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Public Land Policy After the Trump Administration: Is This a Turning Point?

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Public Land Policy After the Trump Administration: Is This a Turning Point?

John D. Leshy*

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* Distinguished Professor Emeritus, University of California, Hastings College of the Law. This is a modestly edited version of the Ruth Wright Distinguished Lecture in Natural Resources I gave at University of Colorado Law School on February 27, 2020. I appreciate helpful comments I received from numerous people, including Peggy Karp, Charles Wilkinson, Molly McUsic, Mark Udall, and Jessica Serrano, editor-in-chief of this law review. Errors are my own.

INTRODUCTION

My forthcoming book¹ on the history of America's public lands describes how, after the Civil War, a bipartisan consensus gradually emerged in favor of the national government owning large tracts of land and managing them for broad public purposes. It culminated in the public lands we see today—our systems of national parks, forests, wildlife refuges, and lands managed by the Bureau of Land Management (“BLM”).

A few graphs show, in ten-year increments, the progression of the nation's public land policy.

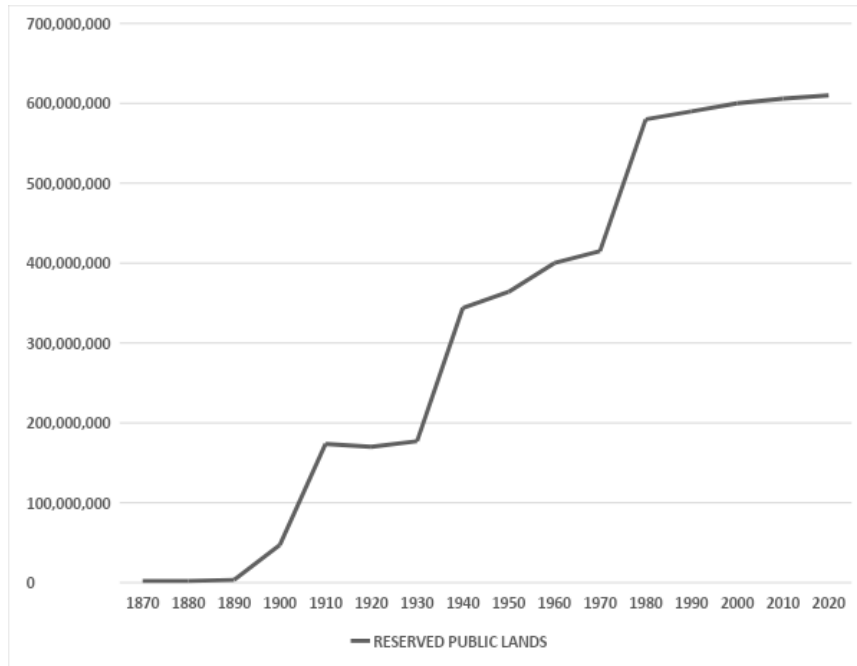
Graph 1 shows the growth over time in what I call “reserved” lands, which now encompass more than six hundred million acres.²

These are the lands the nation decided to hold in national ownership over the long term. These decisions were made by Congress and, in some cases, by the executive branch. The United States had earlier gained title to most of them from foreign governments and Indian tribes by purchase or, sometimes, by force. About ten percent of them, some sixty million acres, were acquired by purchase or donation from states and private owners beginning a little over a century ago.³

¹ The working title is *OUR COMMON GROUND: A HISTORY OF AMERICA'S PUBLIC LANDS* (Yale University Press, forthcoming in 2021).

² The vertical column on the left of each graph refers to acres of public land. Calculating the acreage in these graphs required exercising judgment about several issues including, for example, what should be considered a permanent versus a temporary reservation. None of these graphs include submerged lands off the nation's coasts nor minerals the United States sometimes reserved when it conveyed the land surface to others.

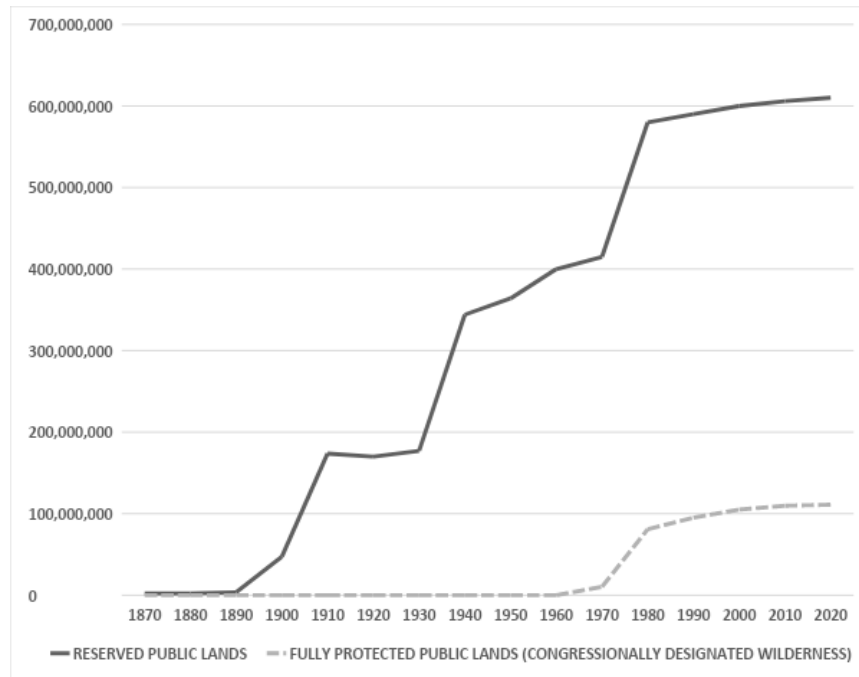
³ The first major acquisition program was authorized by the Weeks Act, 36 Stat. 961 (1911).



Graph 1

The next few graphs illustrate how much public land the Trump administration currently has authority to develop intensively, without securing permission from Congress.

Graph 2 shows the growth over time of what I call “fully protected public lands.” These are lands in the National Wilderness Preservation System, sometimes referred to as Wilderness with a capital “W.” They comprise more than 110 million acres, or nearly twenty percent of all public lands.⁴ Unless Congress acts to permit it, the Trump administration cannot build roads or allow mining, logging, or other intensive development on these lands.

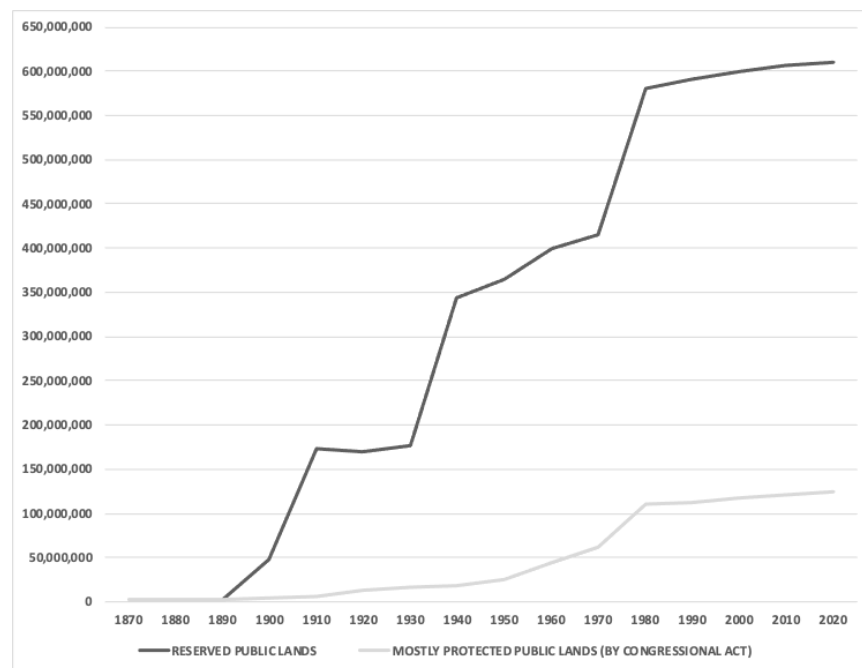


Graph 2

⁴ Specifically, in the National Wilderness Preservation System there are forty-four million acres managed by the National Park Service, thirty-six million acres managed by the Forest Service, twenty-one million acres in national wildlife refuges, and nine million acres managed by the BLM.

Graph 3 shows the growth over time of what I call “mostly protected public lands,” which today includes a total of 125 million acres, or a little more than twenty percent of all public lands. On these lands, Congress has discouraged—but not totally outlawed—road building and other intensive development, leaving some room for an aggressively development-minded executive to act.⁵

Included in this category are all the lands in the national park and wildlife refuge systems that Congress has not designated as Wilderness, all national recreation areas and national scenic areas managed by the Forest Service, and all national conservation areas and wilderness study areas (“WSAs”) managed by the BLM.⁶



Graph 3

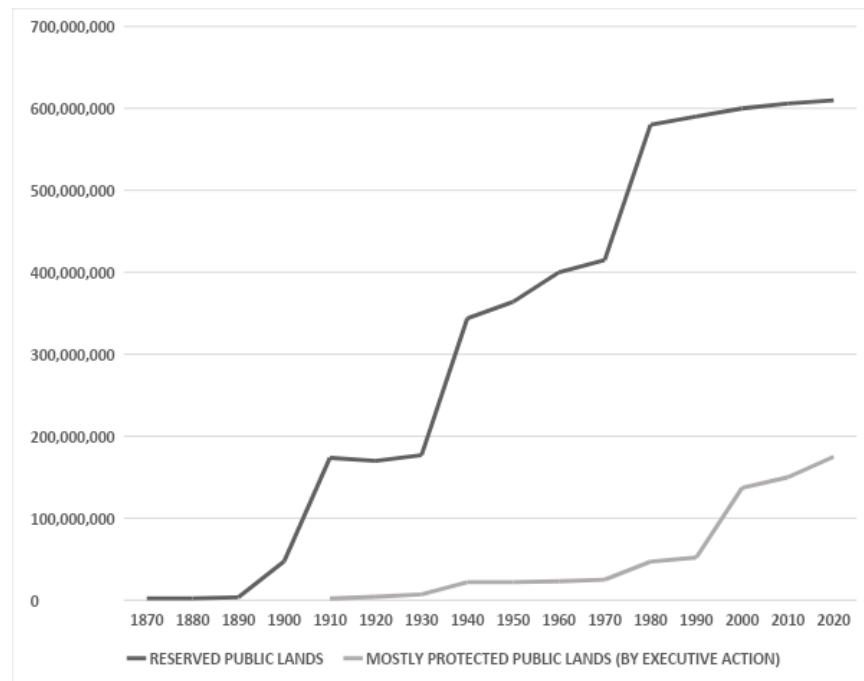
On these lands, congressionally imposed limitations—often reinforced by agency policy—constrain, but do not entirely prohibit, an

⁵ Assembling the data depicted in Graphs 3 and 4 required the exercise of considerable judgment in determining what is prohibited and what is allowed, but I believe the picture they portray is generally accurate.

