of "secondary" uses of refuges, like

lands was an effort comparable to the Northwest Forest Plan. Those efforts were substantially undermined by the Trump administration, and the jury is still out on whether an ESA listing for the sage grouse will be forthcoming. *See id.* at 508; Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining "the Public" in Public Land Law,* 48 ENV'T L. 311, 341–48 (2018) (explaining in some detail the Trump administration's commodification of public land resources and making them available to corporate entities).

257 COMMON GROUND*, supra* note 2, at 509; *see* Robert B. Keiter, *The Law of Fire: Reshaping Public Land Policy in an Era of Ecology and Litigation,* 46 ENV'T L. 301, 332–39 (2006).

258 *See* COMMON GROUND, *supra* note 2, at 509–11.

259 *See id.* at 511–12. Leshy includes a provocative graph that correlates United States population growth with public land ownership and the number of protected lands, implicitly suggesting there is room for growth of the latter.

260 *See id.* at 532–34; *see generally* Robert L. Fischman, *The National Wildlife Refuges: Coordinating a Conservation System Through Law* (2003).

261 *See* COMMON GROUND, *supra* note 2, at 530 (citing ROBERT H. MACARTHUR & E.O. WILSON, THE THEORY OF ISLAND BIOGEOGRAPHY (1967)).

"mining, logging, powerboating, off-road vehicle use, and livestock grazing."[262] The statute required these uses to be "compatible" with the primary purpose of the refuge, but what Leshy describes as "a tension inherent in the refuge system's dual nature…where individual units were established with specific purposes that may not exactly square with the system's overarching mission" produced haphazard implementation and generated litigation.[263]

The 1997 reform act was, in Leshy's estimation, a landmark, requiring the Fish and Wildlife Service to manage the system consistent with ecological principles and declaring that the system's mission was to create a "national network of lands and waters" that would conserve and restore fish, wildlife, and plant habitat "for the benefit of present and future generations."[264] This statutory language is, in Leshy's judgment, "the most ecologically oriented mandate of the four land management agencies."[265] The Act overhauled the regulation of secondary uses by putting teeth into the compatibility standard, clarified that conflicts between refuge purposes and the system's mission be resolved in favor of the former, required plans for all refuges, and instructed that the refuges must be managed "to the extent practicable and compatible with the purposes for which they were established, in accordance with" state laws and policies.[266]

Leshy observes that the refuge system—consisting of nearly one hundred million acres onshore and several hundred million acres of offshore monuments—is "the world's largest and most diverse system of areas devoted primarily to wildlife protection."[267] National refuges exist in every state, protecting about half the major ecosystem types on the planet, and representing a "fundamental

[262] *Id.* at 531–32.

[263] *Id*. at 534.

[264] *Id.* at 532–33 (quoting National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd).

[265] *Id.* at 533.

[266] *See id.* at 533–37 (quoting National Wildlife Refuge System Improvement Act, 16 U.S.C. § 668dd, 668ee) (noting that the Act imposed new procedural requirements for compatibility findings and that the deference to state law is not complete, citing the example of the case of the desert pupfish in Devil's Hole National Monument, in which the Supreme Court affirmed the federal preemption of state water law, Cappaert v. United States, 426 U.S. 128 (1976)).

[267] *Id.* at 539.

transformation in public understanding of the world and man's place in it."[268]

The fourth major public land system, the national parks, established in 1916 in a landmark statute, has had its organic act amended several times in the modern era, most recently in 1998, the year after Congress passed the 1997 National Wildlife Refuge Improvement Act.[269] Leshy prefaces his examination of that statute with a history of the national park system which experienced a significant growth beginning with the Kennedy administration in the early 1960s, and which also underwent a kind of administrative truce of peaceful coexistence with the Forest Service.[270]

