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Public Lands

A Brief History of America’s Public Lands

John D. Leshy

Introduction

This chapter summarizes the history of America’s public lands, those owned and stewarded by the U.S. government. These 620 million acres comprise nearly 30% of the nation’s real estate. Almost all are overseen by four executive-branch agencies: the Bureau of Land Management (BLM), National Park Service (NPS), and U.S. Fish & Wildlife Service (FWS) in the Department of the Interior, and the U.S. Forest Service (USFS) in the Department of Agriculture. Generally open to all, they are managed primarily for conservation and recreation. The image below shows the extent of the lands and their managing agencies.

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1 Excerpted and adapted from JOHN D. LESHY, OUR COMMON GROUND: A HISTORY OF AMERICA’S PUBLIC LANDS (2022).
2 Congress has no fixed definition of “public lands.” Compare, e.g., 43 U.S.C. § 1702(e) (only lands managed by the BLM), with 16 U.S.C. § 1332(e) (lands managed by the BLM or the Forest Service), and with 78 Stat. 985 (1964) (a more inclusive definition in legislation establishing the Public Land Law Review Commission).
3 In the map that follows, Alaska and Hawaii are not to scale; Alaska, for example, has more than twice the acreage of Texas. The United States also owns hundreds of millions of acres of submerged lands offshore.
Their extent surprises many, with a typical response being, “I had no idea—how did that happen?” Of course, it didn’t “just happen”—it came about because of a long series of political decisions made by our representatives in the government. Those decisions form the core of the story of American’s public lands.

The heart of the story begins late in the nineteenth century, when Congress and the executive became serious about conserving significant amounts of land in national ownership. The chart below shows how public-land policy has evolved. The solid line reflects, in ten-year increments, the amount of acreage (shown on the left-hand axis) held permanently in national ownership. The dotted line reflects the amount of acreage generally protected from mining, logging, roadbuilding, and other intensive uses.
Almost all the decisions to hold these lands in national ownership came after—usually long after—the United States acquired title to these lands from Native Americans and from foreign governments. Native Nations usually lost their lands through a series of events after 1492 that began with their frequently brutal dispossession by an evolving cast of characters—miners, settlers, speculators, and others—often backed by the military force of European nations and their successor, the United States. Some of those advocating for holding and protecting public lands, like almost all their contemporaries, regarded Native Americans and their cultures as inferior, and federal land managers have not always shown proper respect for Native Americans and their cultures. But progress is being made. Modern efforts by Tribes to gain greater influence over public lands to which they have ancestral ties have, as noted further below, had considerable success.

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The Principal Theme of Public-Land Policy

The history of America’s public lands shows that, from the nation’s very beginning, these lands have tended to unite rather than divide the nation, although the struggle to end slavery did complicate public-land policy in the decades leading up to the Civil War. Since that conflict, the major political parties have mostly agreed on the importance of not only holding more and more lands in U.S. ownership but also protecting them so that all may have opportunities to recreate in, learn from, and be inspired by their rich natural and cultural resources. Further, most public lands have been established and safeguarded not through a national land grab over local and state opposition but through grassroots petitions and support from state governments.

Who Takes the Lead: The Executive or Congress?

A common view of public-land history is that Congress has usually remained on the sidelines while the executive branch of government has taken the lead on making decisions about public lands. This was somewhat true until the 1960s. Although the Constitution’s Property Clause gives Congress the authority to make “all needful Rules and Regulations” regarding the public lands, it was not uncommon for the executive branch unilaterally to “withdraw” areas of public lands from certain laws like the Homestead Act that aimed to transfer lands out of federal ownership. The Supreme Court has generally upheld such executive “withdrawals,” relying on Congress’s implicit (and sometimes explicit) acceptance of them after the fact.

