

VERSATILE BY NATURE: EXPLORING THE LAW OF THE AMERICAN WILDERNESS

I. Introduction

Deeply rooted in the soil of hundreds of islands on the Alaskan coast, the lush Tongass National Forest was borne from torrential Pacific rains and the irreproachable procession of time. The world's largest temperate rainforest, the Tongass acts as a landlord to numerous rare species of large birds, wolves, deer, and bears.¹ Indeed, it is commonplace in small towns near the Tongass to witness a bald eagle gliding low above the buildings where Alaskans live and work.² Stretching over a thousand miles of coastline, the Alaskan wilderness constitutes more than 40 percent of the world's remaining temperate rainforest.³ The Tongass largely retains "its primeval character and influence, without permanent improvements or human habitation...and [] generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."⁴

Neighboring the Tongass rainforest, citizens in the town of Sitka, Alaska, remember a recent era when pulp mills dominated their tiny coastal town.⁵ The timber industry leveled millions of acres of old-growth forest to process into pulp, discharging untreated waste into the crystalline water and leaving Sitka with bare dirt-brown

¹ KATHIE DURBIN, *TONGASS: PULP POLITICS AND THE FIGHT FOR THE ALASKAN RAIN FOREST*, 206-10 (Oregon State University Press 1999) [hereinafter DURBIN].

² *In Alaska, Help for Logging Comes Late*, THE NEW YORK TIMES, February 29, 2004, at http://www.akrain.org/press_room/news_id=90.

³ Alaska Rainforest Campaign, at www.akrain.org/rainforest/info/landpeople.asp.

⁴ The Wilderness Act, 16 U.S.C.A. § 1131(c) (1964).

⁵ DURBIN, *supra* note 1, at 225.

mountains prone to landslides.⁶ When the controversial mills retired their chainsaws in 1994 and over 80 percent of timber jobs vanished, Sitka expected an economic disaster.⁷ On the contrary, the departure of the timber industry revitalized the local economy.⁸ Diversification of the work force resulted in more white collar jobs; small wood products manufacturers produced a competitive local market; cruise ships docked and tourists contributed millions to the local economy; and a growing health care sector all raised the average standard of living in Sitka exponentially.⁹ Sitka embodies the simplicity of the wilderness protection argument – prosperity does not necessitate maximizing resource exploitation.¹⁰

However, the timber industry continues to covet the Tongass for its seemingly endless supply of trees. Despite decades of legal disputes culminating in the decline of the timber industry in the mid-1990's, the George W. Bush administration seems intent on revitalizing the timber industry of the Northwest.¹¹ On December 23, 2003, despite a quarter of a million public comments pleading to save the rainforest, the Bush administration announced the removal of legal protections for the Tongass and allowed 330,000 acres of the forest to be paved with roads.¹² Less than one percent of the total public comments received supported removing wilderness protections from the Tongass.¹³

⁶ *Id.*

⁷ Jeb Tilly, *State of the Industry Report 2002*, OUTDOOR INDUSTRY ASS'N, at 14, at www.outdoorindustry.org/SOI2002.pdf.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *In Alaska, Help for Logging Comes Late*, THE NEW YORK TIMES, February 29, 2004, at http://www.akrain.org/press_room/news_id=90.

¹² *Id.*

¹³ *Id.*

Wilderness law in the United States ironically resembles wilderness itself -- disorganized, complex, bewildering, and completely irresistible. Cradling the fate of immense tracts of ancient wilderness, the United State federal government carries the burden of responsible management of one-third of the land mass of the country.¹⁴ By congressional mandate, administrative agencies propelled by executive policy choose which wilderness areas should be protected and which should be exploited for other uses.¹⁵ Unfortunately, anti-environmental government policies can permanently destroy unprotected American wilderness or degrade it to render it ineligible for protection in the future. This essay surveys the many methods of attack on American wilderness and the countermeasures taken by wilderness protectors to prevent the eradication of what rightfully belongs to humankind.

Part II of this paper examines the multi-faceted relationship between Americans and wilderness. It traces the history of wilderness appreciation and protection by early American settlers and the changing role of the federal government from a distributor of public land into a retainer of it.

Part III summarizes the first major legislative protections for wilderness and the roles of the administrative agencies entrusted with wilderness protection. It then investigates several mechanisms that pro-development administrations use to prevent wilderness protection. It also outlines the importance of the judiciary in restraining administrative agencies from implementing anti-environmental policies.

¹⁴ Jan G. Laitos. & Thomas A. Carr., *The Transformation on Public Lands*, 26 *ECOLOGY L.Q.* 140, 142 (1999) [hereinafter Laitos & Carr].

¹⁵ *See* The Wilderness Act, 16 U.S.C.A. § 1131(c) (1964); *see also* The Federal Land Policy and Management Act, 43 U.S.C.A. § 1711 (1976) (authorizing land management agencies to choose which lands are optimal for wilderness designation).

Part IV evaluates opportunities for change in the public land management context. After examining various legislative changes that could benefit the wilderness protection movement, the paper then explores strategies to heighten public awareness of wilderness issues and to increase public support for wilderness protection. The essay then proposes economic incentives to bolster local support for wilderness.

Finally, part IV analyzes other approaches to wilderness protection, including the public trust doctrine, conservation easements, proposed privatization of wilderness land, and international treaties. The essay argues that efforts to strengthen the protection of wilderness law require innovative lawyering. Though emphasizing that the best route to long-term wilderness protection is legislative change spurred by active public support, it concludes that the hidden strength of wilderness law remains its versatility, which allows for diverse approaches to wilderness protection.

II. Legal History: America's Unique Relationship With Wilderness

a. The Wilderness Movement

A pristine powdered mountainside is a deceptively simple mascot for the wilderness movement. Wilderness extols numerous values. The beauty of an untouched forest both inspires and comforts humans.¹⁶ In fact, even those few who have never visited a wilderness area often insist that such areas remain unharmed.¹⁷ These people appreciate what economists call “option” and “existence” values. Knowing that a wilderness exists in the world, even if it is not accessible to them, and knowing that they have the option to visit it is significant to many people. Moreover, the majority of the

¹⁶ RODERICK FRAZIER NASH, *WILDERNESS AND THE AMERICAN MIND* 189 (Yale University Press 2001) (1967) [hereinafter NASH, *The American Mind*].

¹⁷ *Id.* at 201 (observing the phenomena of wilderness enthusiasm arising from urban areas).

world supports wilderness preservation because something about it just seems right. One famous quote declares, “the ultimate test of a moral society is the kind of world that it leaves to its children.”¹⁸ Wilderness protection is a highly altruistic notion – to save something for the benefit of others and for its own existence. Acknowledging that the future is unforeseeable, wilderness protectors want to save some of the beauty of the world for future generations to see, enjoy, and, only if absolutely necessary, use. Wilderness offers recreation values that are incomparable to any other sport. Furthermore, wilderness contributes to the ecosystem of the world and cleanses the air, earth, and water that we use.

The United States possesses a vast and incomparable amount of wilderness. A large responsibility to manage and protect the wilderness of this country is vested in the federal government of the United States.¹⁹ As American society rapidly evolves and urbanization increases, wilderness conservation becomes an increasingly uphill battle. Nevertheless, the majority of Americans state consistently that they support wilderness preservation.²⁰

b. Conquering the Land, Then Romancing It

Early American sentiment regarded wilderness as a challenge to be overcome and frontier to be developed. Like most resources, wilderness was not highly valued when it

¹⁸ *Wilderness Quotes, Anonymous Authors, at* www.wilderness.net/index.cfm?fuse=quotes.

¹⁹ Justin J. Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 60-63 (1999) [hereinafter Quigley].

²⁰ Heritage Forests Campaign, *The Most Popular Federal Policy in U.S. History, at* www.ourforests.org/public_support (last visited Feb. 23, 2004). This site noted that over the past seven years, numerous public opinion polls have demonstrated widespread support for conservation of wilderness. On average, the website reports that 76% of Democrats, 66% of Independents, and 58% of Republicans support national forest conservation.

was abundant; only in scarcity has it become precious.²¹ Throughout the settlement years of the United States, calls for wilderness conservation went unheeded. As Aldo Leopold remarked years later, “[a] stump was our symbol of progress.”²² Americans’ relationship with nature in the United States echoed Biblical sentiments from years past; the challenge was to subdue and conquer the wild earth, not to be subdued by it.²³ For an individual struggling to survive, wilderness presented a huge obstacle. Its slick and steep mountainsides, chilling gusts of wind, and disturbing desolation threatened a man’s existence. Though America’s breathtaking landscapes did not go unappreciated by the human eye, Americans quickly got down to the business of developing and settling to give their families a safe and peaceful home.

The United States government encouraged development by distributing public lands freely to citizens who cultivated and “subdued” it.²⁴ For example, in 1866 Congress enacted RS 2477, which simply allowed citizens “the right of way for the construction of highways across public lands, not reserved for public uses.”²⁵ Such legislation reflects the early American perception of the frontier as a threatening and challenging obstacle to be surmounted hand-in-hand by the government and the people.

As time passed and more land was tamed, new Americans began to cherish the landscape they had conquered. Europeans who had never encountered such intense

²¹ NASH, *American Mind*, *supra* note 16, at 189.

²² *Id.* at 188.

²³ THE AMERICAN ENVIRONMENT: READINGS IN THE HISTORY OF CONSERVATION 3 (Roderick Nash ed. 1968)[hereinafter NASH, *The American Environment*]. This page quotes Genesis 1:28, where G-d told the Adam and Eve to “be fruitful, and multiply, and replenish the earth, and subdue it: and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.”

Id.

²⁴ *Id.*

²⁵ Stephen H.M. Bloch & Heidi J. McIntosh, *A View from the Front Lines: The Fate of Utah’s Redrock Wilderness Under the George W. Bush Administration*, 33 GOLDEN GATE U. L.REV. 473, 488 (2003) [hereinafter Bloch & McIntosh].

wilderness displayed both awe and admiration.²⁶ The famous forest-lover Henry David Thoreau popularized Transcendentalism, a philosophy that revered nature as the truest form of the divine.²⁷ Thoreau's indelible prose influenced American appreciation of wilderness.²⁸ Thoreau criticized European land management policies as sterile and too civilized and advocated that the United States keep its wilderness wild.²⁹

Other important figures paved the road for the wilderness movement. George Perkins Marsh wrote in 1864 that relentless lumbering of forests caused the same environmental and climactic damages that he believed ruined the Mediterranean empire.³⁰ Marsh also argued that preserving wilderness as recreation and as a natural filtering system for pollution was economically wise.³¹ Frederick Law Olmsted wrote in 1865 that Congress was obligated to protect American wilderness because the founding fathers had guaranteed Americans the "pursuit of happiness" as a constitutional right.³² Congress responded to public support in 1864 by creating the first national park at Yosemite.³³ Whatever precipitated this shifting attitude, one thing was for sure – Americans had fallen in love with their country, especially their land.

c. Preservation, Conservation, and the President

The wilderness protection movement accelerated in the twentieth century as the United States transformed from a misunderstood wild country into a prosperous, civilized landscape. The respected preservationist writer John Muir published his manifestos on

²⁶ NASH, *American Mind*, *supra* note 16, at 105.

²⁷ *Id.* at 84.

²⁸ *Id.*

²⁹ *Id.* at 90.

³⁰ *Id.* at 105.

³¹ *Id.*

³² NASH, *The American Environment*, *supra* note 23, at 19.