Leshy discusses prominent national park controversies concerning Redwood Park, Mineral King Valley, proposed dams in the Grand Canyon, and the 1978 statute that added fifteen new park system units and launched what Leshy considers "a modern trend of omnibus public land legislation."[271] In 1976, Congress directed the Park Service "to prepare a general management plan" for each of the parks, and two years later, ordered the National Park Service to take into account "visitor carrying capacities" to ensure that their popularity did not lead to visitors "lov[ing] parks to death."[272]

The 1998 National Parks Omnibus Act, which Leshy considers to be a reform of the Park Service's organic act, directed the agency to make science central to its decision making and reformed the agency's concession management program, instituting important changes in a program that generates hundreds of millions of dollars in revenues.[273] These changes did not disturb Congress's interest in enlarging the park system. In each of the years of 2015–19, national park visitations exceeded three hundred million people.[274]

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[268] *Id.* (quoting PETER MATTHIESSEN, WILDLIFE IN AMERICA 269 (rev. ed. 1987)).

[269] *See id.* at 549–51 (citing National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3302 (1998)).

[270] *See id.* at 540–43.

[271] *Id.* at 543–48.

[272] *Id.* at 548.

[273] *See id.* at 549–50.

[274] *See id.* at 551.

VIII. THE PUBLIC LANDS TODAY

Leshy includes chapters on public lands in Alaska, modern mineral and energy development, and Native American lands,[275] all of which should be of widespread interest. But to keep this review of a manageable length, I'm going to pass over them here to turn to his assessment of the challenges facing public lands today. He traces the changing dynamics of public lands politics from the Reagan administration to the second Bush administration to the Trump administration,[276] a forty-year era in which Republican political rhetoric turned increasingly anti-public lands—aided by free enterprise writings of economist Milton Friedman, the Powell Manifesto on the "attack on free enterprise" from leftist groups, and the wealth and philanthropy of Joseph Coors—despite the long history of bipartisan support for public lands.[277] Leshy asserts that the

[275] *See id.* at 513–27 (Alaska); 552–63 (mineral and energy development); 563–74 (Native American lands). Leshy discusses native rights in Alaska lands, the Alaska Statehood Act, the Alaska Native Claims Settlement Act, and a detailed assessment of the Alaska National Interest Lands Conservation Act (ANILCA), concluding that legislation of that expansive a scope is unlikely to happen again but showed "on a grand scale how the American political system could reconcile a complex mixture of interests in a way that afforded considerable protection for nature and for the interests of future generations." *Id.* at 527. On Indian lands, the book highlights Taft's reversal of Theodore Roosevelt's efforts to transfer some Indian reservation lands to the Forest Service, the role of Secretary Harold Ickes in reviving Indian rights in the 1930s, the Indian Claims Commission Act of 1946, tribal efforts to regain control over their lands ceded to the federal government, and some modern examples of federal-tribal cooperative management agreements, like those concerning the National Bison Range adjacent to the reservation of the Confederated Salish and Kootenai tribes. *See id.* at 563–74.

[276] *See id.* at 575–84.

[277] *See supra* note 9 (noting examples of bipartisanship discussed in *Common Ground*). Leshy attributes some of the rising anti-government political rhetoric to the rise of public choice political theory developed by James Buchanan, who saw the government as a self-aggrandizing power maximizer, and whose theory was attractive to libertarians and parts of the philanthropic and business communities. *See id.* at 575–76 (noting that Buchanan developed his public choice ideas in reaction to government efforts to desegregate the South). One of Friedman's best-known books is MILTON FREIDMAN, CAPITALISM AND FREEDOM (1962). The Powell Memo was penned by Lewis Powell, prior to serving on the Supreme Court, as a call to action by corporate America, which was under threat by environmentalists and Ralph Nader. *See* Memorandum from Lewis Powell to Eugene Sydnor, Chairman, Educ. Comm., U.S. Chamber of Com. (August 23, 1971) (available at https://scholarlycommons.law.wlu.edu/powellmemo/1). Coors's money helped

Republicans of the late twentieth century "employ[ed] rhetoric hostile to public lands" but actually worked in a practical way to protect public lands, noting that Republicans never raised any challenges to national parks, and that President Reagan signed forty-three bills that designated more than ten million acres of wilderness areas in twenty-seven states.[278]