Further, from the 1890s into the first few decades of the twentieth century, Congress enacted laws that explicitly vested the executive with broad authority to safeguard lands in national ownership. In 1891, for example, it authorized the president to hold public lands in what came to be known as “forest reserves.” Over the next couple of decades, largely in response to petitions

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5 U.S. CONST. art. IV, § 3.
7 26 Stat. 1095, 1103 (1891).
from states and from grassroots interests, both Republican and Democratic presidents used this authority to create most of the national forests in the western third of the conterminous states and in Alaska. In 1906, Congress enacted the Antiquities Act, which authorized the president to protect, as national “monuments,” features of “historic or scientific interest” on public lands.\(^8\)

Eighteen of the twenty-one presidents who have served since then—nine Republicans and nine Democrats—have used this authority to establish some 150 protected areas covering well over 100 million acres of public lands onshore. In 1910, Congress enacted legislation confirming the president’s sweeping power to “withdraw” tracts of public lands from “settlement, location [of mining claims], sale, or entry” for unspecified “public purposes.”\(^9\)

Congress generally put its stamp of approval on the executive’s use of these protective authorities. It almost never modified any presidentially created forest reserves, and in 1897, directed that they be managed to “improve and protect the forests within the reservation,” among other things.\(^10\) It did much the same with presidential use of the Antiquities Act. In fact, about half of the several dozen national “parks” that Congress has established on public lands were first protected as national “monuments” by presidents using the Antiquities Act.\(^11\)

In the first decade of the twentieth century, President Theodore Roosevelt moved vigorously to use public lands to protect wildlife and their habitat, and Congress soon followed his lead with numerous statutes directed to the same end.\(^12\) Eventually, in the 1920s and 1930s, Congress launched major

\(^8\) 34 Stat. 225 (1906). The statute used the label “monument” to distinguish areas protected under it from national “parks,” a label Congress had made its prerogative to bestow.

\(^9\) 36 Stat. 847 (1910). Although this statute, commonly known as the Pickett Act, called such withdrawals “temporary,” it also provided that they remained in place until reversed by presidential or congressional action, and many were effectively permanent.

\(^10\) 30 Stat. 35 (1897). In 1907 Congress relabeled them “national forests.”


\(^12\) 33 Stat. 614 (1905); 34 Stat. 607, 536–37, 3263 (1906).
programs to acquire prime wildlife habitat, especially along the coasts and in the middle of the country, principally to reverse a sharp decline in the population of migratory birds.\textsuperscript{13}

In 1911, with broad bipartisan support, Congress enacted legislation giving the executive authority to “purchase such lands as … may be necessary to the regulation of the flow of navigable streams.”\textsuperscript{14} The immediate purpose was to reduce erosion and destructive flooding by acquiring and restoring to health logged-over lands in New England and the South. In a gesture of comity, Congress included a requirement that states consent to the use of the authority within their borders.\textsuperscript{15} The legislation led to the purchase of more than 20 million acres and the establishment of fifty-two national forests in more than two dozen states in the East, South, and Midwest.

Altogether, these congressional acquisition programs eventually resulted in almost all the protected public lands now found in the national parks, wildlife refuges, and forests in the eastern two-thirds of the conterminous states. Most were acquired from willing-seller private owners but some—like most of the once-private lands now found in iconic national parks like the Everglades in Florida and Big Bend in Texas—were acquired by the states themselves and donated to the nation to become national parks.

\textit{The Judiciary Defers}

The courts almost never interfered with this process by which Congress gave the president and executive-branch agencies broad power to safeguard more and more land in public ownership, and the executive branch vigorously exercised that power. Since the Civil War, all the Supreme Court’s decisions addressing the breadth of Congress’s constitutional power over public lands, most of them unanimous, have spoken of the power in sweeping terms.\textsuperscript{16} Equally important, the Court and the lower federal courts

\begin{footnotesize}
\textsuperscript{13} 43 Stat. 650 (1924); 45 Stat. 1222 (1929); 48 Stat. 401 (1934).
\textsuperscript{14} 36 Stat. 961 (1911). This statute is known as the Weeks Act, after its prime sponsor, Rep. John Weeks (R-Mass.).
\textsuperscript{15} Id.
\end{footnotesize}
have generally left the more political branches of government to work things out through the political process.\footnote{17}{States, 220 U.S. 523 (1911); Utah Power & Light v. United States, 243 U.S. 389 (1917); Cameron v. United States, 252 U.S. 450 (1920); United States v. Hunt, 278 U.S. 96 (1928); United States v. City & County of San Francisco, 310 U.S. 16 (1940); Kleppe v. New Mexico, 426 U.S. 529 (1976); United States v. Locke, 471 U.S. 84 (1985).}