³³ *Id.*

wilderness preservation and eventually earned the title of “Father of our National Park System” for his involvement in the creation of Yellowstone, Grand Canyon, Sequoia, and Mount Rainier National Parks.³⁴ Muir dedicated his career to preservation and publicized the cause in immeasurable venues. Muir founded the Sierra Club in 1892 and sustained a valuable friendship with President Teddy Roosevelt, embarking on numerous camping trips together.³⁵

Roosevelt’s love for wilderness preservation penetrated mainstream America and legitimized the conservation movement.³⁶ Commonly thought of as the most wilderness-friendly president in American history, he created numerous wildlife refuges and used the Antiquities Act to designate national monuments.³⁷ Roosevelt heavily relied on his natural resources advisor, Gifford Pinchot, to inform and educate him about wilderness issues.³⁸ The first director of the U.S. Forest Service and a graduate of Yale’s forestry program, Pinchot earned the title of the first American to choose forestry as a career.³⁹ Pinchot and Roosevelt organized a national conference on conservation in May of 1908, attracting over a thousand American leaders.⁴⁰ There, Roosevelt emphasized the need to conserve resources for future generations. In one particularly moving speech, he said, “[o]ne distinguishing characteristic of really civilized men is foresight; we have to, as a

³⁴ “Most Often Asked Questions at the John Muir National Historic Site,” *at* http://www.sierraclub.org/john_muir_exhibit/john_muir_national_historic_site/most_often_asked_questions.htm.

³⁵ *Id.*

³⁶ RUTHERFORD M. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* 379 (Island Press 1996) [hereinafter PLATT].

³⁷ NASH, *The American Environment*, *supra* note 23, at 172.

³⁸ PLATT, *supra* note 36, at 379.

³⁹ NASH, *The American Environment*, *supra* note 23, at 38.

⁴⁰ *Id.* at 48.

nation, exercise foresight for this nation in the future; and if we do not exercise that foresight, then dark will be the future!”⁴¹

However, a schism among wilderness protectors accompanied the popularization of the wilderness agenda.⁴² In 1906, San Francisco experienced a severe water shortage and targeted the pristine Hetch Hetchy valley in Yosemite National Park as a water reservoir for the city.⁴³ Damming and flooding Hetch Hetchy would spoil its unique beauty.⁴⁴ Since few alternatives for a viable San Francisco water supply existed, many wilderness proponents, including Gifford Pinchot, supported the exploitation of Hetch Hetchy for the thirst of San Francisco.⁴⁵ Muir, however, opposed the use of the valley for man’s selfish benefit.⁴⁶ Though Muir fought passionately to preserve the beautiful valley, Teddy Roosevelt eventually decided that the city’s need for water trumped the wilderness’ right to exist.⁴⁷ This extended battle marked the end of Muir’s friendship with the President and Pinchot and Muir died soon after the controversy.⁴⁸

Hetch Hetchy also symbolized a permanent division within the wilderness protection movement.⁴⁹ Preservationists like Muir valued wilderness for its own sake and condemned any tampering with it, even if done only by the grazing of sheep.⁵⁰ On the other hand, conservationists like Pinchot and Roosevelt adopted a more utilitarian view of wilderness. To them, nature should be conserved and “managed rationally to

⁴¹ *Id.* at 50.

⁴² PLATT, *supra* note 36, at 379.

⁴³ NASH, *American Mind*, *supra* note 16, at 161.

⁴⁴ PLATT, *supra* note 36, at 379.

⁴⁵ NASH, *American Mind*, *supra* note 16, at 163.

⁴⁶ PLATT, *supra* note 36, at 379.

⁴⁷ NASH, *American Mind*, *supra* note 16, at 163.

⁴⁸ *John Muir: From Wikipedia, the Free Online Encyclopedia*, at http://en.wikipedia.org/wiki/John_Muir.

⁴⁹ PLATT, *supra* note 36, at 379.

⁵⁰ *Id.*

promote the greatest good for the greatest number of people.”⁵¹ Philosophical differences between wilderness protectors persist in the present and contribute to fragmented public support in preservation controversies.

d. The Resurgence of Conservation After the World Wars

After the initial diffusion of wilderness into mainstream concern in the early part of the twentieth century, the nation was distracted by international and economic concerns for decades. Conservation during the Roosevelt era concentrated on the prevention of grim predictions that the world’s population would exceed its productive capacity, resulting in unprecedented famine, disease, and war.⁵² New concerns in the 1950’s and 60’s, however, spotlighted less dramatic, nonmaterial issues.⁵³

Improved technology, education systems, and social integration established that American land was no longer just a means for survival. As one commentator said of the time, “[t]he economy boomed...the music was good, the cars were big, gas was plentiful, leisure time expanded as did the mobility to use it, and the great outdoors beckoned.”⁵⁴ Outdoor recreation and the enjoyment of wilderness increased and became a socially respectable pastime.⁵⁵ The melting pot of American culture proved to be an irresistible recipe.

The environmental movement, along with the civil rights and women’s movements, soared. The invention of color television contributed to the popularization of

⁵¹ *Id.*

⁵² NASH, *American Mind*, *supra* note 16, at 155.

⁵³ *Id.*

⁵⁴ Glicksman, Robert L., *Symposium: Wilderness Act of 1964: Reflections, Applications, and Prediction*, 76 DENV. U. L. REV. 383, 386 (1999) [hereinafter Glicksman].

⁵⁵ Laitos & Carr, *supra* note 14, at 161.

environmental concerns, as Americans saw the delicacy of the earth's ecosystem from Apollo 11 in space.⁵⁶ Aesthetic concerns surged into mainstream thought, as evidenced by frequent intellectual discussions on the “uglification” and “beautification” of the American landscape.⁵⁷ Indeed, Americans now valued the beauty and health of their surroundings. In 1964, President Lyndon B. Johnson said: “If future generations are to remember us with gratitude rather than contempt, we must leave them more than the miracles of technology. We must leave them a glimpse of the world as it was in the beginning, not just after we got through with it.”⁵⁸

e. Institutionalized Environmentalism

i. The Wilderness Act

The public's ardent enthusiasm for environmental causes precipitated the enactment of a flurry of environmental laws in the 1960's and 1970's, including the Wilderness Act of 1964.⁵⁹ At the time of its enactment, the federal government owned hundreds of millions of acres of public land, constituting nearly one-third of the land mass of the entire country.⁶⁰ Though Congress and the Executive branch had been preserving national parks, monuments, and wildlife refuges for decades, criticism over the upkeep of such areas differentiated them from areas of pure, “savage” wilderness.⁶¹

⁵⁶ Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has To Teach Environmentalists Today*, 31 ENVTL. L. 229, 284 (2001) [hereinafter Davies].

⁵⁷ NASH, *The American Environment*, *supra* note 23, at 165, 171.

⁵⁸ Lyndon B. Johnson, at www.outdoorclub.org/Wilderness_Quotes.html.

⁵⁹ 16 U.S.C.A. § 1131 (1964); *see* ROBERT V. PERCIVAL et al., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 106-08 (2d ed. 1996) [hereinafter PERCIVAL] (tracing chronology of passage of environmental laws).

⁶⁰ Glicksman, *supra* note 54, at 384.

⁶¹ *Id.* at 385.

The Wilderness Act established a process of designating wilderness into the National Wilderness Preservation System. “Wilderness” is defined in the act as:

[a]n area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.⁶²

The Act demands a minimal survey process for the suitability of land for wilderness designation by administrative land management agencies.⁶³ After concluding surveys on the suitability of land for wilderness, land management agencies recommend to the President ideal lands for designation.⁶⁴ In turn, the President suggests to Congress that the land be designated as wilderness, and Congress then makes the final decision.⁶⁵ If Congress determines that a particular tract of land should be designated wilderness, management of the area goes to the “[d]epartment or agency having jurisdiction thereover immediately before its inclusion.”⁶⁶

Once included within the National Wilderness Preservation System (“NWPS”), the land is most likely protected indefinitely.⁶⁷ No tract of designated wilderness has ever been removed from the NWPS.⁶⁸ Currently, there are 662 designated wilderness

⁶² 16 U.S.C.A. § 1131(c) (1964).

⁶³ Glicksman, *supra* note 54, at 391.

⁶⁴ *Id.*

⁶⁵ 16 U.S.C.A. §1131 (a).

⁶⁶ *Id.* at §1131(b).

⁶⁷ Glicksman, *supra* note 54, at 392.

⁶⁸ *Id.*

areas in the United States, comprising more than 105 million acres in the NWPS.⁶⁹

Alaska maintains over 50 percent of the National Wilderness Preservation System, rendering it a critical state in the wilderness protection movement.⁷⁰

ii. The Federal Land Policy and Management Act

Initially, the Wilderness Act authorized wilderness designation for lands within the National Forest System, the National Park System, and the National Wildlife Refuge System.⁷¹ The Federal Land Policy and Management Act of 1976 (“FLPMA”) ordered the Bureau of Land Management (“BLM”) to inventory its land for possible wilderness designation.⁷² Considering that the BLM is “by far the federal government’s largest landholder,” this shift in wilderness policy represented a highly significant event.⁷³ The FLPMA exponentially increased the amount of land eligible for wilderness designation.

However, the FLPMA also stipulates that “prior to any recommendations for the designation of an area as wilderness,” the Secretary of the Interior must also evaluate land for potential mineral and mining resource value.⁷⁴ Provisions of the FLPMA are sometimes criticized for their contradictory character, since the statute simultaneously promotes wilderness designation and resource extraction.⁷⁵ Indeed, the FLPMA exhibits an inherent contradiction: that interim BLM lands being evaluated for wilderness designation “should be managed in a manner so as not to impair the suitability of such areas for preservation of wilderness subject, however, to the continuation of existing

⁶⁹ “Wilderness Fast Facts” at www.wilderness.net/index.cfm?fuse=NWPS&sec=fastfacts.

⁷⁰ *Id.*

⁷¹ Quigley, *supra* note 19, at 60.

⁷² *Id.*, at 61.

⁷³ *Id.*

⁷⁴ 43 U.S.C.A. § 1782 (a) (1976).

⁷⁵ *Id.*

mining and grazing uses and mineral leasing....”⁷⁶ Regardless of its inconsistencies, the FLMPA is the most comprehensive and significant wilderness statute passed since the enactment of the Wilderness Act.

iii. The Land Management Agencies

The structures of the Wilderness Act and FLPMA delegate enormous discretion to administrative agencies for the designation of wilderness. Before a busy and preoccupied Congress ever considers a tract of land for potential wilderness designation, the land has been subjected to extensive inventory, study, and reporting efforts by administrative agencies.⁷⁷ The process of designating wilderness “involves hundreds of individual decisions on millions of acres over many years.”⁷⁸ Thus, the amount of wilderness protected in the United States depends largely on administrations determining the eligibility of land for wilderness designation.

The National Park Service (“NPS”) of the Department of Interior can optionally designate wilderness.⁷⁹ The NPS manages incredibly diverse lands, comprising of “monuments, recreation areas, rivers, gateway and urban parks, and a variety of other special areas, in addition to the ‘flagship’ national parks.”⁸⁰ Perhaps because the NPS agency mandate concentrates on recreation and preservation, the agency boasts admirable amounts of designated wilderness.⁸¹ Though managing only 13 percent of federal lands, NPS lands encompass over 41 percent of the total protected wilderness in the United

⁷⁶ *Id.*

⁷⁷ George C. Coggins, “*Nothing Beside Remains*”: *The Legal Legacy of James G. Watt’s Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 512 (1990)[hereinafter Coggins, *Nothing Besides Remains*].

⁷⁸ *Id.*

⁷⁹ *Id.* at 482.

⁸⁰ *Id.* at 483.