⁶ Specifically, thirty-six million acres in national park system, sixty-eight million acres in the national wildlife refuge system, four million acres in the national forest system, and seventeen million acres of BLM-managed land.

aggressive executive from building roads and allowing some other forms of intensive development. Given enough time—as in a second presidential term—these constraints could be overcome.

Graph 4 shows the growth over time of what I call “public lands protected by executive action.” On these lands, the executive branch has, by exercising discretion Congress has given it, imposed sharp limits on roadbuilding, mining, logging, and similar activities. Those decisions could be reversed by the Trump administration without further action by Congress. In this category are almost 200 million acres, or a little less than thirty-three percent, of the total acreage of public lands.



Graph 4

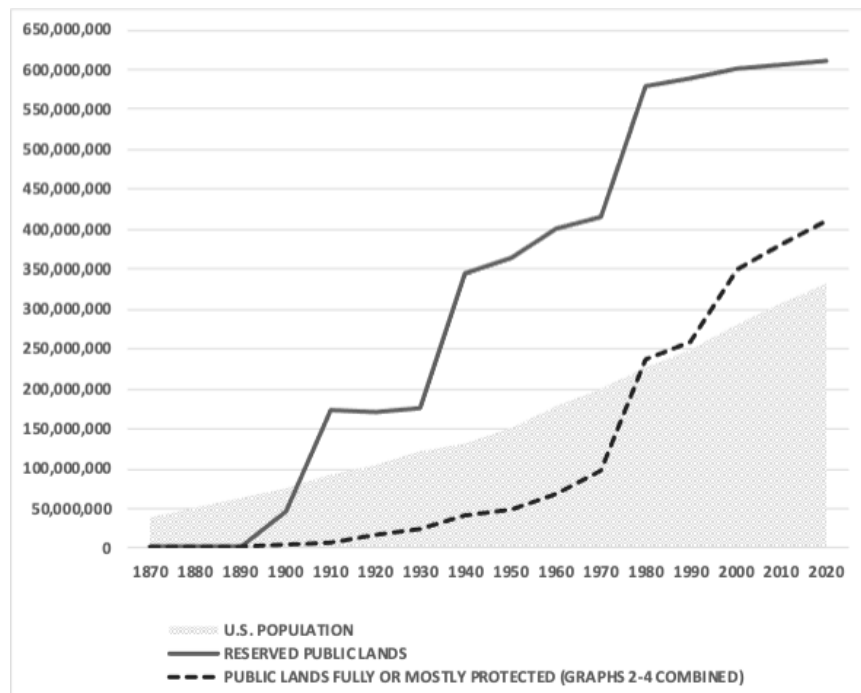
Major examples of lands in this category are the nearly sixty million acres protected by the Forest Service’s roadless rule, some fifty million acres of national forest and BLM lands that the executive has withdrawn from oil and gas leasing,⁷ and some twenty-five million acres outside BLM WSAs that BLM management plans have identified as having wilderness characteristics. Other examples included in this category are lands

⁷ See U.S. Dep’t Interior, Agric., & Energy, *Inventory of Onshore Federal Oil and Natural Gas Resources and Restrictions to Their Development*, 29 (2008), https://www.blm.gov/sites/blm.gov/files/EPCA_III_Inventory_Onshore_Federal_Oil_Gas.pdf.

protected by the Northwest Forest Plan, lands protected by plans designed to keep the sage grouse off the list of endangered species, and lands in the California Desert that BLM has designated for conservation in the Desert Renewable Energy Conservation Plan. Also included here are lands in national monuments managed by the Forest Service (four million acres) and BLM (seven million acres). This assumes the courts ultimately agree with the Trump administration that existing law gives the president authority to abolish or severely downsize national monuments.

Lands in this fourth category—those protected primarily by executive action—are most vulnerable to a change in executive policies. As I will explain below, the Trump administration has already set in motion processes designed to allow for intensive development of a considerable amount of acreage in this category, as well as some acreage in the previous category.

Finally, to sum all this up, Graph 5 shows the cumulative amount of public lands currently protected from most intensive development (adding together data from Graphs 2 through 4) plus U.S. population growth over the same period (using the left hand column to refer to people as well as acres), which shows considerable correlation with the growth of protected lands.



Graph 5

A. *Now, What to Make of This?*

First, it is worth noting that the broad historical trend is almost uniformly toward reservation and conservation. At least until the Trump administration, there was relatively little backsliding, undoing, or retreat.

Libertarians like the late Milton Friedman, Bill Koch, or Peter Thiel would doubtless call what has happened creeping socialism. Conservationists like the late Aldo Leopold, E.O. Wilson, or Bill McKibben would doubtless call it growing enlightenment. For my purposes, it is best regarded simply as our political system operating through representatives chosen by the people to reflect changes in national public opinion and culture.

To some extent this long-term trend correlates with improved scientific understanding of the natural world. For example, the movement to establish what became our national forest system took hold after the Civil War as appreciation grew of the role forested uplands play in making water available for uses downstream.

Overall, however, other influences were more important than science, such as:

- taking patriotic pride in iconic American landscapes;
- reserving open spaces and wildlife habitat for inspiration and public enjoyment;
- stimulating economic activity through scenery-based tourism;
- having regard for future generations; and
- appreciating that government ownership and management could safeguard access to these lands by ordinary folk and prevent domination by powerful entities bent on private profit rather than public benefit.

The political decisions that produced the results depicted in these tables were, with very few exceptions, bipartisan—strongly supported by people and politicians from both major political parties.

My book will discuss how all this played out, illuminating the role played by politicians whose names are mostly unfamiliar today. They include senators like George Vest of Missouri and Reed Smoot of Utah and congressmen like William Holman of Indiana,—whose crucial role in the establishment of the national forest system has been mostly uncredited—John Lacey of Iowa, John Weeks of Massachusetts, Don Colson of Utah, and Edward Taylor of Colorado, as well as presidents like Benjamin Harrison, Grover Cleveland, William Howard Taft, Calvin Coolidge, and Herbert Hoover.

I. ASPINALL AND THE RECAPTURE OF CONGRESSIONAL AUTHORITY

I want to focus briefly on one unlikely hero in this story, Colorado Congressman Wayne Aspinall. The powerful chair of the House Interior Committee from 1959 until 1973 is remembered today, if at all, as a cantankerous advocate for mining, drilling, logging, and grazing public lands.

But he should be remembered for something quite different. More than anyone, he is responsible for fundamentally reorienting how most public land policy has been made in the last few decades.

Aspinall fervently believed that Congress had, ever since authorizing the president to create the national forest system in 1891, relinquished too much power over public land policy to the executive branch. He led a crusade to have Congress recapture much of that authority, and he succeeded.

His success helped pave the way for safeguarding hundreds of millions of acres of public lands, in particular the protected lands shown on Table 2 and a good many of those shown on Graph 3.

Here is how it happened. Aspinall insisted, in the congressional deliberations over what became the Wilderness Act of 1964, that Congress make itself the gatekeeper of the National Wilderness Preservation System. That meant, and still means, that not a single acre of public land can be included in that system without Congress's specific approval.

There is irony here: when he drew that line in the sand, Aspinall, no fan of the idea of preserving wild nature on public lands, anticipated that Congress would be more reluctant to designate Wilderness than the executive branch.

He badly underestimated how much that idea would appeal to the American people and how much success grassroots political campaigns for Wilderness legislation would have. Rather than putting the brakes on the movement to protect uncluttered and wide-open spaces, Congress, with bipartisan support, hit the accelerator. This is plainly revealed in Graph 2.

It is also worth noting that Congress sometimes had to override resistance from the executive branch to do this. One concrete example: in the early 1980s, Ronald Reagan's first Interior Secretary, James Watt, took steps to issue oil and gas leases in Wilderness. Watt's action was perfectly legal because, in a compromise with mining interests in the 1964

Wilderness Act, Congress gave the Interior Secretary twenty more years to issue new mineral leases in Wilderness areas.⁸

But Watt’s proposal created a firestorm of opposition across the country, including in the West from the likes of Republican Senators Jim McClure of Idaho and Malcolm Wallop of Wyoming. A bipartisan coalition led Congress to approve a measure preventing Watt from issuing the leases, and President Reagan signed it into law.⁹

Not long afterward, in a 1985 speech, Arizona Governor Bruce Babbitt described what was happening. The last few years, he said, would be remembered as a time when advocates for protecting public lands sharpened their message, broadened their base, and mounted a strong grassroots campaign to replace the idea of “multiple use”—which historically meant that most public lands managed by the Forest Service and the BLM were fully open to logging and mining—with the idea of “public use.” The latter, Babbitt said, recognizes “the new reality that the highest, best and most productive use of western public land will usually be for public purposes—[protecting] watershed[s], wildlife and recreation.”¹⁰

A. Babbitt Had It Right and Republicans Got the Message

Before he left the presidency in early 1989, Ronald Reagan had signed legislation designating well over ten million acres of public land as Wilderness, most of it approved by a Senate controlled by the Republicans. That was more than any other president in American history had done, except for the special case of Alaska.¹¹

In fact, more than half of the fifty-four million acres of Wilderness outside of Alaska were the result of acts of Congress signed into law by

⁸ 16 U.S.C. § 1133(d)(3) (2018).