The second Bush administration promised to restore multiple use on BLM lands.[279] The President did break with precedent and established a marine national monument.[280] But Bush also signed the so-called Healthy Forests Restoration Act in 2003, which increased public lands logging in an effort to thin overgrown forests.[281]

In 2009, President Obama signed a significant 2009 omnibus act establishing several protected areas, including wilderness areas, the first comprehensive program of paleontological resources, as well as sanctioning the BLM's national conservation lands program begun during the Clinton administration.[282] Obama responded to growing concerns over climate change by promoting solar and wind

establish the Heritage Foundation and the Mountain States Legal Foundation, whose head, James Watt, would become Interior Secretary in the Reagan administration. *See* COMMON GROUND, *supra* note 2, at 576.

[278] COMMON GROUND, *supra* note 2, at 576–78. The Republican takeover of Congress in 1994 did lead to a budget resolution bill that would have opened up the Arctic National Wildlife Refuge to oil and gas drilling, but President Clinton vetoed it. Congress proceeded to pass omnibus legislation establishing several protected areas and enact organic acts governing the national parks and wildlife refuges. Clinton went on to establish over a dozen national monuments, including Grand Staircase Escalante in southern Utah. *See id.* at 578–79. None of the Clinton monuments were dismantled by the Bush administration. *See id.* at 579; *see also* Craig Shirley, *Never Forget Ronald Reagan's Legacy as a Conservative Conservatist*, WASH. TIMES (Feb. 12, 2020), https://www.washingtontimes.com/news/2020/feb/12/never-forget-ronald-reagans-legacy-as-a-conservati/ (for discussion of President Reagan's support for legislation that designated additional wilderness acreage).

[279] *See* COMMON GROUND, *supra* note 2, at 579 (quoting Bush's BLM director's promise to restore multiple use by "reversing what she decried as BLM's recent conversion to a "Bureau of Landscapes and Monuments").

[280] See *id.* at 579–80 (explaining Bush's establishment of four huge marine monuments in the Pacific between 2006 and 2009).

[281] *See id.* at 580.

[282] *See id.*

energy facilities.[283] He invoked his Antiquities Act authority to proclaim several new national monuments, including the Bears Ears which gave Native Americans an important role in managing the area.[284] Even after the Republican takeover of the House in 2010, Obama was able to sign legislation establishing conservation and wilderness areas.[285]

Although the Republican Party's 2016 platform revived the old idea of conveying federal lands to the states, the Trump administration ignored that demand, although it did aggressively open lands to development, reverse the Obama administration's restrictions on coal leasing, offer millions of acres for oil and gas leasing, rewrite NEPA and ESA regulations, narrowly interpret the scope of the Migratory Bird Treaty Act, and attack climate science.[286] But the most publicly criticized Trump administration efforts had to do with its downsizing of the Bears Ears and Grand Staircase-Escalante National Monuments, which Leshy labels as "the most regressive action in public land policy in well over a century."[287] Leshy observes that "[a]lmost no Republican, in or out of Congress," criticized these efforts and, in fact, the party lifted the longstanding ban on oil and gas leasing in the Arctic National Wildlife Refuge on a straight party-line vote.[288]

After the 2018 elections saw the Democrats win the House, a divided Congress revived bipartisanship by passing the John Dingell

283 *See id.* at 581.

284 *See id.* The Trump administration diminished the Bears Ears National Monument by 85% and disbanded the tribal commission. *See* Blumm & Jamin, *supra* note 256, at 319, 323–25. The Biden administration reversed those decisions. Leshy does not spotlight the Malheur occupation and the false constitutional narrative on which it was premised, although he does explain that the Constitution's Enclave Clause—the basis of the occupants' thin constitutional claim—has "played no meaningful role in public land policy," referring to it as a "constitutional oddity." COMMON GROUND, *supra* note 2, at 26. Leshy has previously disputed the argument that federal ownership of the public lands is unconstitutional. *See* John D. Leshy, *Are U.S. Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499 (2018).