⁸¹ *Id.*

States.⁸² The National Park Service has designated 44 million acres of wilderness at 54 locations.⁸³

The Department of the Interior also controls the Fish and Wildlife Service (“FWS”), an agency managing 21 million acres of designated wilderness at 71 areas.⁸⁴ The primary mission of the FWS is to protect wildlife and endangered or threatened species. Much of the land managed by FWS is pristine wilderness eligible for wilderness designation and FWS has the discretion to recommend it for designation. For example, of the wilderness acreage managed by the FWS, over one-third is in the Arctic National Wildlife Refuge (“ANWR”), an area that is frequently and persistently threatened by proposals for oil and gas exploration.⁸⁵ This land could potentially be ruined for wilderness designation if such exploration is allowed.

By far the largest manager of public lands is the Department of Interior’s Bureau of Land Management (“BLM”).⁸⁶ The BLM is in charge of a whopping 261 million acres of land, more than all the other Interior agencies combined.⁸⁷ Of this vast amount of land, BLM has designated only 6.5 million acres of wilderness.⁸⁸ When reviewing suitability for wilderness recommendation to the President, the BLM employs a three step process: (i) inventory, (ii) study, and (iii) reporting.⁸⁹

While the process of surveying and studying land chugs slowly along, immense quantities await wilderness designation. Much of BLM land is gridlocked in interim

⁸² *The National Wilderness Preservation System: National Park Service*, at www.wilderness.net/index.cfm?fuse=NWPS&sec=manageNPS.

⁸³ *Issues of Interest: Wilderness*, U.S. Department of Interior, at www.interior.gov/issues/wilderness.html.

⁸⁴ *Id.*

⁸⁵ ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, *MODERN PUBLIC LAND LAW* 322 (West Group 2nd ed. 2001) (1996).

⁸⁶ Coggins, *supra* note 77, at 483.

⁸⁷ *Id.*

⁸⁸ *Issues of Interest: Wilderness*, U.S. Department of Interior, at www.interior.gov/issues/wilderness.html.

⁸⁹ Quigley, *supra* note 19, at 61.

management and dubbed “de facto wilderness.”⁹⁰ Also referred to as wilderness study areas (“WSAs”), interim management areas were afforded protection by the Utah v. Andrus decision.⁹¹ There, a district court decided that BLM could not allow activities on WSAs that could impair their potential for eventual wilderness designation.⁹²

Anti-wilderness administrations can adopt policies precluding wilderness designation on public lands.⁹³ A new administration has the authority to restart the BLM designation process from the beginning if it feels unsatisfied with older reviews, making the process even more arduous.⁹⁴ Thus, the BLM’s disreputable nickname, the “Bureau of Livestock and Mining,” is sometimes thought of as well-earned.⁹⁵

The last agency capable of designating wilderness is the U.S. Forest Service, part of the Department of Agriculture.⁹⁶ The Forest Service monitors 35 million acres of designated wilderness in 400 localities.⁹⁷ Entrusted with the management of 30 percent of the federal public lands, the Forest Service administers its programs under the multiple use concept of land management.⁹⁸ Multiple use land management instructs agencies to consider the best possible use for a particular tract of land.⁹⁹ Possible uses include recreation, wilderness, wildlife, mining, grazing, timber, oil and gas, fishing, and

⁹⁰ *De Facto Wilderness*, at <http://www.forwolves.org/ralph/wpages/defacto.htm>.

⁹¹ Utah v. Andrus, 486 F. Supp. 995, 1007 (D.C. Utah 1979).

⁹² *Id.*

⁹³ The Bush administration has guided the BLM into a “no more wilderness policy.” Under this new policy, protections for all WSAs have been revoked and the process of designation is halted. *Questions and Answers About the Department of Interior’s April 11, 2003 Settlement with the State of Utah*, at <http://leaveitwild.org/nowilderness/>.

⁹⁴ Quigley, *supra* note 19, at 73-75.

⁹⁵ Coggins, *supra* note 77, at 483.

⁹⁶ *A Wilderness Agenda: Thinking Like a Mountain*, at http://www.fs.fed.us/recreation/programs/wilderness/strategy/Thinking_Mountain_final_5_9_2000.shtml.

⁹⁷ *Issues of Interest: Wilderness*, U.S. Department of Interior, at www.interior.gov/issues/wilderness.html.

⁹⁸ *Wilderness Management: USDA Forest Service*, at www.wilderness.net/index.cfm?fuse=NWPS&sec=manageFS.

⁹⁹ PLATT, *supra* note 36, at 381.

hunting.¹⁰⁰ However, multiple use management fails to give clear instructions to the Forest Service and often frustrates wilderness proponents.¹⁰¹ Though uncontroversial in theory, multiple use management remains the subject of criticism for the wide latitude of administrative discretion it delegates to administrative agencies.¹⁰² As one author wrote of multiple use, “[a]lmost everyone supports the general idea; it is its translation into practice that produces controversies.”¹⁰³

Though each of these agencies has different mandates and objectives, all are concurrently entrusted with evaluating land for wilderness designation. The Secretary of the Interior often shoulders the responsibility of reconciling the different purposes of each agency, which include elements of “preservation, recreational use, resource exploitation, resource protection, dam building, and regulation of private activities.”¹⁰⁴ The Secretary is then left to appease the President, who holds the power to fire her, while remaining in compliance with the Administrative Procedure Act, which demands that agencies follow certain procedures and satisfy certain actions.¹⁰⁵

III. The Current Predicament for Wilderness Protection: “Every Rose Has its Thorn”

Due to changing presidents and administrations, the fate of the American wilderness continually fluctuates. The abundant amount of discretion given to each administration represents a double-edged sword to wilderness protectors. Whether an administration advocates wilderness protection or resource exploitation, it is capable of

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* at 197 (quoting M. CLAWSON, LAND FOR AMERICANS: TRENDS, PROSPECTS, AND PROBLEMS (Rand McNally 1963)).

¹⁰⁴ *Id.* at 485.

¹⁰⁵ *Id.*

taking great strides in either direction. This section explores some of the obstacles that wilderness protectors face. First, it describes what types of actions anti-environmental administrations make to maximize commodity use of land. Then, it summarizes problems encountered by wilderness protectors in courts.

a. Exploitative Agendas: How the Government Minimizes Protection

This section observes three mechanisms used by pro-development governments to thwart wilderness protection. By no means a comprehensive list, it merely exemplifies several anti-environmental attacks on wilderness protections by the government.

i. Reclassification of Wilderness Areas: “How About Another Study?”

Reclassifying potential wilderness areas to alter their eligibility into the National Wilderness Preservation System illustrates one method of administrative manipulation of wilderness policy. For example, Secretary of the Interior for the Reagan administration James Watt made no secret that he favored resource utilization and wanted to limit wilderness preservation.¹⁰⁶ Watt attempted to open federal lands to resource exploitation by re-classifying wilderness study areas (“WSAs”) in interim BLM management.¹⁰⁷ Watt withdrew 90 percent of the WSAs that the BLM was evaluating and quickly ordered new studies on the eligibility of the land for wilderness designation.¹⁰⁸ Though courts ultimately found this action illegal, pro-development administrations still use re-

¹⁰⁶ *Id.* at 382. Watt shared “a frustration [with] states and private economic interests with federal control over the water, timber, grasslands, minerals, and wildlife located on the public domain.” *Id.*

¹⁰⁷ Coggins, *supra* note 77, at 505.

¹⁰⁸ *Id.*

classification of WSAs on a smaller scale to prevent wilderness designation of choice lands.¹⁰⁹

Administrations in opposition to wilderness designation, however, are not the sole circumventors of congressionally designated procedures. Bruce Babbitt, the Secretary of the Interior during the Clinton administration, was widely criticized for his predilection for increasing the acreage of wilderness designated land in Utah.¹¹⁰ When a BLM inventory team found fewer eligible acres for wilderness designation than Babbitt wished, Babbitt ordered a new inventory team.¹¹¹ Babbitt's actions demonstrate how administrations in favor of wilderness protection use re-classification as a tool to increase wilderness designation.

ii. Weakening Existing Rules: The Roadless Area Conservation Rule

Less transparent administrative mechanisms to decrease wilderness designation may be even more lethal than re-classification. For example, the Roadless Area Conservation Rule was designed to protect from logging, mining, and drilling 58.5 million acres of wilderness managed by the Forest Service, totaling 31 percent of the Forest Service's entire land mass.¹¹² The rule was passed with unprecedented public support at the end of the Clinton presidency, with more than two million Americans supporting its adoption and numerous polls indicating that support for the rule transcended regional and political divides.¹¹³

¹⁰⁹ *Id.*

¹¹⁰ Quigley, *supra* note 19, at 73-75.

¹¹¹ *Id.*

¹¹² *USDA Roadless Area Conservation: Tongass National Forest Exemption*, at <http://roadless.fs.fed.us/>.

¹¹³ Statement by Bill Meadows, Wilderness Society President, *The Roadless Area Conservation Rule: One Year Later*, at www.bwca.cc/news/roadlessohv/10jan2002roadless.htm.

Widespread support failed to save the Roadless Area Conservation Rule from an administration determined to develop federal lands. When George W. Bush entered the oval office, his administration promptly delayed the effective date of the rule.¹¹⁴ When opponents to the rule challenged its legality and a district court issued an injunction halting the rule's implementation, the Bush administration declined to defend the rule in court.¹¹⁵ By not supporting the rule's legitimacy, the administration effectively paralyzed it. On appeal, a divided U.S. Court of Appeals for the Ninth Circuit reversed the district court's injunction, forcing the Bush administration to pursue other avenues to dismantle the Roadless Area Conservation Rule.¹¹⁶

By creating an exception to the rule, the administration did just that. On December 30, 2003, the Bush administration issued a rule to "temporarily exempt the Tongass National Forest from prohibitions against timber harvest, road construction, and reconstruction in inventoried roadless areas."¹¹⁷ The Bush administration's main justification for creating an exemption to such a newly minted, publicly supported rule was increased job creation in Southeast Alaska.¹¹⁸ The exemption particularly offended wilderness protectors, who fought decades of legal battles to protect the Tongass from industry.¹¹⁹ Allowing an administration to quietly issue an exemption to a publicly-supported rule creates a gaping loophole to the Roadless Area Conservation Rule and displays another method of administrative weakening of wilderness protection.

iii. Appropriations Riders: Stealth Legislation

¹¹⁴ *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1106 (9th Cir. 2002).

¹¹⁵ *Id.* at 1107.

¹¹⁶ *Id.* at 1126.

¹¹⁷ Department of Agriculture, Forest Service, 36 CFR Part 294, RIN 0596-AC04, at http://roadless.fs.fed.us/documents/tongass_12302003.html.

¹¹⁸ *Id.*

¹¹⁹ DURBIN, *supra* note 1, at 26-44, 108-21, 251-67.

Congress is required to pass thirteen appropriations bills to fund all government operations yearly.¹²⁰ The Interior Appropriations bill funds the public land management agencies.¹²¹ Anti-wilderness appropriations riders are amendments to these mandatory bills, usually unrelated to the bill's stated purpose and often attached to a bill immediately before its passage.¹²² Riders often come to the floor as part of a much larger piece of legislation and escape informed debate or a separate vote by Congress.¹²³

Proponents of commodity uses of public lands have attempted to pass riders that render wilderness available for development. In *Robertson v. Seattle Audubon Society*, an environmental group protested the legality of an appropriations act that directed the outcome of two pending cases against the BLM timber harvesting policy.¹²⁴ Though the United States Court of Appeals for the Ninth Circuit held that legislative predetermination of civil litigation was unconstitutional, the Supreme Court reversed.¹²⁵ The Court held that repeals of current law through appropriations riders were “especially disfavored,” but that “Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly.”¹²⁶ Appropriations riders offer pro-development members of Congress a quiet method to eliminate protection for wilderness-quality land and avoid public outcries.

b. The Laissez-Faire Attitude of the Judiciary

¹²⁰ *Stealth Legislation Through Appropriations Riders*, U.S. Public Interest Research Group 1998, at http://menic.utexas.edu/~bennett/_312/riders-1.htm#Executive.