⁹ Pub. L. 97-276, 96 Stat. 1186 (1982); see Stephen S. Edelson, *The Management of Oil and Gas Leasing on Federal Wilderness Lands*, 10 B. C. ENVTL. AFF. L. REV. 905, 917–8 (1982); see also Frank Gregg, *Public Land Policy: Controversial Beginnings for the Third Century*, in *GOV. & ENVIRONMENTAL POLITICS* 171–2 (Michael J. Lacey, ed., 1992). More detail on post-Wilderness Act congressional actions that imposed new limits on development in Wilderness can be found at Nat. Res. Law Ctr., *Special Use Provisions in Wilderness Legislation* (2004), <https://winapps.umt.edu/winapps/media2/wilderness/toolboxes/documents/MSP/Spec.%20Use%20Provisions%20in%20Legislation.pdf>.

¹⁰ Babbitt’s speech is quoted in Gregg, *supra* note 9, at 177.

¹¹ Alaska’s unique history and vast size resulted in Congress legislating large amounts of Wilderness there in 1980 in a single piece of legislation, the Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487, 94 Stat. 2371 (1980).

six different Republican presidents. More than one quarter moved through Congresses where Republicans were in control of at least one chamber.

Enacting Wilderness legislation was only one of several ways Congress fulfilled Aspinall's mission by recapturing authority from the executive. Dozens of times since 1970, Congress has used other designations to protect large tracts of public lands. It has established national conservation areas on millions of acres of BLM land, established national recreation areas and national scenic areas on millions of acres of national forests, and employed several other labels to protect millions of additional acres. Activities like roadbuilding, mining, drilling, and logging are limited on these lands, although—as I noted earlier—Congress left some room for an aggressive executive to allow some such activities.

II. EFFECTS OF THE CONGRESSIONAL RECAPTURE OF AUTHORITY

Aspinall's success in his crusade to have Congress recapture authority had a number of important effects that are worthy of notice, but often escape attention.

One was to enhance the political influence of members of Congress representing areas directly affected by what Congress was doing—in effect, to give local opinion a louder voice in the political process. This is because, generally speaking, Congress as a whole finds it nearly impossible to protect a particular area of public land—as Wilderness or anything else—if the congressional representatives from that area object. Regardless of party or ideology, members of Congress are very uncomfortable dictating how public lands in other members' districts will be managed, for fear the tables could be turned on them.

Exceptions to this powerful institutional norm are very rare. The principal one was Congress's enactment of the Alaska National Interest Lands Conservation Act in 1980. Alaska's congressional delegation had great influence over its terms but could not stop it entirely. This was only because protection advocates mounted a massive several-year-long national campaign arguing—as the legislation's title announces—that the “national interest” trumped the local interest in making decisions about how Alaska's magnificent public lands were to be managed.¹²

¹² Another example was Congress's 1987 decision to site the nation's high-level nuclear waste repository on public lands in Nevada over the fierce opposition of the state's members of Congress. 42 U.S.C. §10172 (2018). Ironically, Presidents Obama and—

In addition to giving local congressional representatives heavy influence over outcomes, another effect of Congress recapturing authority has been to promote cooperation and compromise across party and ideological lines. This has especially been true when Congress and the White House are not controlled by a single party, which has been the case for most of the past forty years. It has also given decisions to protect public lands more durability. Congress has almost never weakened, much less rescinded, protections for public lands once it has enacted them.

Yet another little-noticed effect of Congress recapturing authority has been a significant blurring of distinctions among the public land managing agencies. For example, each of these four agencies—the BLM, Forest Service, National Park Service, and Fish and Wildlife Service—now manages many millions of acres of Wilderness in a basically identical fashion following the strict requirements of the Wilderness Act.¹³

Enacting new agency “organic acts” or fundamental management charters is another way Congress has blurred distinctions among agencies while reasserting its authority over public lands. These acts prescribe how agencies are to make decisions when they exercise what management discretion Congress has given them.

Congressional modernization of organic acts began in 1976 with enactment of the Federal Land Policy and Management Act for BLM and the National Forest Management Act for the U.S. Forest Service.¹⁴ It culminated in major reforms Congress made in the organic acts for the U.S. Fish and Wildlife Service and the National Park Service in the late 1990s.¹⁵

This modernization has given decision making across the four agencies many common characteristics. Each must prepare and follow comprehensive management plans, each must pay attention to science, each must look to the long term and carefully weigh environmental and other consequences, and each must allow opportunities for public participation.

recently—Trump have stalled implementation of this legislation, at least in part to curry favor with Nevadans. Timothy Gardner, *Trump Halts Support for Yucca Mountain, Nevada Nuclear Waste Dump*, REUTERS (Feb. 6, 2020, 5:29 PM), <https://www.reuters.com/article/us-usa-trump-nuclearpower-yucca/trump-halts-support-for-yucca-mountain-nevada-nuclear-waste-dump-idUSKBN20101J>.

¹³ See *supra*, note 4.

¹⁴ Federal Land Policy and Management Act, Pub. L. No. 94-579, 90 Stat. 2744 (1976); National Forest Management Act, Pub. L. No. 94-588, 90 Stat. 2949 (1976).

¹⁵ National Wildlife System Refuge System Improvement Act, Pub. L. No. 105-57, 111 Stat. 1252 (1997); National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497 (1998).

The Endangered Species Act¹⁶ is another prominent way Congress has mandated uniformity. It requires each of the four agencies to pay attention to biodiversity and to protect imperiled species on all the lands it manages.

The organic acts, the Endangered Species Act, and other modern statutes reflect another technique Congress has used to limit executive discretion and effectively reassert its own authority. It has invited the courts to scrutinize executive agency decisions to ensure they are complying with the laws Congress has enacted. Courts have accepted the invitation, and their decisions have sometimes played a significant role in ensuring that Congress's decisions are implemented.

Congress's reasserting control and blurring distinctions has also made it more common for land managers to move from one agency to another and has discouraged sillier, more destructive aspects of agency competition. It has been a long time since the Forest Service published, as it once did, a map that left national parks as blank spaces, or since a Park Service leader complained when a Forest Service official promoted recreation on national forests at a conference hosted by the Park Service.

Finally, and perhaps most important, the result of Aspinall's crusade has been to give all the public lands a kind of national identity. The general public has come to focus less on which agency is managing public lands and more on the reasons why the lands are being held—and that means, increasingly, to preserve their natural and cultural values.

While I have concentrated so far on what Congress has done, the strong public demand for protecting public lands has also, unsurprisingly, been acted upon by the executive branch—at least until the Trump administration. This is in part because, as Supreme Court Justice Elena Kagan noted (when she was a mere law professor), the president “has a national constituency” and is thus more likely to consider the “preferences of the general public, rather than merely parochial interests.”¹⁷

Graph 4 captures this by showing how a succession of presidential administrations, both Republican and Democratic, have protected large tracts of public lands, using authorities like the Antiquities Act. This has also helped blur distinctions among the agencies, for each agency now manages substantial acreage in national monuments in ways mostly indistinguishable from one another.

¹⁶ The Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2018).

¹⁷ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2335 (2001).

Like Congress, the executive has used other labels to achieve similar protective ends. For example, as mentioned earlier, it has protected nearly sixty million acres of “roadless” areas in the national forests.

Although the bipartisan tradition in public land policymaking has continued, there have been a few hiccups along the way. Political rhetoric took on a partisan tone when Ronald Reagan declared, in his successful 1980 campaign for the White House, that he was a “sagebrush rebel.” The so-called “sagebrush rebellion” had been launched a year or so earlier, led by a group of ranchers and libertarians who sought to transfer ownership of many public lands to states or the private sector.¹⁸ After he won, Reagan appointed James Watt as Interior Secretary and for a time “essentially relinquished” public land policy to the libertarian wing of the Republican Party.¹⁹

But the idea of divesting ownership of public lands never attracted mainstream support. As this became clear, President Reagan retreated. Congress continued passing bills adding protections to millions of acres of public lands. Indeed, before leaving office, Reagan signed more Wilderness legislation than any president in U.S. history, Jimmy Carter excepted.

Republican rhetoric hostile to protecting public lands did make a small comeback in the mid-1990s, although the “Contract with America” that was the centerpiece of the 1994 campaign by which the Party captured control of both houses of Congress for the first time since 1952 made no mention of public lands. The Republican Party’s libertarian wing succeeded in inserting in the party’s 1996 platform a call for a “thorough review” of U.S. public lands aimed at retaining only “unique property worthy of national oversight” and transferring the rest to state or local governments.²⁰ Then, in September 1996, President Clinton provoked an outcry from the right by establishing the nearly two million-acre Grand Staircase Escalante National Monument in southern Utah.²¹

The anti-public-lands rhetoric helped produce a misconception that partisan gridlock stalled all legislation protecting public lands. But the rhetorical bark lacked bite, for there was no gridlock. Less than two

¹⁸ John D. Leshy, *Unraveling the Sagebrush Rebellion: Law Politics and Federal Lands*, 14 U.C. Davis L. Rev. 317 (1980).

¹⁹ See LOU CANNON, *PRESIDENT REAGAN: THE ROLE OF A LIFETIME* 469 (1991).