\textit{Congress Takes a Leadership Role}

In the 1960s, Congress began to recapture a good deal of the authority it had earlier delegated to the executive branch, and this ultimately led to more protections for more public lands. Its first major step in that direction was the Wilderness Act of 1964. It established a new National Wilderness Preservation System consisting of public lands that were generally to remain free from roads, motorized vehicles, and extractive activities like logging and mining.\footnote{18}{78 Stat. 890–96 (1964).} Congress made itself the gatekeeper, requiring legislation to put lands in the system.\footnote{19}{\textit{Id.} at 891–92.}

The Wilderness Act ushered in an era of legislative “zoning,” where Congress spelled out, in particular laws, what uses could and could not take place on particular expanses of public land. Importantly, zoning by Congress has given people in closer proximity to these lands more political power because a long-standing congressional custom makes it very difficult to enact legislation aimed at particular locales without the approval or acquiescence of the most directly affected members of Congress.\footnote{20}{LESHY, \textit{supra} note 1, at 469.} It has also made these protections more durable, because Congress almost never reverses itself on such matters.

Since 1964, Congress has enacted hundreds of such laws, giving areas labels like wild and scenic river, national recreation area, conservation area, scenic area, and preserve. At last count, the National Wilderness Preservation System has more than 800 separate areas (totaling more than 111 million acres),\footnote{21}{https://wilderness.net/learn-about-wilderness/fast-facts/default.php.} and the National Wild and Scenic River System has 226 separate units.
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(totalling more than 13,000 river miles).\textsuperscript{22} Congress has also created more than three dozen national recreation areas, seventeen national conservation areas, nearly a dozen national seashores, lakeshores, and scenic areas, and numerous other areas with unique labels connoting special protections.\textsuperscript{23} Each of these laws makes conservation and recreation the primary objectives of management and limits agency discretion by ruling out or strongly discouraging roadbuilding, mining, timber harvesting, and the like. Each label brings more visibility to areas’ natural and cultural qualities, attracting more recreational uses and stimulating economic activity aimed at facilitating them.

With strong bipartisan support, Congress has also enacted new management charters, or “organic acts,” as they are known, for all four agencies—BLM and Forest Service in 1976, FWS in 1997, and NPS in 1998. In each, Congress provided more specificity in management objectives, a more detailed process for making decisions, and marching orders to pay close attention to science and the environment.\textsuperscript{24} Altogether, the congressional actions since the Wilderness Act have blurred distinctions among the four agencies. Today, the BLM, the FWS, the NPS, and the Forest Service each looks after many millions of acres in the wilderness system, numerous wild and scenic river segments, and many other places with labels that emphasize protection and conservation.\textsuperscript{25}

\textit{The Growing Influence of Native American Tribes on Public Lands}

Another important development in recent decades is the vigorous effort of Native American Tribes to reclaim their sovereignty and revitalize their cultures, a movement that was marked by President Biden naming Deb Haaland as Secretary of the Interior—the first Native American to hold a cabinet post in

\textsuperscript{23} \textit{LESHY}, supra note 1, at 472–82.
\textsuperscript{25} \textit{LESHY}, \textit{supra} note 1, at 500–02 (BLM), 509–12 (USFS), 528–39 (FWS), 547–48 (NPS).
U.S. history. The modern renaissance has led Tribes to assert more control or influence over those public lands to which they have ancestral and cultural connections. These efforts have had considerable success, taking several different forms.

Congress has responded by enacting the Archeological Resources Protection Act in 1979 and the Native American Graves Protection and Repatriation Act in 1990 and by amending the National Historic Preservation Act in 1992 to extend its protections to resources that are of “traditional religious and cultural importance” to Native American Tribes.26 Congress and the executive branch have also put in place numerous arrangements that have enhanced tribal influence on how public lands in particular locales are managed.27 In a small number of cases, Tribes have made a sufficient political and legal case to be revested with a form of ownership through executive or congressional action.28

The interests of Native American Tribes and public-land-protection advocates overlap a great deal. Federal land-management agencies are now—like their counterparts in many nations around the world—drawing more on the traditional knowledge of Indigenous Peoples for guidance in protecting biodiversity and dealing with the challenges of climate change, such as by using fire as a management tool.29