285 *See* COMMON GROUND, *supra* note 2, at 581 (noting the Rocky Mountain Heritage Act of 2014 and three new wilderness areas in Idaho).

286 *See id.* at 581–82. *See also* Blumm & Jamin, *supra* note 256 (cataloguing the elements in the Trump administration's attempt at a public lands' revolution).

287 COMMON GROUND, *supra* note 2, at 582.

288 *Id.* at 582–83.

Act—which established new wilderness areas, wild and scenic rivers, a national conservation area, and a national monument—which President Trump signed "without fanfare."[289] Importantly, the Dingell Act also permanently reauthorized the Land and Water Conservation Fund which provides money for public acquisitions by both the federal government and the state.[290] The election of 2020 meant that the country had survived what Leshy calls the "nearly unremitting hostility of the Trump administration."[291]

Leshy observes that during the past sixty years, as "the U.S. population . . . nearly doubled—and nearly tripled in the West"—public "support has steadily grown for using public lands for recreation and inspiration," wildlife protection, and restoration, not for extraction.[292] He maintains that modern public land law has blurred distinctions between agencies, aided by generic requirements imposed by statutes like the NEPA, the ESA, the Migratory Bird Treaty Act, and the Antiquities Act as well a proliferation of areas designated as "conservation areas," "scenic areas," "preserves," and so forth, which can be managed by any of the federal land management agencies.[293] The book might have made more of the effects of those statutes on public land management, since arguably they have been at least as central to modern public land law as the planning requirements in the land management statutes, imposing, for example, species and water-quality restrictions and requiring alternatives analysis. In fact, modern public land law is an integration of generic environmental law statutes and the public land management statutes.

Congress has, according to Leshy, reasserted its constitutional authority over public lands through a variety of techniques. It has constrained executive authority by imposing generic requirements

289 *Id.* at 583.

290 *See id* at 584. The next year, in 2020, Congress made the fund a revolving fund, effectively increasing the amount of money available for acquisitions. *See id.*

291 *Id.*

292 *Id.* at 585. Leshy asserts that since 1916, there have been only two noteworthy significant divestment initiatives ever passed by Congress: (1) the 1953 Submerged Lands Act, *supra* note 206, which conveyed to coastal states three miles (sometimes three marine leagues) of submerged lands off their coasts, and (2) the 1959 Alaska Statehood Act, which conveyed to the state over one hundred million acres, far more than any other state received. *See id.* at 456, 585.

293 *Id.* at 586.

to develop and implement land plans, consider science, limit road-building, and restore the environment among all the principal federal land managers.[294] Further, Congress has increasingly used its Article IV Property Clause authority to zone particular lands, almost always with the consent of the local congressional representatives, which Leshy alleges made congressional decisions more durable, as "[i]t is almost unheard of for Congress to weaken, much less rescind, protections for public lands once it enacts them."[295]

Leshy briefly mentions that statutes like the ESA change the discretion of land managers by altering decision making authority, giving federal wildlife agencies substantial control over many land management decisions.[296] He might have made more of this unusual congressionally authorized shift in decision making, for it has had significant effects on species like the Northern spotted owl and the sage grouse. Moreover, this important shift in decision making authority from land managers to wildlife agencies seems inconsistent with Leshy's claim of the modern trend to blur agency responsibilities, at least among land managers.[297]

An insightful reflection of Leshy's is his contention that another way Congress has reasserted control over public lands is by authorizing judicial review of agency actions, opening the courts to

294 *See id.* at 587–88.

295 *Id.* at 589; *see also id.* at 33–34.

296 *See* COMMON GROUND, *supra* note 2, at 590 (mentioning the role of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service).