²⁰ *The 1996 Republican Party Platform*, CNN (Apr. 7, 2020), <https://www.cnn.com/ALLPOLITICS/1996/conventions/san.diego/facts/gop.platform/platform6.shtml>.

²¹ Proclamation No. 6920, 3 C.F.R. 64 (1996), <https://www.govinfo.gov/content/pkg/WCPD-1996-09-23/pdf/WCPD-1996-09-23-Pg1788.pdf>.

months after Clinton's protective act, he signed into law an Omnibus Parks and Public Lands Management Act that, among other things, added protections, including Wilderness designation, to several additional areas of public lands. It had been guided through the Republican-controlled Congress by Congressman Don Young (R-AK).²² Before Clinton left office, as I have already noted, Congress approved bipartisan bills reforming the organic acts of the national park and wildlife refuge systems.²³

Another hiccup came in 2001. The early months of the George W. Bush presidency contained echoes of the early Reagan administration two decades before. Vice President Dick Cheney and Interior Secretary Gale Norton, a protégé of James Watt, promoted fossil fuel development and openly considered rolling back public land protections like Clinton's national monument proclamations.

But very little rollback actually occurred. Partly, this was because Congress stepped in. For example, it included in an Interior Department funding bill a ban on all mineral leasing within the boundary of any national monument as it existed on January 20, 2001, unless the pertinent monument proclamation specifically allowed it. President Bush signed the bill into law on November 5, 2001.²⁴

In 2002, Frank Luntz, the Republican messaging strategist who had been the principal author of the 1994 "Contract with America," bluntly advised Republicans not to challenge what he called "the most popular federal programs today," namely, "conservation of public lands and waters through parks and open spaces."²⁵

Bush got the message. Before he left office in 2009, Bush did much more than simply keep prior protections in place. He signed into law numerous bipartisan bills protecting areas of public lands, and broke important new ground by using the Antiquities Act offshore, establishing

²² Omnibus Parks and Public Lands Management Act of 1996, Pub. L. No. 104-333, 110 Stat. 4093, 4093-4281 (1996).

²³ National Wildlife System Refuge System Improvement Act, Pub. L. No. 105-57, 111 Stat. 1252 (1997); National Parks Omnibus Management Act of 1998, Pub. L. No. 105-391, 112 Stat. 3497 (1998).

²⁴ Pub. L. 107-63, § 331, 115 Stat. 414, 471 (2001).

²⁵ Memorandum from Luntz Research Companies to President George W. Bush, *The Environment: A Cleaner, Safer, Healthier America* (2002), https://www.sindark.com/NonBlog/Articles/LuntzResearch_environment.pdf.

four huge marine national monuments in U.S. waters in the Pacific Ocean.²⁶

The increasing engagement of Indian tribes on public lands issues in the post-Aspinall era also deserves mention because tribes have almost uniformly advocated for more protection for more lands. Their engagement has produced results. A number of congressional and executive actions have given tribes more influence over public lands to which they have ancestral ties. The most notable was President Barack Obama's establishment of the 1.35-million-acre Bears Ears National Monument in southeastern Utah, responding to a petition by a consortium of tribes.²⁷

III. NOW TO THE TRUMP ADMINISTRATION

First, the bottom line: by practically all accounts, the Trump administration has been the most hostile in many decades to protecting public lands.

So far, however, President Trump has not advocated stripping the United States of ownership of these lands. To the contrary, in campaigning for his party's nomination in 2016, he understood better than any of his rivals that this cause appealed only to his party's fringe libertarians. And so, a few days before the Nevada caucuses in February 2016—when his rivals like Senator Ted Cruz were criticizing U.S. ownership of so much land—Trump told *Field and Stream* magazine the public lands were “magnificent,” and therefore the United States should keep and be “great stewards” of them.²⁸

A few months later, at the GOP convention, the libertarian wing did succeed in putting a plank in the Republican Platform that called on Congress to “immediately pass universal legislation providing for a timely

²⁶ Examples included bills jointly crafted by Senators Harry Reid (D-Nev.) and John Ensign (R-Nev.) that established a new national conservation area and designated several hundred thousand acres of Wilderness on Nevada public lands. Pub. L. 107-206, 116 Stat. 2012 (2002); Pub. L. 108-424, 118 Stat. 2403, 2403-19 (2004); Pub. L. 109-432, 120 Stat. 2922, 3028-30 (2006). Examples of Bush marine monument proclamations are at 74 C.F.R. §§ 1555, 1565, 1577 (2009).

²⁷ See OFFICE OF THE PRESS SECRETARY, PRESIDENTIAL PROCLAMATION: ESTABLISHMENT OF THE BEARS EARS NATIONAL MONUMENT (2016), <https://obamawhitehouse.archives.gov/the-press-office/2016/12/28/proclamation-establishment-bears-ears-national-monument>.

²⁸ Anthony Licata, *Q&A: Donald Trump on Guns, Hunting, and Conservation*, FIELD & STREAM (Jan. 22, 2016), <https://www.fieldandstream.com/articles/hunting/2016/01/qadonald-trump-on-guns-hunting-and-conservation/>.

and orderly mechanism” by which the United States would convey some public lands to the states. But Trump never mentioned this plank in the campaign, even though the right-wing *National Review* had earlier suggested that his refusal to support the idea could cost him politically in Nevada and other western states with large amounts of public land.²⁹

The *National Review* was wrong. Trump’s support for keeping and being a “great steward” of the “magnificent” public lands helped him carry Alaska, Idaho, Utah, Arizona, Montana and Wyoming, most by very substantial margins. Once elected, Trump named as his first Secretary of the Interior former Montana Congressman Ryan Zinke, who at the 2016 convention had resigned from the Platform Committee in protest over the plank advocating divestiture of public lands.

Just four days after his inauguration, Trump’s stance was further vindicated when Utah Republican Congressman Jason Chaffetz introduced a bill calling for the sale of more than three million acres of public lands. It was so roundly criticized that Chaffetz withdrew it nine days later, admitting it was a huge mistake.³⁰

Trump’s pro-public lands rhetoric worked to give his administration political cover to pursue its principal objective—which was to transfer as much control as possible to fossil fuel companies and other industrial enterprises. For those who believe in the political maxim “follow the money,” this was not surprising, for nearly all the political money these interests donate goes to Republicans.³¹ Nevertheless, the Trump administration’s efforts have been almost breathtaking in their breadth and depth.

The move that attracted the most attention came in late 2017, when President Trump signed executive orders severely downsizing both President Obama’s Bears Ears National Monument and President Clinton’s Grand Staircase-Escalante National Monument in southern Utah. His action removed protections from some two million scenic acres containing many thousands of cultural sites. A study published in *Science*

²⁹ Alexis Levinson, *Nevada, the Great Unknown*, NAT’L REV. (Feb. 17, 2016, 9:00 AM), <https://www.nationalreview.com/2016/02/nevada-caucus-unpredictable-trump/>.

³⁰ Katy Enders, *Republicans Back Off Bill to Sell 3.3m Acres of Public Land After Outcry*, GUARDIAN (Feb. 2, 2017, 2:24 PM), <https://www.theguardian.com/environment/2017/feb/02/republican-selling-public-lands-bill-withdraw-jason-chaffetz>.

³¹ See *Oil & Gas: Long-Term Contribution Trends*, OPENSECRETS.ORG, <https://www.opensecrets.org/industries/totals.php?ind=E01++> (last visited Apr. 9, 2020).

magazine described it as the largest reduction of protected public lands in history.³²

At the time, the administration emphasized that it was not opening the door to privatizing these lands. Nine months later, however, it published a draft management plan for the Grand Staircase-Escalante National Monument that proposed to relinquish title to 1,600 acres of public land that the president had excised from the monument. Interior Secretary David Bernhardt quickly took the idea off the table, but the episode caused the administration some embarrassment, especially after it was learned that some of the public land proposed for transfer was contiguous to land owned by Utah state legislator Mike Noel, a former BLM employee who had long been the monument's leading opponent.³³

The administration has also taken steps to open previously protected areas of public lands to oil and gas drilling, such as:

- the coastal plain of the Arctic National Wildlife Refuge in northeastern Alaska, the heart of the calving ground of the Porcupine caribou herd, which is reputed to have the largest and longest migration of any land mammal on Earth;
- about half of the twenty-five-million-acre national petroleum reserve in northwest Alaska which was closed to development by an Obama-era management plan; and
- hundreds of millions of acres in U.S. waters off the nation's shores that had been closed to oil and gas leasing by Trump's Republican and Democratic predecessors.

The administration has also scrapped several Obama initiatives having to do with fossil fuels on public lands, such as regulating methane emissions, reevaluating the financial terms of federal mineral leases, and initiating a long-overdue reevaluation of federal coal leasing policy.³⁴ And

³² Rachel E. Golden Kroner, et al., *The Uncertain Future of Protected Lands and Waters*, 364 *SCIENCE* 881, 882 (2019).

³³ Michael Doyle, *Interior Retreats on Land Sale Near Grand Staircase-Escalante*, *GREENWIRE* (Aug. 20, 2018), <https://www.eenews.net/greenwire/stories/1060094747>; Chris D'Angelo, *Trump Administration Scraps Plans To Sell Land Cut from Utah Monument*, *HUFFPOST* (Aug. 17, 2018, 7:15 PM), https://www.huffpost.com/entry/ryan-zinke-backtracks-grand-staircase-land-sale_n_5b7751e7e4b0a5b1febb5bfb; Thomas Burr & Brian Maffly, *Surprised by Plan from His Own BLM to Unload Land Inside Utah's Former Grand Staircase Monument, Interior Boss Cancels Sale*, *THE SALT LAKE TRIB.* (Aug. 17, 2018), <https://www.sltrib.com/news/politics/2018/08/17/interior-secretary/>.