*The Long-Term Trend Continues*

The overall trend in favor of more protection for more public land has continued even as political polarization has grown. Efforts to end or even reverse the trend have sometimes triggered hiccups—like the so-called “sagebrush rebellion” of the late 1970s and the proposal by President Reagan to sell off 35 million acres of “surplus” public lands to help balance the budget—but no such effort has gained significant political traction. Quite the contrary, Congress has continued to enact, in bipartisan fashion, legislation to protect more lands. Not long after taking office in

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27 LESHY, supra note 1, at 563–74.
28 Id. at 565–71.
29 Id. at 574.
early 2009, for example, President Obama signed an Omnibus Public Land Management Act into law. Most of its constituent parts had been assembled earlier, when Republicans controlled the White House and the House of Representatives. Among other things, it added millions more acres to the wilderness system, established four new national conservation areas, and added three new units to the national-park system.\(^{30}\)

In its first year, the Trump Administration briefly reversed the trend. The president significantly shrank two national monuments that President Clinton and President Obama had established on more than 3 million acres of public land in southern Utah. He also signed into law a bill Congress had passed, on a strict party-line vote, to open the Arctic National Wildlife Refuge (ANWR) in Alaska to oil and gas leasing.\(^{31}\) Neither of these actions had lasting effect. President Biden reversed Trump’s monument downsizing,\(^{32}\) and the ANWR lease sale held shortly before Trump left office was a giant bust, drawing few bids and none from major petroleum companies.\(^{33}\)

Even more telling, before he left office, President Trump signed two major public-land-protection bills into law. Both commanded strong bipartisan support. The first, in 2019, was another so-called omnibus bill. Among other things, it put more than a million acres into the wilderness system and added protections to nearly a million acres of public land in southern Utah not far from the two monuments Trump had earlier downsized.\(^ {34}\) It also made permanent the Land and Water Conservation Fund (LWCF) that Congress had established in 1964 and periodically renewed.\(^{35}\) The LWCF provides a stream of money, derived primarily from petroleum leases on public lands,

\(^{33}\) Tegan Hanlon & Nat Herz, Major Oil Companies Take a Pass on Controversial Lease Sale in Arctic Refuge, NAT’L PUB. RADIO (Jan. 6, 2021).
\(^{34}\) 133 Stat. 580–844 (2019). The Utah law had unanimous support from the Utah congressional delegation.
for federal, state, and local government agencies to buy more land for conservation and recreation.

In 2020, Trump signed the Great American Outdoors Act into law,\textsuperscript{36} It made an even more fundamental change in the LWCF, which had been structured so that each year Congress had to decide how much money to spend of the money that was accruing to it. As a result, between 1965 and 2019, less than half of the more than 40 billion dollars accruing to it had been disbursed. The Great American Outdoors Act made the LWCF a true revolving fund by permitting its revenues to be spent as they are accrued, a huge victory for public-land conservation.

\textit{Conclusion}

According to practically every opinion poll taken for many years in the West as well as in the rest of the nation, large majorities of Americans across both political parties want more and better-protected public lands.\textsuperscript{37} They agree, in other words, that holding and protecting large amounts of public land in national ownership, open to all, has been extraordinarily visionary and beneficial. The public lands should therefore be regarded as a political success story, showing the process working as it is supposed to work, where Congress responds to and accurately reflects public opinion. Bringing more attention to success stories is particularly important in our polarized era, where many are skeptical that anything good can come out of the nation’s capital.

America’s public lands have long made the United States a world leader in land conservation. They have helped foster global networks of protected lands that today include biosphere reserves (now numbering more than 700 in more than 120 nations, including a dozen in the United States, all on public lands); world heritage sites that celebrate nature (now numbering more than 200 in nearly 100 nations, including 20 in the United States, mostly on

\textsuperscript{36} 134 Stat. 686–87 (2020).

\textsuperscript{37} As just one example, the State of the Rockies Project of Colorado College has, for many years, annually polled equal numbers of Republicans and Democrats in several western states on a variety of public lands and related issues. See https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2023.html.
public lands); and wetlands of international importance (now numbering well over 2,000 in more than 150 nations, including 40 in the United States that are, by acreage, nearly all on public lands). 38

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38 LESHY, supra note 1, at 597.