¹²¹ *Id.*

¹²² *Background on Anti-Environmental Riders to Appropriations Bills*, (GREEN, GrassRoots Environmental Effectiveness Network's 6/22/98), at <http://forests.org/archive/america/top62298.htm>.

¹²³ *Id.*

¹²⁴ *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 432-33 (1992).

¹²⁵ *Id.* at 440.

¹²⁶ *Id.*

The judiciary has not been a consistent champion of wilderness protection.¹²⁷ Courts understandably defer to agency expertise in complex areas of law and abide by their prudential doctrines. However, as one public lands law scholar said of the courts applying public land law, “their reluctance has approached abdication.”¹²⁸

i. Finding a Leg To Stand On

While the environmental laws generally authorize citizen suits, restrictive interpretations of standing doctrine impede environmental groups in their challenges to administrative action. Standing law precludes a plaintiff from suing unless three requirements are met: (i) that the plaintiff suffered from an actual or threatened injury (“injury-in-fact”), (ii) that the injury is fairly traceable to the challenged action, and (iii) that the injury is redressable by judicial action.¹²⁹ In the 1990’s, environmental groups encountered increasing difficulties in satisfying more restrictive standing doctrines championed by Justice Antonin Scalia.¹³⁰ Hardly a fan of the environmental movement, Scalia once argued in a law journal article that enforcement of environmental laws reflected “the political pressures” of an elite economic class.¹³¹

Scalia ushered in a new era of standing jurisprudence in *Lujan v. National Wildlife Federation*.¹³² In the case, the National Wildlife Federation (“NWF”) challenged the legality of the BLM’s reclassification of public lands for oil and mining exploration.¹³³ The Court denied NWF standing to sue for failure to satisfy the injury-in-

¹²⁷ George Cameron Coggins, *Some Disjointed Observations on Federal Public Land and Resources Law*, 11 ENVTL. L. 471, 492 (1981) [hereinafter Coggins, *Disjointed Observations*].

¹²⁸ *Id.*

¹²⁹ PERCIVAL, *supra* note 59, at 726.

¹³⁰ *Id.* at 728-36.

¹³¹ Scalia, Antonin, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 896 (1983).

¹³² *Lujan v. Nat’l Wildlife Federation*, 110 S.Ct. 3177 (1990).

¹³³ *Id.*

fact requirement.¹³⁴ The Court withheld standing because the plaintiffs were unable to identify precisely which tracts of land would be developed and to allege use of these specific tracts of the vast territory subject to BLM's action.¹³⁵ Plaintiffs premising their standing on alleged injury of recreational land are obligated to corroborate their use of specific tracts at issue after *Lujan*.¹³⁶

Subsequently, in *Friends of Earth v. Laidlaw Environmental Services*, the Court loosened the standing noose for environmental groups seeking enforcement of environmental laws.¹³⁷ In *Laidlaw*, the Court declared that a plaintiff suing a polluter for violating his discharge permit can satisfy the injury-in-fact requirement of standing by expressing reasonable concern that the violation will affect his "recreational, aesthetic, and economic interests."¹³⁸ Furthermore, *Laidlaw* established that the redressability prerequisite of standing could be fulfilled "by abating current violations and preventing future ones," even if civil penalties for violations were not paid to private plaintiffs.¹³⁹

Ironically, plaintiffs attempting to protect the most pristine tracts of wilderness are the least likely to attain standing under the current judicial approach. The relaxation of standing jurisprudence afforded by *Laidlaw* in citizen enforcement cases does not negate *Lujan*'s holding with respect to lawsuits challenging public lands regulations. Since few people use the most isolated tracts of wilderness, the injury-in-fact requirement of standing remains difficult to fulfill.¹⁴⁰ Thus, while standing doctrine represents an

¹³⁴ *Id.* at 3189.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Friends of Earth v. Laidlaw Environmental Services*, 528 U.S. 167, 183 (2000).

¹³⁸ *Id.*

¹³⁹ *Id.* at 187.

¹⁴⁰ *Lujan v. Nat'l Wildlife Federation*, 110 S.Ct. 3177, 3189 (1990).

obstacle in many environmental cases, it can serve as a roadblock in wilderness preservation cases.

ii. The Administrative Procedure Act, NEPA, and *Chevron*

The Administrative Procedure Act (“APA”) presents another avenue for citizens groups to force administrative agency compliance through the courts.¹⁴¹ If an agency acts arbitrarily or capriciously when issuing a rule or decision, citizens groups can sue under the judicial review provisions of the APA.¹⁴² Furthermore, section 706(1) of the APA gives federal courts the authority to “compel agency action unlawfully withheld or unreasonably delayed.”¹⁴³ Wilderness advocates can sue agencies for violating the APA in ways that damage wilderness quality lands.

For example, an agency’s failure to comply with National Environmental Policy Act (“NEPA”) gives public interest groups ammunition to sue in court. NEPA requires federal agencies to prepare an environmental impact statement (“EIS”) detailing the environmental effects of major federal actions likely to have a significant effect on the environment.¹⁴⁴ Citizens can use the APA to sue to enjoin the agency’s action until an EIS has been completed. Recently, several citizens groups sued the BLM and the Secretary of Interior for failing to prepare an EIS evaluating the effect of off-road vehicles on wilderness study areas in Utah.¹⁴⁵ On appeal, a divided U.S. Court of Appeals for the Tenth Circuit declared that the BLM’s failure to comply with its duty under the FLPMA to preserve the quality of the wilderness study areas constitutes a

¹⁴¹ Administrative Procedure Act, 5 U.S.C.A. § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof”).

¹⁴² 5 U.S.C.A. § 706(2)(a).

¹⁴³ 5 U.S.C.A. 706(1).

¹⁴⁴ National Environmental Policy Act, 42 U.S.C.A. § 4332(c).

¹⁴⁵ Norton v. Southern Utah Wilderness Alliance, 301 F.3d 1217, 1221 (2002).

possible violation of the APA that could serve as the basis for a cause of action by environmental groups.¹⁴⁶ The Supreme Court granted certiorari to hear the case this spring.¹⁴⁷ Since NEPA's passage in 1969, citizens have often sued successfully to stop action by agencies that violate the EIS requirement.¹⁴⁸

However, the Supreme Court decision in *Chevron v. Natural Resources Defense Council* instructs courts to give considerable deference to agency expertise when reviewing questionable agency interpretations of their mandates.¹⁴⁹ This deference to administrative agency discretion often prevents courts from addressing the merits of citizens' groups' complaints about agency interpretations of mandates. This presents another judicial obstacle to wilderness protection.¹⁵⁰ Courts are required to make a thorough inquiry into agency actions and decision-making, but ultimately, "the court is not empowered to substitute its judgment for that of the agency."¹⁵¹ Generally, courts have not "felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to [agencies] executing or applying the law."¹⁵² Thus, courts defer to the decision-making of land management agencies that remove protections from wilderness-quality lands under *Chevron*. Such deference exacerbates the difficulties encountered by wilderness protectors in court. All in all, the judiciary has not provided reliable relief for wilderness protection claims against administrative agencies.

¹⁴⁶ *Id.*

¹⁴⁷ *On the Docket: Northwestern University: Case List for the 2003-2004 Term*, Medill School of Journalism, at <http://journalism.medill.northwestern.edu/docket/>.

¹⁴⁸ *Conservation Law Fund v. Harper*, 587 F. Supp. 357, 362 (D. Mass. 1984) (prohibiting Secretary of Interior James Watt from selling federal lands to private sector without an EIS).

¹⁴⁹ *Chevron v. Natural Resources Defense Council*, 104 S. Ct. 2778, 2793 (1984).

¹⁵⁰ *Id.*

¹⁵¹ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989).

¹⁵² *Mistretta v. United States*, 488 U.S. 361, 416 (1989).

IV. Protecting the Wilderness Against Administrative Hostility

Since the enactment of major legislation affecting wilderness, commentators have proffered numerous recommendations to improve the state of wilderness law and better wilderness protection. These suggestions, though hardly fluid, exemplify the creativity and diversity of approaches to wilderness law. This section describes and evaluates various modifications to wilderness law that have been suggested. It maintains that the most effective route to permanent wilderness protection is through legislative change backed by unyielding public support.¹⁵³ The section also observes that the plethora of creative approaches to wilderness protection, however diverse, constitutes the greatest strength of the movement. The first subsection explores legislative actions that could enhance wilderness protection. The second subsection outlines methods to incite public support for wilderness protection, especially the integral support of communities near wilderness areas. The third section evaluates a medley of judicial, private, and international proposals to improve the state of wilderness law.

a. Legislative Solutions

Since weighty judicial obstacles presently impede judicial protection of wilderness and administrations can hardly be impartial protectors, legislatures retain the most potent power to strengthen wilderness law. This paper contends that the best permanent solution to long term wilderness protection is through legislative change. The Supreme Court of the United States eloquently summarized the advantages of legislative

¹⁵³ See PLATT, *supra* note 36, at 390 (“Barring a drastic change in Congressional policy, there is little likelihood of a change in the foregoing policies”).

change: “[a] statutory directive binds *both* the executive officials who administer the statute *and* the judges who apply it in particular cases.”¹⁵⁴

i. Revising Wilderness Statutes

Revising the statutory prerequisites for inclusion of a tract of wilderness into the National Wilderness Preservation System would increase wilderness designations.¹⁵⁵ To meet the current requirements of wilderness under the Wilderness Act, a tract of land must be over 5,000 acres, “untrammeled by man,” and completely roadless.¹⁵⁶ These oppressive restrictions have spawned numerous “purity” debates among scholars regarding the requisite level of purity an area must have to be worthy of preservation.¹⁵⁷ Scholars argue that the integrity of a wilderness area is not determined by its total acreage or its relationship to man.¹⁵⁸ Many valuable ecosystems within the United States fail to fulfill all of these requirements and thus are ineligible for protection.¹⁵⁹

Ironically, such an exacting definition of wilderness provides opponents to preservation with an incentive to damage federal lands and thus spoil the chance of designation.¹⁶⁰ Anti-wilderness administrations profit from the restrictiveness of the wilderness definition. For example, on January 6, 2002, the Bush administration furthered its development agenda by issuing a rule reviving R.S. 2477, a law enacted by Congress at the height of American frontier development in 1866.¹⁶¹ R.S. 2477 gave

¹⁵⁴ *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 439 (1992).

¹⁵⁵ Susan Jane M. Brown, “*Green Gold*”: *Securing Protection for Roadless Areas on Gifford Pinchot National Forest*, 8 U. BALT. ENVTL. L. J. 1, 16 (2000) [hereinafter Brown].

¹⁵⁶ 16 U.S.C.A. § 1131(c).