³⁴ See, e.g., *Regulatory Rollbacks*, *ENVTL. INTEGRITY PROJECT*, <https://environmentalintegrity.org/trump-watch-epa/regulatory-rollbacks/> (last visited Apr. 9, 2020).

it has overturned a longstanding policy requiring regulated industries to provide “compensatory mitigation” in return for gaining approval to take certain kinds of destructive actions on public lands or elsewhere.³⁵

But that is just part of the picture. The Trump administration has also set in motion many other changes that will clear the way for all kinds of intensive development of public lands.³⁶ Some of these changes would:

- drastically reduce the regulatory reach of the Migratory Bird Treaty Act;³⁷
- weaken regulations to protect endangered species;³⁸
- limit the scope of the bedrock National Environmental Policy Act President Richard Nixon signed into law a half-century ago;³⁹ and
- revisit the Clinton administration’s roadless rule, threatening to open to development more than half of the Tongass National Forest in southeast Alaska, the nation’s biggest, which contains the largest temperate rainforest on earth.⁴⁰

And much more is in the pipeline, so to speak.

Some of the administration’s moves show an eagerness to reverse or undo everything its predecessor did, even when they seemed to make little sense as a matter of politics or policy. It has, for example, sought to revise

³⁵ See Dave Owen, *The Conservative Turn Against Compensatory Mitigation*, 48 ENVTL. L. 265 (2019); Justin R. Pidot, *The Bureau of Land Management’s Infirm Compensatory Mitigation Policy*, 30 FORDHAM ENVTL. L. REV. 1 (2018); Justin R. Pidot, *Compensatory Mitigation and Public Lands*, 61 B.C.L. REV. 1045 (2020).

³⁶ See Michael C. Blumm & Olivier Jamin, *The Trump Public Lands Revolution: Redefining “the Public” in Public Land Law*, 48 ENVTL. L. 312 (2018) (containing more details on administration actions in its first eighteen months).

³⁷ See Lisa Friedman, *Trump Administration Moves to Relax Rules Against Killing Birds*, N.Y. TIMES (Jan. 30, 2020), <https://www.nytimes.com/2020/01/30/climate/trump-bird-deaths.html>.

³⁸ See Bruce Babbitt, *Why We Must Save the Endangered Species Act from the Trump Administration*, YALE ENV’T 360 (Sept. 20, 2018), <https://e360.yale.edu/features/why-we-must-save-the-endangered-species-act-from-the-trump-administration-babbitt>.

³⁹ Related to this, the administration is now considering exempting BLM planning entirely from the Act. See Bobby Magill, *Land Bureau May Exempt Plans from Environmental Review*, BLOOMBERG LAW (Feb. 4, 2010, 1:37 AM), <https://myconvergence.bna.com/ContentItem/ArticlePublic/252654148000000002/495787?itemGuid=a5044b20-ad28-4bcb-9bcf-9ce8523383c0>.

⁴⁰ Nathan Rott & Elizabeth Jenkins, *Trump Administration Moves to Expand Logging in America’s Largest National Forest*, NPR (Oct. 15, 2019, 8:59 PM), <https://www.npr.org/2019/10/15/770410803/trump-administration-moves-to-expand-logging-in-nations-largest-national-forest>.

a successful collaboration between the Obama administration and western governors, including some Republicans, designed to protect the sage grouse in order to keep it off the list of endangered species.⁴¹

It has also launched an effort to rewrite a conservation plan the Obama administration crafted for many millions of acres of BLM land in the California Desert. Development of that plan meticulously involved all stakeholders and so carefully balanced protections with energy development and other uses that no interest group challenged it in court—an almost unprecedented outcome in our litigious age.⁴²

Earlier this year, the administration even rolled back protections on lands it left inside the boundaries of the two Utah national monuments it drastically down-sized.⁴³ A few months before that, it proposed to remove protections from ninety-nine percent of public lands previously designated as “areas of critical environmental concern” or having “wilderness characteristics” in BLM management plans covering more than twenty-one million acres in Alaska, Colorado, Idaho, Montana, and Oregon.⁴⁴

These moves seem calculated to take the BLM—which manages more public lands than any other agency—back to the era captured by its original emblem, which depicted a miner, logger, rancher, engineer, and surveyor looking over an industrial landscape, before it was changed in 1964 to depict mountains, meadows, a river, and a tree.⁴⁵

⁴¹ A federal district judge issued a preliminary injunction halting the effort until the Trump administration better explains its reasoning; Interior is appealing but also taking steps to comply with the judge’s order. *See* *Western Watersheds Project v. Schneider*, No. 1:16-cv-00083-BLW (D. Idaho Oct. 16, 2019).

⁴² Evan Halper, *Trump Administration Takes Aim at California Desert Protection Plan*, L.A. TIMES (Feb. 1, 2018, 3:30 PM), <https://www.latimes.com/politics/la-na-pol-desert-solar-20180201-story.html>.

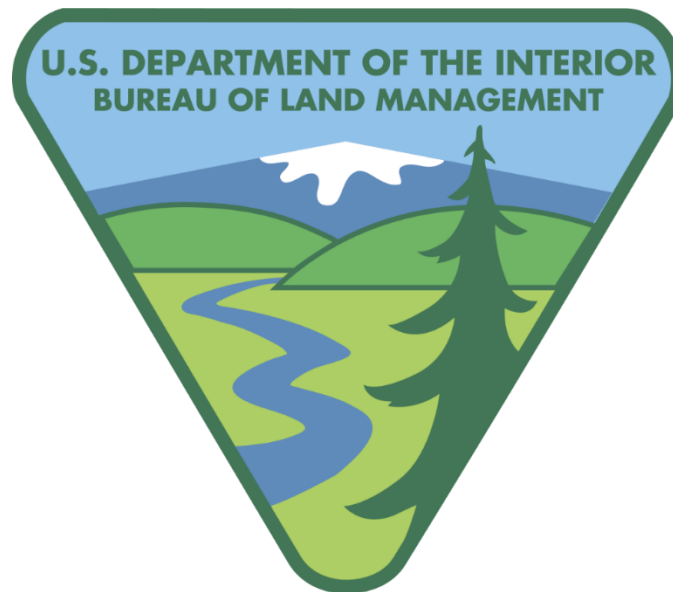
⁴³ *See* John C. Ruple & Heather Tanana, *Beyond the Antiquities Act: Can BLM Reconcile Energy Dominance and National Monument Protection?*, 34 NAT. RES. & ENV’T 8 (Winter 2020); John Leshy, *A Trump Plan Breaks a Great Deal for Ranchers and Park Lovers*, N.Y. TIMES (Mar. 3, 2020), <https://www.nytimes.com/2020/03/03/opinion/environment-ranchers-trump.html>.

⁴⁴ *BLM Ignores Own Findings in Proposed Management Plans*, PEW CHARITABLE TR. (Jan. 23, 2020), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2020/01/blm-ignores-own-findings-in-proposed-management-plans>.

⁴⁵ JAMES MUHN & HANSON R. STUART, *OPPORTUNITY AND CHALLENGE: THE STORY OF THE BLM* 116 (1988).



*Figure 1*⁴⁶



*Figure 2*⁴⁷

⁴⁶ Depiction of the pre-1964 BLM emblem. *Id.*

⁴⁷ Depiction of the BLM emblem as of the change in 1964. *Id.*; *Home*, BUREAU OF LAND MANAGEMENT, <https://www.blm.gov/> (last visited May 15, 2020).

Another administration initiative could prove over time to be the most destructive of all—its campaign to hollow out the federal agencies that manage public lands.

This push has come along several fronts. From the beginning, the administration has consistently asked Congress to make deep cuts in the budgets of practically all public land programs, except those having to do with fossil fuels. A revealing moment came during the government shutdown in late 2018 to early 2019, when the Interior Department leadership furloughed national park rangers but ordered BLM staff to process permits to drill public lands for oil and gas.⁴⁸

It has filled many leadership positions over public lands with “acting” officials, a practice that allows key decisionmakers to escape the Senate confirmation process where background investigations and public hearings would allow their qualifications to be explored.⁴⁹

It has made wholesale transfers of senior career agency officials to remote locations in an undisguised effort to remove them from the federal service. President Trump’s acting Chief of Staff and Office of Management and Budget Director, Mick Mulvaney, bragged that this strategy was a “wonderful way to streamline government,” because it circumvents formal downsizing processes.⁵⁰ The resulting loss of experience and talent will not be easy to remedy.

What the administration is doing to the BLM deserves special mention. It is in the process of moving its headquarters from Washington, D.C. to western Colorado—not far from where the current Interior Secretary grew up—which seems likely to result in the retirement or resignation of a good portion of its career leadership. It has installed William Perry Pendley, who has a long track record supporting the right-wing fringe view of America’s public lands, as BLM’s “acting” director. Back in 2016, just two days before Trump announced to *Field and Stream* his opposition to privatization, Pendley published an essay in *National Review* calling for complete divestment of all the public lands, trumpeting

⁴⁸ Alan Neuhauser, *No Park Rangers Or Food Inspections – But Government Reopens for Oil and Gas*, U.S. NEWS (Jan. 11, 2019, 5:01 PM), <https://www.usnews.com/news/national-news/articles/2019-01-11/no-park-rangers-or-food-inspections-but-government-reopens-for-oil-and-gas>.

⁴⁹ Kevin Schaul & Kevin Uhrmacher, *Tracking How Many Key Positions Trump Has Filled So Far*, WASH. POST: TRUMP TRANSITION (Apr. 6, 2020, 9:30 AM), <https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/>.

⁵⁰ John Hanna & Ellen Knickmeyer, *Union: Mulvaney Comments Confirm Agency Moves Meant to Cut*, U.S. NEWS (Aug. 6, 2019, 6:51 PM), <https://www.usnews.com/news/politics/articles/2019-08-06/union-mulvaney-comments-confirm-agency-moves-meant-to-cut>.

that the “Founding Fathers intended all lands owned by the federal government to be sold.”⁵¹ That would have been news to the Founding Fathers.⁵² The administration also continues to give friendly, if behind-the-scenes, receptions to other long-time advocates of divesting the public lands.⁵³

Altogether, the Trump administration’s public land policies aim at nothing less than a complete upending of many decades of bipartisan policymaking. This view is shared by political appointees from prior Republican as well as Democratic administrations.