297 The ESA oversight is not the book's only one. The significant role of NEPA in public land management is largely overlooked. *See, e.g.*, Michael C. Blumm & Lorena M. Wisehart, *The Underappreciated Role of the National Environmental Policy Act in Wilderness Management,* 44 ENV'T L. 323 (2014); Michael C. Blumm & Keith Mosman, *The Overlooked Role of the National Environmental Policy Act in Protecting the Western Environment*, 2 WASH. J. ENV'T L. & POL'Y 193 (2012). The book arguably underemphasizes the influence of federal environmental law on public land management throughout. *See, e.g.*, *infra* note 307. The book also fails to link the rise of federal conservation to the earlier pioneering state wildlife conservation statutes of the late nineteenth century. *See* COMMON GROUND, *supra* note 2; *supra* notes 97–99 and accompanying text. It also erroneously attributes the origin of roadless reviews to the Nixon administration in 1971. *See* COMMON GROUND, *supra* note 2, at 474. Actually, the first roadless review was initiated by the Johnson administration in 1967. *See* Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENV'T L. 1143, 1150 (2004).

noneconomic interests to file suits to ensure that agencies in fact implement congressional commands.[298] However, Congress has been largely unwilling to share decision making authority with non-federal entities, apparently due to concerns over upsetting the balance of national and local interests.[299]

Efforts to consolidate land holdings are also characteristic of modern public land law. The checkerboarded ownership created by railroad grants has created widespread interest in land exchanges as well as purchases of conservation easements and access easements for recreation.[300] Leshy salutes the efforts of Senator Harry Reid and Secretary Bruce Babbitt as particularly noteworthy in, for example, orchestrating a land exchange to resolve the problem of state school lands within the Grand Staircase-Escalante National Monument in southern Utah and in enacting the Southern Nevada Public Land Management Act that facilitated the sale of surplus BLM lands for development in Greater Las Vegas while directing the proceeds to acquire lands valuable for ecological and recreational purposes within the state.[301] Such land exchange agreements seem likely to proliferate in the future given the increasing public demand for conservation and recreation lands.

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298 *See* COMMON GROUND*, supra* note 2, at 590.

299 *See id.* (noting exceptions where private lands predominate, as in the New Jersey Pinelands and the Columbia River Gorge, or where tribal cultural values are especially high, as in Bears Ears National Monument). Leshy also mentions federal, state, and local coordination in efforts to avoid ESA listings, like the sage grouse and the desert tortoise. *See id.* at 591.

300 *See id.* at 591–92. Leshy reports that about nine million acres of public lands in the West have public access problems. *See id.* at 592. He discusses the roles played by the Land and Water Conservation Fund in acquiring recreation access and the Federal Land Transaction Act in authorizing the sales of isolated tracts of public land and devoting the proceeds to the purchase of private inholdings in protected areas. *See id.* at 592–94.

301 The Utah exchanges resulted in federal conveyances of nearly three hundred thousand acres to the state in return for some six hundred thousand acres of scattered state lands; the Nevada sales of some forty thousand acres produced some $4 billion in revenue for the purchase of over seventy thousand public land acres. *See id.* at 593–95. Leshy also discusses an interstate exchange of land to a Phoenix developer in return for Florida lands near Everglades National Park and Big Cypress National Preserve and the closure of military bases and their conversion to national wildlife refuges. *See id.* at 595.

CONCLUSION

Leshy concludes with a look to the future, as climate change simultaneously threatens some public lands with drought and wildfires and others with flooding.[302] Public lands account for about twenty-five percent of the United States' carbon emissions, yet also have substantial solar and wind energy resources.[303] Threats to biodiversity are also grave; species extinctions are likely as more of the planet is developed, and some scientists believe that the sixth great extinction in the planet's history is well underway.[304] Federal public lands are habitat for many ESA-listed species and could be a substantial contributor to a worldwide campaign to preserve thirty percent of lands and waters by 2030—the so-called 30 by 30 campaign.[305] A greater emphasis on the effect of environmental statutes like the ESA on public land management would have been welcome throughout the book.[306]

Leshy includes among the challenges for the future the exponential growth in public land recreational visits. He suggests that the challenge of balancing recreational use against protection of wildlife habitat and cultural sites is likely to prove to be more vexing

[302] *See id.* at 596 (noting that about one-third of national wildlife refuges face inundation due to sea- level rise).