¹⁵⁷ Brown, *supra* note 155, at 16.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Robert L. Glicksman, *Lecture: Fear and Loathing on the Federal Lands*, 45 KAN. L. REV. 647, 649 (1997). In Utah and Alaska, local citizens frustrated with preservationist agendas used tractors to mutilate areas of pristine wilderness and obliterate their suitability for wilderness designation. *Id.*

¹⁶¹ Bloch & McIntosh, *supra* note 25, at 489.

settlers the right to create and establish county highways and roads on federal government land.¹⁶² This law encouraged the development of infrastructure by settlers with minimal federal financial support. Now, over 130 years later, RS 2477 allows “cow paths, abandoned jeep trails, hiking paths, and other faint tracks in the desert,” to be classifiable as “county highways.”¹⁶³ Recognition of a “county highway” on a tract of wilderness precludes wilderness designation of that land because Congress stipulates that designated wilderness be “roadless.”¹⁶⁴

This action eliminates many pristine areas from wilderness designation. One author describing what R.S. 2477 claims meant for wilderness designation said, “Utah counties could torpedo wilderness designation by Congress with submarine R.S. 2477 road claims.”¹⁶⁵ Indeed, Alaska already has exploited R.S.2477 to prevent wilderness designations. The state of Alaska has claimed “nearly 900,000 miles of section lines (used for survey purposes) with no apparent surface manifestation” as R.S. 2477 highways.¹⁶⁶ R.S. 2477 gives opponents of wilderness designation an incentive to trespass onto public lands and create roads, thus guaranteeing that such land will never be designated as wilderness. That the Wilderness Act produces such perverse incentives should signal to Congress that change is necessary to safeguard the integrity of wilderness.¹⁶⁷

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ 43 U.S.C.A. 1131 (c) (1964).

¹⁶⁵ Kevin Hayes, *History and Future of the Conflict Over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 239 (2001).

¹⁶⁶ Bloch & MicIntosh, *supra* note 25.

¹⁶⁷ Coggins, *Disjointed Observations*, *supra* note 127, at 482.

Congress also could improve federal public land management by revising the FLPMA.¹⁶⁸ The FLPMA is the quintessential example of an internally contradictory public land management law.¹⁶⁹ The FLPMA reveals conflicting policies for the interim period between BLM’s review of potential wilderness areas and congressional inclusion of such areas in the wilderness preservation system.¹⁷⁰ The FLPMA states that during the interim period, BLM must “manage the lands...in a manner so as not to impair the suitability of such areas for preservation as wilderness,” but also that interim regulation should “continu[e] [] existing mining and grazing uses and mineral leasing.”¹⁷¹ Since wilderness must be completely “untrammelled by man” to qualify for inclusion in the preservation system, sustaining a tract’s suitability for protection while simultaneously appeasing the destructive mining and mineral leases of businesses defies realistic expectations.¹⁷² Congress could amend the FLPMA to eliminate this internal contradiction and to safeguard wilderness areas on BLM lands.

ii. State Legislation

State statutes and constitutions possess significant, untapped potential for wilderness protection. Federal agencies are barred by law from some of the innovative strategies employed by states to preserve wilderness.¹⁷³ For example, New York citizens persuaded their state legislature to amend the state constitution to protect the precious Adirondack and Catskill parks.¹⁷⁴ The New York Constitution explicitly designates

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ 43 U.S.C.A. § 1782 (a) (1976).

¹⁷¹ *Id.*

¹⁷² Coggins, *supra* note 127.

¹⁷³ Matthew Brown and Jane S. Shaw, *To Preserve It, Buy It*, TACOMA NEWS TRIBUNE, August 13, 1998, at www.perc.org/publications/opeds/preserve.php?s=2.

¹⁷⁴ Bret Adams, et. al., *Environmental and Natural Resources Provisions in State Constitutions*, 22 J. LAND RESOURCES & ENVTL. L. 73, 179 (2002) [hereinafter Adams].

wilderness preserves: “The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or private, nor shall timber thereon be sold, removed or destroyed.”¹⁷⁵ Dubbed the “Forever Wild” clause, courts have interpreted this provision to allow reasonable uses of wilderness for the public enjoyment, but the clause clearly has enhanced protection of wilderness from development, helping it withstand the agenda of pro-development administrations.¹⁷⁶

Unfortunately, many state constitutional provisions decidedly subscribe to policies promoting development. Alaska’s state constitution, for instance, states that “it is the policy of the State to encourage settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.”¹⁷⁷ Because Alaska retains more than one-half of the country’s remaining wilderness, this provision provides cold comfort indeed to preservationists.¹⁷⁸ Today, only fourteen state constitutions address public land management, with less than half promoting preservation.¹⁷⁹ More states should follow New York’s example and use their constitutions to preserve state wilderness for the enjoyment of future generations.

iii. Restructuring the Administrative Framework

¹⁷⁵ NY CONST. Art. 14, § 1.

¹⁷⁶ See *Helms v. New York*, 394 N.Y.S.2d 987, 999 (N.Y. App. Div. 1977) (explaining that a reasonable use of the state wilderness included public enjoyment); *but see Balsam Lake Anglers Club v. Dep’t of Environmental Conservation*, 605 N.Y.S.2d 795, 797 (N.Y. App. Div. 1993) (holding that the cutting of 350 trees for development of a parking lot constituted a reasonable use).

¹⁷⁷ ALASKA CONST. art VIII, §1.

¹⁷⁸ *The National Wilderness Preservation System: Fast Facts*, at <http://www.wilderness.net/index.cfm?fuse=NWPS&sec=fastFacts> (citing that Alaska has 54% of country’s wilderness).

¹⁷⁹ Adams, *supra* note 174, at 263. Table 2, Summary of Subjects Addressed.

Many argue that the wilderness designation process needs to be simplified to restore predictability and consistency to American wilderness protection. Presently, four separate agencies with different governing statutes in two different departments concurrently manage American public lands.¹⁸⁰ The organization of the current system evades logic because it is a historical byproduct, not a calculated system.¹⁸¹ For example, the BLM initially was instructed to encourage grazing, mining, and oil and gas development rights on public land.¹⁸² The enactment of the FLPMA in 1976 entrusted the BLM, known as a pro-development agency, with wilderness designation tasks.¹⁸³ Perhaps the BLM's inexperience with wilderness designation and management provides a partial explanation of why BLM lands constitute only six percent of the NWPS, though it manages 42 percent of federal lands.¹⁸⁴

Significant amounts of animosity and interagency competition also affect public land management decisions.¹⁸⁵ Historically, the Forest Service exhibited reluctance to designate wilderness lands and thus “lose administrative discretion over large areas of its land.”¹⁸⁶ Its unique placement in the Department of Agriculture, as opposed to the Department of the Interior, earns the Forest Service the title of the only land management agency in its Department.¹⁸⁷ Due in part to its exclusion from the other land management agencies, the Forest Service has a history filled with accusations of acting with agency

¹⁸⁰ See *supra* notes 83-111 and accompanying text.

¹⁸¹ Coggins, *supra* note 127, at 487.

¹⁸² The National Wilderness Preservation System: Wilderness Management: Bureau of Land Management, at www.wilderness.net/index.cfm?fuse+NWPS&sec=manageBLM.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Coggins, *supra* note 127, at 486.

¹⁸⁶ David Gerard, THE ORIGINS OF THE FEDERAL WILDERNESS SYSTEM, Chapter 6 p. 23, at www.perc.org/pdf/pltcenv6.pdf.

¹⁸⁷ *Id.*

self-interest.¹⁸⁸ In fact, empirical data indicate that the motivation for many of the Forest Service's early wilderness designations was not a commitment to preservation, but rather a defensive response to the Park Service's expansion near land managed by the Forest Service.¹⁸⁹

Some scholars propose the creation of a federal Department of Natural Resources as a remedy for the disorganization of the current system.¹⁹⁰ An agency in charge of wilderness designation within the Department of Natural Resources could consolidate the process and designate more acreage as wilderness.¹⁹¹ Different agencies within the Department could specialize in conservation, recreation, and resource exploitation.¹⁹² In fact, President Carter attempted to create a Department of Natural Resources on several occasions.¹⁹³ The rejection of Carter's proposals was largely attributed to political pressures, since losing jurisdiction over an agency as significant as the Forest Service would decrease the size and scope of the Department of Agriculture's duties.¹⁹⁴ Although such political pressures still exist, consolidating the land management agencies of the federal government would increase the efficiency and the effectiveness of wilderness protection policy.

Nevertheless, major hurdles obstruct the creation of a Department of Natural Resources. Consolidating administrative agencies in charge of public lands will not necessarily obviate administrative policies favoring resource exploitation and commodity

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 25.

¹⁹⁰ Coggins, *supra* note 127, at 487.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at n. 85.

¹⁹⁴ *Id.*

uses of wilderness land.¹⁹⁵ Indeed, shifting or consolidating administrative agencies by congressional demand alone is not guaranteed to forestall administrative misconduct.¹⁹⁶ Nevertheless, consolidation of the administration of the public lands management framework could reduce administrative confusion, interagency conflict, and ineffective bureaucratic rituals.

b. Impetus for Lasting Change: Building Public Support

The vast majority of Americans passively support wilderness preservation.¹⁹⁷ Public opinion polls reveal broad public support that supersedes party and economic lines.¹⁹⁸ Nevertheless, certain issues in the wilderness protection movement erode its strength. Some conservatives, mistakenly operating under the assumption that conservative environmentalism is an oxymoron, dismiss wilderness protection to avoid betraying the Republican party.¹⁹⁹ Philosophical discord between preservationists, conservationists, and a variety of other parties thwarts the consolidation of diverse forces to achieve the shared objective of protecting wilderness. Finally, vocal and passionate opposition to wilderness protection by state and local communities surrounding wilderness areas pressures Congress to sponsor commodity use of land.²⁰⁰ This section explores mechanisms to enhance public support for wilderness protection, including the

¹⁹⁵ Michael J. Mortimer, *The Delegation of Law-Making Authority to the United States Forest Service: Implications in the Struggle for National Forest Management*, 54 ADMIN. L. REV. 907, 973 (2002).

¹⁹⁶ *Id.*

¹⁹⁷ Heritage Forests Campaign, *The Most Popular Federal Policy in U.S. History*, at www.ourforests.org/public_support, last seen 2/23/04. This site noted that over the past seven years, numerous public opinion polls have demonstrated widespread support for conservation of wilderness. On average, the website reports that 76% of Democrats, 66% of Independents, and 58% of Republicans support national forest conservation.

¹⁹⁸ *Id.*

¹⁹⁹ GORDON K. DURNIL, *THE MAKING OF A CONSERVATIVE ENVIRONMENTALIST 1* (Indiana University Press 1995) [hereinafter DURNIL].

²⁰⁰ See www.anwr.org. This website is run by Alaskans in favor of oil drilling in the Arctic National Wildlife Refuge.

unification of diverse interests, increasing awareness of the actual economic value of wilderness protection and commodity use of public land, and boosting local economies without exploiting public lands.

i. Broad Public Support

1. Politically Palatable Decisions

Public opinion polls reveal bipartisan support for conservation.²⁰¹ Tourists on cruises of scenic Alaska have been so disturbed by mountainsides checkered with clearcuts that they send postcards to Washington protesting the logging of Alaska.²⁰² In response, the U.S. Forest Service concentrates on keeping logging away from the shoreline so that tourists cannot see the damage.²⁰³ However, a common misconception exists that wilderness battles represent classic partisan politics.²⁰⁴ Many Americans mentally associate environmental causes with liberal politics and assume that supporting such a cause betrays conservative values.²⁰⁵ In truth, “[c]onservative ought to be in favor of conserving things.”²⁰⁶ Some regard wilderness protection as the only truly conservative environmental cause. Indeed, Republicans were some of the first great wilderness advocates, like Theodore Roosevelt, Benjamin Harrison, and Charles Lindbergh.²⁰⁷ If more conservatives understood that supporting wilderness protection does not compromise their political consistency, then they would be more likely to champion the cause.