An op-ed by former BLM directors from the Bush and Obama administrations called the administration’s attack on the BLM a “stealth plan” to render the agency dysfunctional and ultimately “dismantle public ownership” of the land and its resources.⁵⁴ In February 2020, fifteen senior officials who served in four of the last five Republican administrations and the last two Democratic administrations—several in Senate-confirmed positions—condemned a “new, contrived” interpretation of the Migratory Bird Treaty Act as creating a “huge loophole” and contrary to the position taken by every Republican and Democratic administration for many decades.⁵⁵

⁵¹ William Perry Pendley, *The Federal Government Should Follow the Constitution and Sell Its Western Lands*, Nat’l Rev. (Jan. 19, 2016, 9:00 AM), <https://www.nationalreview.com/2016/01/federal-government-should-sell-western-land-follow-constitution>. For a capsule review of Pendley’s five books, which mostly attack public lands, see Timothy Cama, *BLM’s Top Boss Wrote 5 Books. We Read Them.*, GREENWIRE (Jan. 13, 2020) <https://www.eenews.net/stories/1062071139>.

⁵² I explored the founders’ understanding in John Leshy, *Are the Public Lands Unconstitutional?*, 69 HASTINGS L.J. 499, 504–16 (2018).

⁵³ Chris D’Angelo, *Interior Department (Again) Hosts People Who Want to Sell Off Public Land*, HUFFPOST (Feb. 14, 2020), https://www.huffpost.com/entry/trump-interior-department-public-lands-myronbell_n_5e45a6bcc5b6e095c6bcb614?ncid=engmodushpimg00000006.

⁵⁴ Bob Abbey & Jim Caswell, *The Stealth Plan to Erode Public Control of Public Lands*, POLITICO (Dec. 12, 2019), <https://www.politico.com/news/agenda/2019/12/12/public-lands-bureau-land-management-082689>; see also John Freemuth & James Skillen, *Moving Bureau of Land Management Headquarters to Colorado Won’t Be Good for Public Lands*, CONVERSATION (Jan. 8, 2020), <https://theconversation.com/moving-bureau-of-land-management-headquarters-to-colorado-wont-be-good-for-public-lands-126990>.

⁵⁵ Letter from former Deputy Secretaries of the Interior, Assistant Secretaries of the Interior, U.S. Fish and Wildlife Service Directors, and Migratory Bird Conservation Chiefs to Secretary of the Interior David Bernhardt (Feb. 11, 2020), https://defenders.org/sites/default/files/2020-02/Former%20DOI%20officials%20letter%20to%20Sec.%20Bernhardt%20on%20MBT%20regulation_0.pdf. In the same vein, Brad Barber, the chief negotiator for the state of

IV. SO, WHAT DOES THIS PORTEND FOR THE FUTURE OF PUBLIC LAND POLICY?

The administration has encountered some pushback in its campaign to weaken and remove protections for public lands, especially outside the very red states of Utah, Wyoming, and Alaska. An informal, bipartisan coalition has emerged to fight the administration's plan to open up practically the entire Outer Continental Shelf to oil and gas leasing. A number of states, including some in the West, have joined conservation groups in challenging many of its rollbacks in court.⁵⁶

On Capitol Hill, however, many congressional Republicans have said little about the administration's public land policies. One reason they have been able to stay silent is because the administration has rarely sought Congress's help in implementing its agenda. It has, instead, mostly been content to act on its own, pushing the boundaries of executive authority when necessary.

A rare exception came in 2017, when Congress included a provision in tax legislation that overturned a 1980 congressional ban on oil and gas leasing in Alaska's Arctic National Wildlife Refuge. Alaska's political establishment had long pushed for this as oil revenues on which the state is so dependent had declined with diminished production from state lands on the North Slope. The measure passed Congress on a strict party-line vote, with Republicans in the lower forty-eight hoping that developing the Refuge would generate revenue for the U.S. Treasury as well.⁵⁷

Except for some resistance to the administration's push to open up formerly protected areas of the Outer Continental Shelf to oil and gas leasing, almost no Republican in Congress has taken a prominent stand against any of the administration's pro-development public land policies. This is in distinct contrast to the early Reagan years, where a significant number of Republicans publicly broke with James Watt. The sea change

Utah who was instrumental in crafting a massive state-federal land exchange approved by Congress after President Clinton established the Grand Staircase-Escalante National Monument, published an op-ed in the *Deseret News* charging that Trump had turned "a win-win public lands compromise into a loss for all Americans." Brad Barber, *Guest opinion: Turning a Win-Win Public Lands Compromise Into a Loss for All Americans*, *DESERET NEWS* (Oct. 19, 2018), <https://www.deseret.com/2018/10/19/20656398/guest-opinion-turning-a-win-win-public-lands-compromise-into-a-loss-for-all-americans>.

⁵⁶ DAVID J. HAYES ET AL., *THE ST. ENERGY & ENVTL. IMPACT CTR. N.Y.U. SCH. OF LAW, 300 AND COUNTING: STATE ATTORNEYS GENERAL LEAD THE FIGHT FOR HEALTH AND THE ENVIRONMENT 1* (2019), <https://www.law.nyu.edu/sites/default/files/300%20and%20Counting%20-%20State%20Impact%20Center.pdf>.

⁵⁷ Pub. L. No. 115-97, 131 Stat. 2054 (2017).

in the Grand Old Party was poignantly underscored when Arizona Senator John McCain died in August 2018. Some years earlier, he had pointedly reminded Republicans of Theodore Roosevelt's proud public lands legacy in a *New York Times* op-ed entitled "Nature is Not a Liberal Plot."⁵⁸

On the other hand, most congressional Republicans have not—at least not yet—wholeheartedly embraced many of the Trump administration's efforts to eliminate or weaken protections for public lands. For example, Republican members have united with their Democratic colleagues to rebuff the Trump administration's request to make huge budget cuts in public lands programs not related to fossil fuels. This happened even in 2017–18, when both houses of Congress were under Republican control.

Similarly, congressional Republicans also worked with Democrats to enact an omnibus public land protection bill named after a long-time congressional advocate for protecting public lands, John D. Dingell, Jr., who had been one of the sponsors of the original Wilderness Act.⁵⁹ President Trump signed the bill into law in March 2019, albeit without fanfare. Most of its parts had been fully worked out earlier when the Republicans controlled both chambers, although its final approval came after the Democrats had recaptured the House in the fall 2018 midterm elections.

The Dingell Act, the latest in a series of bipartisan protection packages that date back decades, established a national recreation area, a national monument, and a national conservation area on BLM land in Utah—ironically, not far from the Bears Ears National Monument that President Trump had downsized by some eighty-five percent a little more than a year earlier. It also established new Wilderness areas in Utah and California and new wild and scenic rivers in Utah and several New England states.

Most significantly, the Dingell Act permanently reauthorized the Land and Water Conservation Fund ("LWCF"). Since Congress launched it in 1964, the Fund has provided several billion in federal dollars to acquire millions more acres into public ownership (state as well as federal) for conservation and recreation.⁶⁰ The multi-year campaign for its permanent reauthorization had gained the support of a number of congressional Republicans from western states as well as elsewhere. They

⁵⁸ John McCain, *Nature Is Not a Liberal Plot*, N.Y. TIMES (Nov. 22, 1996), <https://www.nytimes.com/1996/11/22/opinion/nature-is-not-a-liberal-plot.html>.

⁵⁹ John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, 113 Stat. 580 (2019).

⁶⁰ *See id.*

had good reason to do this. Measures of public opinion like the annual “Conservation in the West” poll of Colorado College’s *State of the Rockies* project (surveying attitudes in the eight states of the intermountain West) have continued to show strong bipartisan support for protected public lands.⁶¹

As election season approached, the Trump administration indicated support for a measure that would provide more public land protection. It came shortly after his administration submitted a budget for fiscal year 2021 that proposed slashing funding for the LWCF to less than \$15 million—compared to the \$495 million Congress appropriated for it in fiscal year 2020, and to a full funding level of nearly \$1 billion. In a huge pivot, the President tweeted a call for Congress to “send me a Bill that fully and permanently funds the LWCF and restores our National Parks” which would be “HISTORIC for our beautiful public lands.”⁶²

This was a transparent attempt to boost the campaigns of three western Republican Senators facing tough re-election fights, Steve Daines in Montana, Cory Gardner in Colorado, and Martha McSally in Arizona. It also provoked some conservative House Republicans to express outrage in a rare break with the President. Tom McClintock (R-Calif.) said “we are lousy stewards of the nation’s lands,” and should be taking care of what we have rather than acquiring more; and Garrett Graves (R-La.) called the President’s tweet “absolutely ridiculous and short-sighted.”⁶³

There is ample room to doubt whether this new position on the LWCF signals a genuine change in the administration’s general attitude toward public lands. In the same month, the White House issued a statement threatening to veto a bill, then pending in the House, that would add protections like Wilderness on more than 2.5 million acres of public land in Colorado, California, and Washington. Its statement bristled with hostility to what it called the bill’s “unnecessary and harmful restrictions” that it claimed “could impede future energy and mineral development” and

⁶¹ 2020 Poll Results: *The 10th Annual Survey of Voters in the Rocky Mountain West*, COLO. COLLEGE, <https://www.coloradocollege.edu/stateoftherockies/conservationinthewest/> (last visited Apr. 12, 2020).