[303] *See id.* at 596–97.

[304] *See id.* at 597 (reporting that bird populations have declined by nearly 30 percent in the last half-century).

[305] *See id.* (noting that about "12 percent of U.S. lands and about 26 percent of U.S. marine areas" are permanently protected public lands). On the 30 by 30 effort, see Blumm et al., *supra* note 155 (recommending against including all federal grazing lands as conservation lands under the 30 by 30 program, given their poor ecological condition); see also Michael C. Blumm & Gregory A. Allen, *30 by 30, Areas of Critical Environmental Concern, and Tribal Cultural Lands,* 52 ENV'T L. REP. 10366 (2022) (suggesting that a revitalization of BLM's areas of critical environmental concern could protect tribal cultural sites while contributing to 30 by 30 conservation goals).

[306] *See supra* note 297 and accompanying text. A more integrated approach would have avoided what Rob Fischman has called "public lands exceptionalism." Email from Rob Fischman, Professor of L., Maurer Sch. of L., Ind. Univ. Bloomington, to author (Aug. 28, 2022) (on file with author).

than questions about logging or mining, both of which are in decline.[307]

The one extractive use not in decline is livestock grazing, which exists on "well over half the public lands in the lower forty-eight states," even though it never amounts to more than "a tiny fraction of the nation's meat production" and is a relatively insignificant contributor to most western economies.[308] Leshy predicts that public land livestock grazing will eventually decline due to climate-induced drought and "as American diets change."[309] His solution is voluntary sale of grazing permits, coupled with congressional approval of their permanence, but he cautions that such a solution will require overcoming the steadfast opposition by groups like the Public Lands Council, which resist all efforts to reduce public land grazing.[310]

Leshy observes that funding for public land management, remaining at about $13 billion per year, and employing only about three percent of the federal workforce, has not kept pace with the demand for public land visitations and the costs of fighting wildfires.[311] A lack of funding will make it difficult to meet rising public demand and perhaps undermine future public support for public land management.[312] Since the public lands are ultimately "political lands," continued public support is vital.

Leshy ends his opus with the claim that the public lands have "functioned with considerable success to bridge partisan, regional,

307 *See* COMMON GROUND, *supra* note 2, at 598 (referencing growth in and conflicts among off-road vehicle use, mountain biking, birdwatching, wild horse lovers, target shooters, sport hunters and anglers, and climbers). Leshy reports that "[p]ublic lands are responsible for a declining share of petroleum exploration and development in the nation;" public land timber harvests remain well below their peak of thirty-some years ago; and few new hard-rock mines are proposed, and those that are face substantial opposition. *Id.*

308 *Id.* at 599. While regionally insignificant, livestock grazing does remain a dominant force in a number of local economies. *See Federal Grazing Lands Have Heavy Implications for Economy*, AGDAILY (Nov. 29, 2022), https://www.agdaily.com/news/federal-grazing-lands-have-heavy-implications-for-economy.

309 COMMON GROUND, *supra* note 2, at 599.

310 *See id.*

311 *See id.* at 599–600.

312 *See id.* at 599–600 (noting that the four principal land management agencies employ only about three percent of the federal civilian workforce).

and other divisions" throughout American history.[313] If they are to continue to serve such a role in an era of vitriolic partisan rhetoric, scientific skepticism, and existential challenges like climate change and biodiversity loss, the public needs splendid historical analyses like John Leshy's magisterial work.[314]

[313] *Id.* at 600.

[314] As Charles Wilkinson stated in his review of Leshy's book, "[t]his masterful volume will have staying power and we can expect it to be influential and constructive for generations to come." Charles F. Wilkinson, *Our Common Lands: A History of America's Public Lands*, 52 ENV'T L.771, 775 (2022) (book review).