²⁰¹ DURNIL, *supra* note 199.

²⁰² Marego Athans, *Timber, tourism set sights on Tongass*, May 9, 2001 at baltimoresun.com/news/nationworld/bal-te.alaska09may09.story.

²⁰³ *Id.*

²⁰⁴ DURNIL, *supra* note 199, at ix.

²⁰⁵ JOHN R.E. BLIESE, *THE GREENING OF CONSERVATIVE AMERICA* 1 (Westview Press 2001) [hereinafter BLIESE].

²⁰⁶ *Id.* at 1.

²⁰⁷ DURNIL, *supra* note 199, at 181.

Politically savvy coalitions may have the skills to persuade those in positions of power and influence to take measures to protect the wilderness. For example, a new organization calling itself the Theodore Roosevelt Conservation Partnership unites divergent outdoors groups like the National Rifle Association, Environmental Defense, World Wildlife Fund, and the Bass Angler Sportsman Society to champion various environmental causes, including the reduction of oil and gas development on federal public lands.²⁰⁸ Though the group's main appeal is to hunters and fishers, the causes it campaigns for align with wilderness protection, like "Securing Conservation Funding" and "Protecting National Forest Roadless Areas."²⁰⁹ Indeed, the group's Republican roots enabled it to obtain a recent White House audience with President Bush. After the meeting with the Theodore Roosevelt Conservation Partnership, Bush halted EPA plans to remove Clean Water Act protections for isolated wetlands.²¹⁰ The success of a coalition that appeals both to traditionally conservative values, like hunting, and traditionally liberal values, like preservation, provides hope that no matter what an administration's agenda, wilderness protection can continue to advance in some areas.

2. *Eliminating Divisions Within the Wilderness Protection Movement: "Never Be Your Own Worst Enemy"*

American opinion on wilderness is as diverse as America itself. Where one would see wilderness as sacred ground, another would see a hunting ground, and yet another would see a playground. Uniting the voices of preservationists, recreationists, hunters, and other could make the wilderness movement more influential in Congress.

²⁰⁸ Angus Phillips, *A Cause That's Catching On*, THE WASHINGTON POST, February 15, 2004.

²⁰⁹ *Theodore Roosevelt Conservation Partnership Homepage*, at www.trcp.org/takeaction.html.

²¹⁰ Angus Phillips, *A Cause That's Catching On*, THE WASHINGTON POST, February 15, 2004.

However, to embrace this line of thought, some wilderness protectors may have to eschew absolutist approaches to their preservationist values. Recreation does impact the quality of wilderness, though in a significantly less damaging way than commodity uses. For example, the Bush administration recently approved the use of snowmobiles on recreational areas in various national parks, including Yellowstone, despite evidence that snowmobiling harms wildlife, increases noise levels, and damages air quality in these pristine areas.²¹¹ Particularly damaging recreational activities like snowmobiling and off road vehicle driving should be prohibited on valuable public lands.²¹² Nevertheless, to protect forests one may have to accept the idea that there will inevitably be human interaction with the public lands and embrace their recreational value. Adopting this position may better protect forests from development in the long run because it represents a more moderate point of view. Though it has been established that preservation alone has significant economic value, recreational uses of these lands offer more incentives to states and locals to support environmental protection.²¹³

ii. Getting Local Public Support

Gaining public support in state and local settings presents a daunting challenge to wilderness protectors, but promises great rewards. The public lands of the West belong to all the citizens of the United States and “giving away resources because of proximity is questionable policy.”²¹⁴ However, the voices of state and local communities are unusually influential in Congressional decision-making on wilderness policy.²¹⁵ Since

²¹¹ *National Park Service Officially Adopts Snowmobile Plan*, March 25, 2003, at http://www.nrdc.org/bushrecord/wildlife_parks.asp#1296.

²¹² *Id.*

²¹³ Laitos & Carr, *supra* note 14, at 193.

²¹⁴ *What in the Heck Is Enlibra?*, at www.bigeastern.com/bigdumbhoosier/08122003.htm.

²¹⁵ Robert H. Nelson, *A New Era for the Western Public Lands: Government as Theater: Toward a New Paradigm for Public Lands*, 65 U. COLO. L. REV. 335, 350 (1994).

locals are most immediately affected by the consequences of administrative decisions on wilderness, ethical reasons to consider their opinions exist.²¹⁶ At the very least, state and local public support for conservation would counter Justice Scalia's contention that environmentalism reflects a privileged class-based malaise.²¹⁷ Were local and state communities to champion wilderness protection, a high probability exists that Congress would respond to their desires by increasing preservation.²¹⁸ Giving state and local communities incentives to protect their wilderness resource could win their support in the wilderness protection movement and significantly shift the course of the battle over wilderness.²¹⁹

1. The Myth: Jobs vs. Trees

States and local communities generally support commodity uses and increased development of wilderness because doing so boosts their local economies.²²⁰ For example, 75 percent of Alaskans favor opening sensitive, wilderness-quality federal lands in the Arctic National Wildlife Refuge for oil exploration.²²¹ Alaskan courts endorsed George W. Bush's exemption of the Alaskan national forests from the Roadless Area Conservation Rule, even though almost a quarter of a million nationwide public comments objected to the plan.²²²

²¹⁶ Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 448 (2003) [hereinafter Stewart].

²¹⁷ See James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 ENVTL. L. 1, 62-66 (2001) [hereinafter Rasband] (exploring reasons why local participation in public land decision-making should occur).

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *The National Defense Council Foundation Fast Facts ANWR*, at http://www.anwr.org/docs/ANWR_jobs_brief.pdf.

²²¹ *Id.*

²²² *George W. Bush and Forests: Tongass Gets Slashed from Roadless Rule*, December 23, 2003, at www.sierraclub.org/wwatch/forests/index.asp.

Local advocates for commodity uses of wilderness argue that their jobs and livelihoods depend on exploiting local public resources. Few arguments perturb the emotions like the loss of one's livelihood and the demise of a community's traditional means of supporting their families. Evidence demonstrates that Congress sympathizes with such arguments and consistently favors the creation of new jobs. Indeed, a vote by the House of Representatives in August 2003 to allow oil drilling on portions of the Arctic National Wildlife Refuge was based largely on the Teamster Union's contention that doing so would create 735,000 jobs nationwide.²²³ The resource extraction industry plainly won this battle for oil drilling in the House by arguing that Americans need jobs more than they need wilderness. One Representative remarked, "if labor hadn't weighed in, the environment would have won."²²⁴

Tragically, the estimate by the Teamster's Union, on which Congress relied, was from a decade old study funded by the American Petroleum Institute and widely criticized by economists.²²⁵ In fact, subsequent studies by the Congressional Research Service and the Economic Policy Institute declared that the number cited by the Teamster's Union was clearly wrong and that a more realistic estimate of the number of jobs created was between 46,000 and 130,000 jobs.²²⁶ While efforts to open the untouched Arctic National Wildlife Refuge were blocked in the U.S. Senate, the message is clear: to get the support of Congress, wilderness protectors cannot permit the characterization of the wilderness movement as a battle between jobs and wilderness.

²²³ H.R. 4, "Securing America's Future Energy Act"

²²⁴ *Fuelish Claims: Drilling the Arctic Won't Create a Significant Number of Jobs*, at <http://www.nrdc.org/land/wilderness/artech/farcjobs.as>. This cites to the comment made by Representative Ed Markey (D-Mass).

²²⁵ *Id.*

²²⁶ *Id.*

2. *The Reality: Wilderness Protection Is Economically Superior*

a. *Decline In Commodity Uses of Public Lands*

Painting the wilderness battle as a showdown between jobs and preservation distorts and disregards the true basis of the wilderness protection movement.²²⁷ Resource extraction does not, in fact, constitute the most profitable use of American wilderness.²²⁸ Unfortunately, widespread knowledge about the economic inefficiency of commodity uses does not exist, accentuating the need to educate Americans about the practical virtues of wilderness protection and the decline in commodity uses.

Commodity uses of federal lands have plummeted sharply in the last 50 years.²²⁹ Though still a source of revenue for the BLM and Forest Service, timber production has steadily declined during this period.²³⁰ Overall American timber production has decreased 90 percent since the late 1980's.²³¹ Hardrock mining leases on public lands also steadily declined from 3,300 in 1954 to 1,000 in the late 1990's.²³² In addition, oil and gas leasing on public lands has dropped 71 percent since its 1960 peak.²³³ Another example is oil sales: the federal government sold 201.5 million of barrels of oil in 1970, which steadily decreased to 121.5 million in 1995.²³⁴ Similarly, coal leasing dropped 36 percent since its mid-1980's peak.²³⁵

²²⁷ Davies, *supra* note 56, at 342.

²²⁸ Rasband, *supra* note 217, at 24-25.

²²⁹ Laitos & Carr, *supra* note 14, at 153.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

²³³ *Id.* at 159.

²³⁴ *Id.*

²³⁵ *Id.*

The most notable aspect of these statistics is not that commodity uses of public lands have decreased, but that all commodity uses have concurrently decreased.²³⁶ Many attribute this trend to the massive increases in technology in recent decades, since it is widely accepted that technological innovations generally reduce the demand for natural resources necessary to produce manufactured goods.²³⁷ Whatever the reason for the decline in the business of natural resource extraction, it demonstrates that natural resources do not constitute as vital a part of the American economy as they once did. Thus, it can hardly be argued that commodity uses of wilderness are becoming increasingly more valuable than the value of conservation.

b. Increase in Value of Recreation and Preservation

Economically, recreation presents a wiser and more valuable use for public lands than commodity development.²³⁸ Recreational uses of public land have skyrocketed in the past 25 years and continue to grow.²³⁹ The billions that are spent each year on recreation surpass the federal government's total income from mining, timber harvesting, and grazing profits.²⁴⁰ Forest Service lands have seen a 1,161 percent increase in recreational visitors since 1950, while the BLM has shown a 176 percent increase in recreational visitors since 1982.²⁴¹ Outdoor businesses contribute 18 billion dollars annually to the American economy.²⁴² In the 1990's, the Secretary of Agriculture acknowledged that "of the \$130 billion that the national forests will contribute to the

²³⁶ *Id.*

²³⁷ *Id.* at 240.

²³⁸ Rasband, *supra* note 217, at 25.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ Laitos & Carr, *supra* note 14, at 153. BLM figures previous to 1980 are unavailable.

²⁴² Jeb Tilly, *State of the Industry Report 2002*, Outdoor Industry Association, at www.outdoorindustry.org/SOI2002.pdf.

national economy by the year 2000, nearly \$100 billion will come from recreation.”²⁴³ In 1999, recreation created an estimated 75 percent of the gross domestic product generated from Forest Service land.²⁴⁴

Though not as profitable as recreation, wilderness preservation offers a variety of economic benefits. Protected wilderness enhances the amenity value of a community by improving the quality of life of citizens.²⁴⁵ It also contributes to the economic well-being of local communities because it attracts visitors, people searching for second homes, and relocators.²⁴⁶ Wilderness also adds landscape value far beyond the bounds of local communities. People purchase and admire paintings and photographs of gorgeous panoramas captured by professional photographers or talented artists. Another economic benefit of preservation is “ecosystem services.”²⁴⁷ Ecosystem services are the natural processes by which wilderness filters out and controls pollution in air, water, and soil.²⁴⁸ Some economists estimate the calculable value of ecosystem services, including both wilderness and non-wilderness areas, to be as much as \$33 trillion.²⁴⁹ With the addition of existence and option values, pure preservation often is more economically advantageous than commodity uses and, in the opinion of some economists, even recreational uses.²⁵⁰ In either case, use of public wilderness for recreation and preservation presents a more economically desirable result than resource extraction.