⁶² Caitlyn Kim, *One Tweet From Trump Just Gave New Hope for a Conservation Fund that the President Had Been Trying to Defund*, CPR NEWS (Mar. 4, 2020), <https://www.cpr.org/2020/03/04/one-tweet-from-trump-just-gave-new-hope-for-a-conservation-fund-that-the-president-had-been-trying-to-defund/> (emphasis in original tweet).

⁶³ Geof Koss, Kellie Lunney, & Michael Doyle, *LWCF, Parks Bills Head to Senate Floor After Trump Tweet*, E&E NEWS (Mar. 4, 2020), <https://www.eenews.net/stories/1062516497>.

limit, among other things, off-highway vehicle use.⁶⁴ The House ignored the threat and passed the bill, but only six House Republicans voted for it.⁶⁵

V. A TURNING POINT?

Finally, to the question posed in the title. Plainly the Trump administration is posing a stress test for the public lands, much as for our entire system of governance. But is it marking a turning point in American public land policy away from the long bipartisan tradition of adding more protections to more public lands?

With the caveat that, as an old Danish proverb has it,⁶⁶ “prediction is never easy, especially of the future,” my answer to this question is that it depends largely on whether the President is re-elected this fall.

If he is defeated, history will probably view his administration as just another hiccup in the modern history of public lands. Mainstream public opinion still seems to favor strong protections for these lands. Many of the administration’s efforts to eliminate these protections are works-in-progress or readily reversible, especially if Democrats take control of the Senate, retain control of the House, and win the White House.

If that were the election outcome, the Trump legacy might resemble that left by James Watt—namely, public lands littered with oil and gas leases that many, including the government, will regard as having been inappropriately issued. If so, future administrations will have to spend considerable time and money to get these leases off the books.

An illustrative case is furnished by a cluster of oil and gas leases Watt issued in the so-called Badger-Two Medicine area of national forest land in Montana considered sacred by the Blackfoot Indians. As opposition to drilling in the area grew more vocal, Congress eventually enacted legislation providing federal tax subsidies to those lessees who relinquished their leases. A few lessees chose not to take advantage of this

⁶⁴ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: H.R. 2546 – PROTECTING AMERICA’S WILDERNESS ACT (2020), https://www.whitehouse.gov/wp-content/uploads/2020/02/SAP_HR-2546.pdf.

⁶⁵ Jason Blevins, *U.S. House Approves Largest Colorado Wilderness Bill in 40 Years. But Not Everyone is Happy.*, COLO. SUN (Feb. 14, 2020), <https://coloradosun.com/2020/02/14/wilderness-bill-passes-on-twentieth-try-degette/>.

⁶⁶ *It’s Difficult to Make Predictions, Especially About the Future*, QUOTE INVESTIGATOR, <https://quoteinvestigator.com/2013/10/20/no-predict/> (last visited May 19, 2020).

offer and instead engaged in lengthy court battles; indeed, one lease remains in litigation almost forty years later.⁶⁷

But if President Trump has four more years in office, a paradigm shift in the politics of public lands could well be the result.

Consider Graph 4, indicating there are about 200 million acres of public lands where the administration already has authority—and indeed, as I have described, has already initiated efforts—to remove legal protections and thus open the door to various kinds of intensive development. Consider also Graph 3, which shows that another 125 million acres are, with somewhat more effort, susceptible to similar executive action.

Existing protections on more than half the nation’s public lands are, in other words, vulnerable to unilateral executive undoing in a second Trump term. Opening up even a fraction of these—tens of millions of acres—would dramatically reverse the long-term trend depicted in these Tables. That could truly mark a turning point in America’s policy toward its public lands.

It would, moreover, come at a time when the public lands already face daunting challenges. These challenges will only grow regardless of the election outcome. The biggest of these have to do with climate change, which is profoundly altering conditions that led the American people to hold and protect these lands.⁶⁸

Some iconic areas of public lands are at considerable risk within the lifetime of many alive today. Scientists believe that Glacier National Park in Montana will have no glaciers within a decade or two.⁶⁹ Florida’s Everglades and numerous other protected areas of public lands along our coasts—including nearly one-third of the nation’s 550 national wildlife refuges—are facing inundation as the seas rise. “Your children’s Yellowstone,” the headline of an article in the New York Times warned

⁶⁷ CONG. RESEARCH SERV., R42432, U.S. Crude Oil and Natural Gas Production in Federal and Nonfederal Areas (2018); Aaron Bolton, *U.S. Appeals court Hears Arguments over Oil and Gas Lease Near Glacier National Park*, MONTANA PUBLIC RADIO (JAN. 21, 2020), <https://www.mtpr.org/post/us-appeals-court-hears-arguments-over-oil-and-gas-lease-near-glacier-national-park>. For a capsule view of the amount of public lands leased for oil and gas by the Trump Administration, see *The Climate Report 2020: Greenhouse Gas Emissions from Public Lands*, THE WILDERNESS SOCIETY (2020), https://www.wilderness.org/sites/default/files/media/file/TWS_The%20Climate%20Report%202020_Greenhouse%20Gas%20Emissions%20from%20Public%20Lands.pdf.

⁶⁸ John Leshy, *Federal Lands in the Twenty-First Century*, 50 NAT. RES. J. 111 (2010).

⁶⁹ *Melting Glaciers*, NAT’L. PARK SERV., <https://www.nps.gov/glac/learn/nature/melting-glaciers.htm> (last visited Apr. 19, 2020).

not long ago, “will be radically different.”⁷⁰ In many public-lands-rich places, droughts are becoming more frequent, severe, and longer-lasting, and large wildfires are growing in frequency.

The changing climate also threatens biodiversity, which is already under siege as the human footprint continues to expand across the American landscape.⁷¹ The number of birds in America and Canada has declined by about one-third in the last half century.⁷² The list of endangered species will likely grow by leaps and bounds. Eventually the Endangered Species Act, which for a couple of generations has been a powerful influence on public land management, will be put in the political crosshairs.

A glimpse at what may come was suggested in a recent *New York Times* article on the fires sweeping Australia. Under the headline “The End of Australia as We Know It,” its subtitle provocatively asked, “[w]ith climate change forcing a relaxed country to stumble toward new ways of work, leisure and life, will politics follow?” It then went on to detail how climate change was threatening “heavy pillars of Australian identity” like the “life lived outdoors.”⁷³

A recent article in *Yale Environment 360* discussed adaptation schemes being considered for the two-million-acre Kenai National Wildlife Refuge south of Anchorage, Alaska. Like most of that state, it has experienced sharply rising temperatures and drought from an increasingly unstable climate. The refuge’s chief biologist predicts mass extinction. The idea of introducing bison and transplanting lodgepole pine is being explored as a grassland ecosystem emerges where there used to be alpine tundra and boreal woodlands.⁷⁴

⁷⁰ Marguerite Holloway, *Your Children’s Yellowstone Will Be Radically Different*, N.Y. TIMES (Nov. 15, 2018), <https://www.nytimes.com/interactive/2018/11/15/climate/yellowstone-global-warming.html>.

⁷¹ Matt Lee-Ashley, *How Much Nature Should America Keep*, CTR. FOR AMERICAN PROGRESS (Aug. 6, 2019), <https://www.americanprogress.org/issues/green/reports/2019/08/06/473242/much-nature-america-keep/>.

⁷² Carl Zimmer, *Birds Are Vanishing from North America*, N.Y. TIMES (Sep. 19, 2019), <https://www.nytimes.com/2019/09/19/science/bird-populations-america-canada.html>; Kenneth Rosenberg, et. al., *Decline of the North American avifauna*, SCIENCE (Oct. 4, 2019), <https://science.sciencemag.org/content/366/6461/120.editor-summary>.

⁷³ Damien Cave, *The End of Australia as We Know It*, N.Y. TIMES (Feb. 15, 2020), https://www.nytimes.com/2020/02/15/world/australia/fires-climate-change.html?referrin_gSource=articleShare.

⁷⁴ Miranda Weiss, *As Warming Alters Alaska, Can a Key Wildlife Refuge Adapt?*, YALE ENV. 360 (Mar. 5, 2020), <https://e360.yale.edu/features/as-warming-alters-alaska-can-a-key-wildlife-refuge-adapt>.

Besides a changing climate and ongoing loss of biodiversity, there is also the challenge of “loving the public lands to death,” as recreational visits to public lands skyrocket. What has happened at Grand Canyon National Park is typical. In 1980, it hosted two million visitors; in 2011, four million; and in 2017, six million. More and more places on public lands are experiencing what has come to be known as the “Instagram problem.” Within months after a scenic viewpoint overlooking Horseshoe Bend on the Colorado River in the Glen Canyon National Recreation Area in Utah was “geo-tagged” and publicized on social media, visitation skyrocketed from one thousand *a year* to four thousand *a day*.⁷⁵

At the same time, public lands managers also have to grapple with aging, inadequate infrastructure as well as funding and workforce limitations. Ballooning federal budget deficits are likely to complicate efforts to make funds available to meet these challenges.

The Trump administration has paid little attention to these challenges. There is no reason to expect it will do anything different in a second term, for it has persisted in attacking, undermining, or ignoring the teachings of science, especially climate science.⁷⁶ Still, as Aldous Huxley said, “facts do not cease to exist because they are ignored.”⁷⁷

Nevertheless, last year Interior Secretary Bernhardt told Congress that he has “not lost any sleep” over the dramatic increase of carbon dioxide in the earth’s upper atmosphere, despite the strong scientific consensus that the increase is the primary driver of climate change that, unchecked, could lead to catastrophe.⁷⁸

Remarkably, Bernhardt also announced that the Interior Secretary had no legal obligation to make public lands part of the climate solution, even though carbon emissions from fossil fuels extracted from public

⁷⁵ Brent Knepper, *Instagram is Loving Nature to Death*, THE OUTLINE (Nov. 7, 2017, 10:36 AM), <https://theoutline.com/post/2450/instagram-is-loving-nature-to-death?zd=1&zi=xjxrljwb>.