²⁴³ Laitos & Carr, *supra* note 14, at 153.

²⁴⁴ Jeb Tilly, *State of the Industry Report 2002*, Outdoor Industry Association, at www.outdoorindustry.org/SOI2002.pdf.

²⁴⁵ Laitos & Carr, *supra* note 14, at 199.

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 200.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

3. Incentives for Local Support

Ensuring that local communities reap some of the economic benefits of conservation would bolster local public support.²⁵¹ Economic benefits would induce local support if the revenues for citizens were greater than the revenues generated from commodity and extractive uses of public lands.²⁵² This section discusses incentives for local communities to support the protection of their wilderness.

a. Fee Demo Program

Matching the financial benefits for commodity uses of wilderness with similar incentives for recreation and preservation might increase local support for preservation. For example, in 1996 Congress passed the Recreational Fee Demonstration Program (“Fee Demo”), which gave land management agencies the option to charge higher entrance fees into national parks and allowing each park to keep 80 percent of the additional revenues.²⁵³ Though some Americans dislike paying fees for access to public lands, the government continues to run the program because national surveys indicate that fees “rank low on the list of reasons why individuals choose not to visit” national parks.²⁵⁴ The money generated by the parks directly benefits local communities by impacting the quality of the park and the level of tourism there.²⁵⁵ Creative programs like the Fee Demo can introduce economic benefits to communities without spoiling public wilderness areas.

b. Tourism

²⁵¹ Rasband, *supra* note 217, at 65.

²⁵² *Id.*

²⁵³ Recreational Fee Demonstration Program, April 2002, *Interim Report to Congress*, at 61, at <http://www.fs.fed.us/recreation/programs/feedemo/index.shtml>

²⁵⁴ *Id.*

²⁵⁵ *Id.*

Similarly, tourists traveling to wilderness areas arrive not just for refreshing air and breathtaking views, but also for a taste of the local culture, cuisine, and people.²⁵⁶ Communities attracting tourism receive a boost to their local economies. Counties containing the country's largest national parks have, over the past 30 years, enjoyed above average population growth, triple the job growth, and twice the income of other counties.²⁵⁷ A citizens' group in New Mexico, where the Otero Mesa grasslands are coveted by gas industry officials, notes that "tourism has become New Mexico's largest industry, dwarfing in revenue generation the hard rock and mineral mining, ranching, and agriculture industries."²⁵⁸ Moreover, while commodity extraction would present an exhaustible economic contribution to local communities, tourism would boost the local economy indefinitely and offer long term economic stability to these communities.²⁵⁹ Thus, statistics on the value of tourism refute the argument that the wilderness issue is a choice between an economically successful community and trees.

c. Job Retraining Subsidies

Job retraining subsidies are another method of increasing local public support for wilderness conservation.²⁶⁰ Statistics demonstrate that a very small percentage of jobs in the American West are involved with resource exploitation and that such jobs are steadily declining in number.²⁶¹ To quiet the fears of local communities that preservation will leave them jobless, subsidies for job retraining programs could help assure them and their

²⁵⁶ *Id.*

²⁵⁷ Jeb Tilly, *State of the Industry Report 2002*, Outdoor Industry Association, 12, at www.outdoorindustry.org/SOI2002.pdf.

²⁵⁸ New Mexico Wilderness Alliance, *Wilderness Benefits New Mexico's Economy*, at <http://www.nmwild.org/wild/economics.htm>.

²⁵⁹ *Id.*

²⁶⁰ Davies, *supra* note 56, at 358.

²⁶¹ Rasband, *supra* note 217, at 25.

families' economic survival.²⁶² The federal government has already implemented job retraining programs in California to “train former loggers to conduct wildlife studies and stream restoration projects – skills that will enable them to continue working in forests.”²⁶³ Offering job retraining programs to locals employed in commodity use industries averts criticism that wilderness protection hurts the local economy. Such programs could also give the employees specializing in resource extraction more long term job security, since the commodity use of wilderness industry is shrinking in size.²⁶⁴

d. Collaborative Administrative Networks

Some proposals call for administrative agencies to collaborate with local interests and reach mutually beneficial solutions. Since public and local discontent with wilderness management largely results from administrations “attempting to dictate the conduct of millions of actors in a quickly changing and very complex economy and society throughout a large and diverse nation,” collaborative planning networks would allow local concerns to tailor wilderness management plans.²⁶⁵ Stakeholders in the networks would include “politicians, professional land managers, private economic interests, adjacent and inholder property owners, the environmental community, and the recreation-seeking public.”²⁶⁶

In theory, such networks could promote administrative stability by establishing “a quasi-contractual working relationship among the participants to solve regulatory problems on a coordinated basis.”²⁶⁷ The Quincy Library Group, a California coalition of

²⁶² Davies, *supra* note 56, at 358.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ Stewart, *supra* note 216, at 446.

²⁶⁶ PLATT, *supra* note 36, at 388.

²⁶⁷ *Id.*

timber industry representatives, local officials, and environmentalists, successfully collaborated in a non-confrontational manner to negotiate an alternative management plan for several national forests in California.²⁶⁸ The accomplishments of the group inspired the United States Senate to approve the FY 1999 Omnibus Spending Bill, which included the group's agreement.²⁶⁹

However, other collaborative networks failed to thwart anti-wilderness policies. For example, former Utah governor and current EPA administrator Mike Leavitt crafted his own environmental and land management philosophy called "Enlibra."²⁷⁰ In reaction to the passionate public land battles between conservationists and miners, ranchers, and local governments in Utah, Enlibra was meant to promote negotiation and collaboration between all parties.²⁷¹

Administrations with development agendas can filter out wilderness protectors by excluding or muting their cries for wilderness preservation.²⁷² Public interest groups have widely criticized Leavitt for excluding them from this process. Leavitt's implementation sometimes rebuffs interested parties. As a director of the Southern Utah Wilderness Alliance said of Leavitt's Enlibra plan, "[h]e invites people to the table who he knows are going to agree with the decisions he's going to reach and calls everyone else an extremist."²⁷³ Additionally, flexible agency-stakeholder systems fail to curb administrative discretion on public land policy. For example, Leavitt's Enlibra principles

²⁶⁸ *Recognition & Awards*, at <http://www.qlg.org/pub/miscdoc/awards.htm> (describing the group's receipt of the Governor's Environmental and Economic Leadership Award).

²⁶⁹ Senator Diane Feinstein, *Quincy Library Group*, at <http://feinstein.senate.gov/qlg.html>.

²⁷⁰ Western Governors' Association, *Enlibra*, at <http://www.westgov.org/wga/initiatives/enlibra/>.

²⁷¹ *Id.*

²⁷² Friends of Earth, *Current Issues, Leavitt Nomination*, at www.foe.org/camps/leg/current/leavittfacts.html.

²⁷³ Larry Young, Southern Utah Wilderness Alliance, LOS ANGELES TIMES, August 17, 2003, at <http://www.net.org/leavitt/record.html>.

did not deter him, as governor, from making a closed door deal with the Department of Interior to drop an impending lawsuit against Interior in exchange for removing 6 million acres of Utah land from protected interim wilderness status.²⁷⁴

To ensure the success of agency-stakeholder networks, Congress must safeguard the collaborative process to forestall unfair and administratively biased results. Consensus groups, though capable of promising results, cannot change administrative policy and decisions ultimately must lie with the administrative agency.²⁷⁵ Though helpful, “at best they only offer a small step toward true reform.”²⁷⁶

C. Other Avenues for Wilderness Protection

Though the reasoning of this paper concludes that long term wilderness protection is best facilitated through legislative change and public support, prudence demands the mention of several other notable approaches to wilderness protection. This section describes an assortment of wilderness protection approaches and evaluates their strengths and weaknesses. The *mélange* includes the public trust doctrine, privatizing wilderness, conservation easements, international treaties, and the environmental justice movement.

i. Judicial Reform: The Public Trust Doctrine

Though courts generally provide unreliable support for wilderness protection, their usefulness cannot be dismissed. The revival of the public trust doctrine by Professor Joseph Sax in the early 1970’s ushered in a new mechanism for judicial

²⁷⁴ National Environmental Trust, *Love It or Leavitt: The Leavitt Record*, at <http://www.net.org/leavitt/record.html> (citing the *Salt Lake Tribune*, May 18, 2003).

²⁷⁵ BLIESE, *supra* note 205, at 109.

²⁷⁶ *Id.*

protection of natural areas.²⁷⁷ The tenet of the public trust doctrine avers that the public is entitled to certain water rights and that such rights should be protected by the state for the public use.²⁷⁸ Jurisprudence dating back to the 1820's recognized the public trust doctrine to secure waterway access for state citizens to enjoy unobstructed fishing and navigation.²⁷⁹ While the legal contours of the public trust doctrine remain somewhat elusive, the Supreme Court legitimized the doctrine in several cases as a method to “support judicial control of state legislatures’ excessive grants of public lands to private parties.”²⁸⁰ Sax advocated for the expansion of the doctrine into natural resources law, arguing that “the doctrine enabled judicial oversight when inadequacies in legislative and administrative processes result in wrongful discounting of natural resource values.”²⁸¹ Using the public trust doctrine in the wilderness context suggests some exciting opportunities for circumventing administrative agendas.

However, the public trust doctrine is sometimes criticized as sporadic and underdeveloped.²⁸² While the doctrine heralded a notable success when the California Supreme Court reprimanded the city of Los Angeles’ for failing to “take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible,” such achievements generally correlate to water law.²⁸³

Additionally, many argue that the simplicity of the doctrine masks its reliance on a pro-

²⁷⁷ Joseph L. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 473 (1970) [hereinafter Sax].

²⁷⁸ BLACK'S LAW DICTIONARY (Bryan A. Garner ed. 1990) (1891).

²⁷⁹ Erin Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVTL. L. 477, 481 (2001) [hereinafter Ryan].

²⁸⁰ Barton H. Thompson, *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L. J. 863, 877 (1996) [hereinafter Thompson].

²⁸¹ Ryan, *supra* note 279, at 483.

²⁸² Thompson, *supra* note 280, at 880.

²⁸³ *See id.*; *National Audubon Society v. Superior Court*, 658 P.2d 709, 728 (Cal.), cert denied 464 U.S. 977 (1983).

environmental bias of the judiciary.²⁸⁴ Indeed, scholars have noted that “courts in this decade have shown little interest in further expanding the doctrine.”²⁸⁵

Despite its flaws, the public trust doctrine is embraced by environmentalists as a potential tool for wilderness protection.²⁸⁶ Some consider the FLPMA’s mandate that resources be preserved for future generations as a codification of the essence of the public trust.²⁸⁷ In light of the *Chevron* decision and the attenuated standing for environmental plaintiffs, the need for new legitimate avenues into the courtroom for wilderness plaintiffs remains pronounced.²⁸⁸ Though the Rehnquist court seems unlikely to legitimize the public trust doctrine for the wilderness protection movement, the doctrine could potentially provide relief from unwelcome administrative inclinations in the future. Furthermore, several states incorporate public trust principles into their constitutions, providing a potential outlet for conservation groups in state courts.²⁸⁹ As Joseph Sax eloquently stated: “courts have been both misunderstood and underrated as a resource for dealing with resources. It is usually true that those who know the least about the judicial process are often the most ready to characterize it as doctrinaire and rigid.”²⁹⁰

ii. “It’s Mine!”: Conservation Easements and Privatizing Land

Conservation easements represent a creative tool to encourage wise land planning independently from executive branch discretion. The federal government has provided

²⁸⁴ Ryan, *supra* note 279, at 492.

²⁸⁵ Thompson, *supra* note 280, at 880.

²⁸⁶ *Id.*

²⁸⁷ Susan D. Baer, *The Public Trust Doctrine – A Tool to Make Federal Administrative Agencies Increase Protection of Public Land and Its Resources*, 15 B.C. ENVTL. AFF. L. REV. 385, 395 (1988) [hereinafter Baer].

²⁸⁸ See *supra* notes 128-52 and accompanying text.

²⁸⁹ Adams, *supra* note 174, at 265. Alaska, California, Hawaii, Idaho, Louisiana, Montana, and Virginia have public trust provisions in their state constitutions.

²⁹⁰ Sax, *supra* note 277, at 565.

tax incentives to reward private landowners who agree to conserve their land.²⁹¹

Conservation easements are voluntary, negotiable agreements between private landowners to refrain from developing their forest land.²⁹² By prohibiting the development of land indefinitely, the agreements lower the fair market value of the land while generating tax benefits.²⁹³

The government provides noteworthy federal income tax, inheritance tax, and current property tax incentives to private landowners who enter conservation easement agreements.²⁹⁴ Conservation easements qualify as a “deductible charitable donation” for income tax benefits.²⁹⁵ Estate taxes, including the option to exclude up to forty percent of the value of the conserved land from taxes, also give landowners incentives to conserve.²⁹⁶ In some cases, the income, state, and property tax benefits granted to owners of conservation easements far exceed the reduction in fair market value from the easement’s adoption.²⁹⁷ Numerous environmental groups have purchased choice forest lands and protected them through conservation easements so development will never be legal on them.²⁹⁸ These easements ensure that a new presidential administration will present no threat to private lands protected by them.

A few supporters of wilderness protection argue that privatization of federal land offers the best protection for wilderness. Indeed, it is quite rational to distrust the

²⁹¹ Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. RES. L. REV. 401, 408 (1993) (defining conservation easements).

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Kari Gathen, *The Use of Conservation Easements to Preserve New York State’s Natural Resources*, 7 ALB. L. ENVTL. OUTLOOK 188, 189 (2002).

²⁹⁵ Francine J. Lipman, *No More Parking Lots: How the Tax Code Keeps the Trees Out of a Tree Museum and Paradise Unpaved*, 27 HARV. ENVTL. L. REV. 471, 492 (2003).

²⁹⁶ *Id.* at 501.

²⁹⁷ *Id.* at 475.

²⁹⁸ Matthew Brown and Jane S. Shaw, *To Preserve It, Buy It*, TACOMA NEWS TRIBUNE, August 13, 1998, at www.perc.org/publications/opeds/preserve.php?s=2.

government's intervention and regulation of public lands. Economists observe that government often causes wilderness damage and they argue that wilderness preservation will be enhanced without government involvement.²⁹⁹ For example, an environmental coalition in 1998 paid the federal government for 24,000 acres of healthy forest in Washington to prevent logging.³⁰⁰ The Nature Conservancy maintains a reputation for preserving valuable landscapes by purchasing land and development rights.³⁰¹ Also, conservation minded entrepreneurs buy or lease wilderness areas and run them as recreation areas for the public.³⁰²

Such conduct appalls many preservationists, however, who view privatizing wilderness as simply permitting another damaging commodity use of land.³⁰³ The worst scenario of privatizing wilderness management would be timber companies buying vast tracts of wilderness to clearcut.³⁰⁴ Based on the past conduct of timber companies, selling the public's economically productive forests in the Northwest would contribute to the decimation of old growth forests.³⁰⁵ Timber companies typically clearcut significantly larger areas on their own land than what the Forest Service allows.³⁰⁶ When chopping down their own forests in Oregon in the winter of 1996-97, the companies left so few trees standing on steep mountainsides that massive landslides "devastated the

²⁹⁹ Christopher Lingle, *Environmentalism As Though People and Facts Really Mattered*, Foundation for Economic Education, The Freeman: Ideas on Liberty, May 2001, at <http://www.fee.org/vnews.php?nid=4927>.

³⁰⁰ *Id.*

³⁰¹ Property & Environment Research Center, *Logging for Conservation*, at <http://www.perc.org/privatesolutions/logging.php?s=3>.

³⁰² Property & Environment Research Center, *Wilderness By Reservation*, at <http://www.perc.org/privatesolutions/wilderness.php?s=3>.

³⁰³ Ruth Rosen, *Why Privatize Wilderness?*, SAN FRANCISCO CHRONICLE August 4, 2003, at <http://www.commondreams.org/views03/0804-05.htm>.

³⁰⁴ BLIESE, *supra* note 205, at 110.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

streams and rivers, destroyed many homes, and killed a dozen people.”³⁰⁷ Though privatization of wilderness presents intriguing alternatives to traditional protection routes, it by no means offers a guarantee at surpassing the government’s preservation record.

iii. International Treaties

Wilderness protectors could indirectly safeguard pristine areas from administrative whim by emphasizing their international value and pushing for designation of certain wilderness areas as protected World Heritage Sites. In 1972, the Convention Concerning the Protection of the World Cultural and Natural Heritage (WHC or World Heritage Convention) was adopted by UNESCO to afford an international framework for areas of exceptional value to mankind.³⁰⁸ Article 6 of the WHC states, “whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage...is situated, and without prejudice to property rights provided by national legislation, the State Parties to this convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to cooperate.”³⁰⁹

However, only eighteen World Heritage Sites have been designated in the United States in thirty years, illustrating the limitations of this strategy.³¹⁰ Since the inception of the WHC, other countries comprising a mere fraction of the size of the United States have designated more sites than the United States for the benefit of mankind. For instance,

³⁰⁷ *Id.*

³⁰⁸ World Heritage Convention, *Pathways to Preservation*, at <http://whc.unesco.org/nwhc/pages/doc/main.htm>.

³⁰⁹ John C. Kunich, *Fiddling Around While the Hotspots Burn*, 14 GEO. INT’L ENVTL. L. REV. 179, 195 (2001) [hereinafter Kunich].

³¹⁰ *Europe and North America: United States of America*, at <http://whc.unesco.org/nwhc/pages/sites/main.htm>.

Italy, a country approximately the size of Arizona, has designated 35 World Heritage sites, nearly double that of the United States.³¹¹

As with many other international treaties, lack of meaningful enforcement mechanisms constitutes the overarching flaw of the WHC system.³¹² No sovereign power exists to punish a country's abuse of a World Heritage Site except listing of the site as "threatened," which hardly presents a consequential penalty to a country that elects to forgo compliance.³¹³ Additionally, some treaties bear the reputation of being "so weakened with exceptions, qualifiers, reservations, and discretionary provisions that by the time they are acceptable to most nations they are powerless to achieve their stated purpose."³¹⁴

Nevertheless, two-thirds of the World Heritage Sites in the United States consist of wilderness areas.³¹⁵ Some of the sites protected by the World Heritage Convention are the majestic national parks of the United States, including Yosemite National Park, Redwood National Park, Yellowstone, Mesa Verde, Grand Canyon National Park, and Carlsbad Caverns National Park.³¹⁶ International treaties potentially could override administrative agency decisions regarding where to extract commodity resources. Though such treaties are not always effective, they would improve wilderness protections in countries with comparatively high rates of government accountability, like the United States.

³¹¹ *Italy, Geography*, at <http://geography.about.com/library/cia/blcitaly.htm>

³¹² Kunich, *supra* note 309.

³¹³ *Id.* Article 11(4). The WHC also estimates the costs of saving the site.

³¹⁴ *Id.* at 207.

³¹⁵ *Europe and North America: United States of America*, at <http://whc.unesco.org/nwhc/pages/sites/main.htm>.

³¹⁶ *Id.*

iv. Environmental Justice Movement

The greater incorporation of the environmental justice movement into the wilderness protection agenda might also help to increase public support for conservation.³¹⁷ Mainstream environmentalism, which is stereotyped as being an economically privileged philosophy, is generally viewed as a distinct entity from the environmental justice movement.³¹⁸ Traditionally, environmental justice issues center on “effort[s] to fight the placement of polluting industries in poor, minority areas.”³¹⁹ Environmental justice issues are appropriate, however, whenever the location of a project has environmental, social, and economic effects on local communities.³²⁰

Integrating the wilderness agenda with the environmental justice movement “may provide an opportunity in which environmentalists may more effectively regain part of what first jump-started the movement: grassroots support at the local level.”³²¹ Many indigenous tribes in the American West protest resource extraction and destruction of the land that represents an essential part of their ancestral culture.³²² For example, the Gwich’in tribe of Alaska addresses the protection of the Arctic National Wildlife Refuge as a matter of environmental justice.³²³ Tribe representatives say: “[t]he Gwich’in have the inherent right to continue our way of life; this right is recognized and affirmed by

³¹⁷ Davies, *supra* note 56, at 354.

³¹⁸ ROGER W. FINDLEY, ENVIRONMENTAL LAW IN A NUTSHELL 297-318 (5th ed. 2000) (describing separation between environmental justice movement and mainstream environmentalism by failing to reference environmental justice in book).

³¹⁹ Bonnie Docherty, *Maine’s North Woods: Environmental Justice and the National Park Proposal*, 24 HARV. ENVTL. L. REV. 537, 541 (2000) [hereinafter Docherty].

³²⁰ *Id.*

³²¹ Davies, *supra* note 56, at 354.

³²² Indigenous Environmental Network, at www.ienearth.org. This site is an indigenous environmental network dealing with environmental justice issues related to wilderness protection.

³²³ *Gwich’in Steering Committee*, at www.alaska.net/~gwichin/.

civilized nations in the international convention of human rights.”³²⁴ On the other side of the issue, pro-development parties argue that environmental justice should preserve their right to log, mine, hunt, or whale, since the tradition is an essential part of the community and their families.³²⁵ Thus, the environmental justice argument potentially could be argued against wilderness preservation. Nevertheless, that historically disadvantaged minority groups lose an integral part of their heritage for commodity uses of land is a compelling argument for the wilderness protection movement to protect some tracts of land.

V. Conclusion

The Sitka community, bustling through crisp Alaskan days, represents what wilderness protectors hope is America’s new relationship with wilderness. When a timber company lays bare the face of a mountain, discharges its waste into the purest streams of our country, and strips away the habitat of our endangered national bird, citizens of the United States must object. Rescuing wilderness in the United States for recreation, tourism, and preservation would not only be a testament to future generations, but to the foresight and intelligence of our own.

This essay does not argue for legislative change as the best method of wilderness protection because such reform presents an easy or perfect solution. To the contrary, it implicitly acknowledges that no foolproof system to protect wilderness exists. The analysis focuses on finding durable and reliable methods of protecting wilderness and eschews excessive dependence on a singular approach.

³²⁴ *Id.*

³²⁵ Docherty, *supra* note 319.

The inherent irony in current wilderness law is that its greatest weakness impels its greatest strength. The lack of cohesiveness and organization generates confusion, but also allows for a variety of versatile approaches in Congress, in state legislatures, in town meetings, in local neighborhoods, and in courtrooms to instigate change in wilderness law. Though the current state of wilderness law is sometimes confusing due to administrative disorganization, unpredictable jurisprudential roadblocks, and arduous designation processes, this confusion predicates the underlying strength of the system. No perfect avenue to wilderness protection currently exists, but the sheer number of avenues to pursue promises that when one approach disappoints, another may pleasantly surprise. Inspiration, energy, and innovation has sufficed in the past and will suffice in the future to rescue a part of the American wilderness, whether it be one tree, one forest, or one person's love for the beauty that pre-dated America itself.