⁷⁶ Brad Plumer & Coral Davenport, *Science Under Attack: How Trump is Sidelining Researchers and Their Work*, N.Y. TIMES (Dec. 28, 2019), <https://www.nytimes.com/2019/12/28/climate/trump-administration-war-on-science.html>.

⁷⁷ ALDOUS HUXLEY, *PROPER STUDIES* 205 (1927).

⁷⁸ John Lesby, *Interior’s Authority to Curb Fossil Fuel Leasing*, 49 ENVTL. L. REP. 10631, 10631 (2019); Nichola Groom, *Trump Interior Chief Not Losing Sleep Over Record CO2 Levels*, REUTERS (May 15, 2019), <https://www.reuters.com/article/us-usa-climatechange-bernhardt/trump-interior-chief-not-losing-sleep-over-record-co2-levels-idUSKCN1SL2MU>.

lands comprise a significant proportion of total U.S. emissions.⁷⁹ His conclusion ignored numerous laws that, for example, require the Interior Secretary to manage public lands to serve “the long-term needs of future generations,” to “prevent unnecessary or undue degradation,” to “ensure” that the “environmental health” of national wildlife refuges is maintained, and to leave national parks “unimpaired for the enjoyment of future generations.”⁸⁰

As all these challenges mount, and likely go unaddressed in a second Trump term, will the American people continue to support protecting public lands? Will they tolerate places being “loved to death?” Will they demand more roads and easier access to more places? Does evidence of a decline in interest among younger people in outings in the great outdoors signal an emerging trend that could undermine support for public lands?⁸¹

Will voters support continued protection for public lands as a changing climate takes its toll? Will they want to maintain the strict protections of the Endangered Species Act as extinctions multiply? The looming extinction has led eminent biologist Edward O. Wilson—who in 1980 called the loss of biodiversity from “careless misuse” and destruction of natural habitats the “folly that our descendants are least likely to forgive”—to advocate setting aside about half the earth’s surface as a protected natural reserve.⁸² Already there are calls for radically changing the ESA because relatively few listed species have recovered enough to be removed from the list, leading Wilson to respond that one might as well call for closing hospital emergency rooms because so many people die there.⁸³

A second Trump term’s impact on the institutions that manage our public lands might be even more profound. Even if successor administrations decided to reverse course, rebuilding agency capacity to

⁷⁹ Leshy, *supra* note 78; *The Climate Report 2020: Greenhouse Gas Emissions from Public Lands*, WILDERNESS SOC., https://www.wilderness.org/sites/default/files/media/file/TWS_The%20Climate%20Report%202020_Greenhouse%20Gas%20Emissions%20from%20Public%20Lands.pdf (last visited Apr. 12, 2020); Adam Aton, *Here’s What Bernhardt Could do on Climate — If He Wanted To*, E&E NEWS (May 23, 2019), <https://www.eenews.net/stories/1060381769>.

⁸⁰ 43 U.S.C. § 1702 (2018); 43 U.S.C. § 1782 (2018); 16 U.S.C. § 668dd (2018); 16 U.S.C. § 1 (2018).

⁸¹ *2019 Outdoor Participation Report*, OUTDOOR FOUND. (Jan. 29, 2020), <https://outdoorindustry.org/resource/2019-outdoor-participation-report/>.

⁸² EDWARD O. WILSON, *NATURE REVEALED: SELECTED WRITINGS, 1949-2006* 617 (2006); see generally EDWARD O. WILSON, *HALF EARTH: OUR PLANET’S FIGHT FOR LIFE* (2016).

⁸³ Edward O. Wilson, *Afterword*, in *SILENT SPRING 357* (Anniversary ed. 2002).

meet these challenges could take much more time, political energy, and money than the American people are willing to expend.

In short, if in a second Trump term partisanship intensifies, the political system becomes even more dysfunctional, and respect for the teachings of science continues to decline, the longstanding bipartisan consensus in support of holding and protecting public lands might simply unravel. That could persuade future presidents and Congresses to continue down the path set by the Trump administration.

A kind of death spiral could follow, with more downsizing and decentralizing of the public land management agencies and more delegation of responsibility to state and local governments and private entities. Ultimately, the “sagebrush rebels,” those committed libertarians who want all or most of the public lands privatized, could prevail.⁸⁴

Yet, describing the 2020 election as a potential pivot point in the nation’s public land policy is far from saying the election will prove to be a popular referendum on the Trump public lands agenda.

While many Americans voice support for protecting public lands, it is rarely a decisive issue for most voters, even in states with large amounts of public lands. Combine concerns about the coronavirus pandemic, the state of the economy, and health care policy with issues like immigration, impeachment, the President’s personal character, and possible foreign interference in the election, and it is easy to conclude that voter attitudes toward public lands will not count for much at the ballot box in November. Instead, to borrow a formulation from historian Patty Limerick, discussions of public lands are “now situated in a much broader and much more troubling set of questions about national coherence and shared purpose.”⁸⁵

⁸⁴ A recent Trump nominee for the Federal Reserve Board, July Shelton, advocated that consideration be given to privatizing “numerous federal land holdings” in her 2009 book *Money Meltdown*. Kelsey Tamborrino, *White House Finally Renominates FERC Pick*, POLITICO (Feb. 13, 2020, 10:00 AM), <https://www.politico.com/newsletters/morning-energy/2020/02/13/white-house-finally-renominates-ferc-pick-785350>.

⁸⁵ Patricia Nelson Limerick, *A History of the Public Lands Debate*, in CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS 1, 19 (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law ed. 1995).

CONCLUSION: CHECKS AND BALANCES? CONGRESS AND THE JUDICIARY

But, one might ask, if the 2020 election is not a referendum on Trump public land policies and many Americans in fact oppose those policies, might one reasonably expect the checks and balances in our system to operate and other branches of government to exert countervailing influence? Perhaps, but there is much room for doubt.

First, consider the Congress. Will Republican members who have supported public lands protections in the past be willing to take steps to rein in a re-elected President Trump and prevent him from cementing into place the extensive array of policy and regulatory changes he has set in motion?

So far, the answer is not encouraging. So strong is the President Trump's hold on the Grand Old Party that moderate Republicans have been mostly unwilling to cross him. Would that change in a second Trump term?

Moderate Republican Senators' stance on his impeachment signal otherwise, suggesting that, if the President is re-elected, they would acquiesce no matter how much they might disagree with his specific policies and actions. That would make a second Trump term far different from, say, a second Reagan term on public lands issues.

Moreover, having developed a cult of personality that has shattered so many norms in American political life, President Trump seems unlikely to succumb to the "lame duck" effect that tends to diminish a president's power as he approaches the end of his tenure.

But then, what about the courts, which public land protection advocates have used with considerable success to advance their agenda for a half-century, and where multiple challenges to Trump initiatives are pending?

So far, with Senator McConnell having essentially converted the U.S. Senate into a judicial confirmation machine, President Trump has put on the bench two of nine Supreme Court Justices and far more lower court judges than any other modern president has done in so short a time. And it is not just the numbers, but who they are: young (most are in their forties), conservative, dedicated members of the Federalist Society.⁸⁶

⁸⁶ See generally, Ian Millhiser, *What Trump Has Done to the Courts, Explained*, VOX (Feb. 4, 2020), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges>; Rebecca R. Ruiz et al., *A Conservative Agenda Unleashed on*

The almost inevitable result is that, despite protestations that there are not “Republican judges and Democratic judges,”⁸⁷ legal issues involving public lands protection will be resolved by an increasingly conservative federal judiciary that will be much less likely than in the past to be receptive to arguments by advocates for protecting public lands.

If President Trump has another four years to remake the courts—and were he re-elected, the Republicans would likely retain control of the Senate, making confirmation of his nominees a near-certainty—that outcome becomes even more certain.

A more right-leaning court system means that, if advocates for protecting public lands are to succeed, they must concentrate on political action, on winning the hearts and minds of ordinary people rather than judges.

Altogether, then, there is a powerful case that a second Trump term could well be a turning point in America’s policy toward its public lands.

A. What Might Come Further Down the Road is Harder to Predict

One possibility looks like this. Few expected a rosy economy to continue for another four years even before the emergence of the coronavirus. A severe economic downturn—made harder to fight because of trillion-dollar deficits and already rock-bottom interest rates—could pave the way for a second Progressive Movement similar to the one that emerged in the wake of a severe recession in the 1890s.

That was a time when, as one commentator recently put it, “inequality, partisanship and discontent were all sky-high,” the political system seemed “thoroughly corrupted,” and large corporations seemed “imposingly powerful.” Sound familiar? And yet a “new generation of

the Federal Courts, N.Y. TIMES (Mar. 14, 2020), <https://nyti.ms/3aOHDXA>; Search for “U.S. Public Lands” in the Federalist Society Database, FED. SOC., <https://fed.soc.org/search?term=U.S.+public+lands> (last visited Apr. 9, 2020). While the Federalist Society has not taken a formal position on public lands issues, it has generally provided a platform for skeptical views of U.S. public lands and their regulation, including making available one paper with its imprimatur that found “credible legal arguments” for finding at least some U.S. public lands are unconstitutional. DONALD J. KOCHAN, A LEGAL OVERVIEW OF UTAH’S H.B. 148 – The Transfer of Public Lands Act 27 (Fed. Soc. 2013). For a rebuttal to the arguments in Kochan’s paper, see Leshy, *supra* note 52, at 555–59.

⁸⁷ J. Richard Cohen, *Yes, Judge Gorsuch, There are Republican and Democratic Judges*, HUFFPOST (Mar. 22, 2017), https://www.huffpost.com/entry/yes-judge-gorsuch-there-are-republican-and-democratic_b_58d280f0e4b062043ad4ae89?guccounter=1.

reform-oriented activists and politicians” emerged and led to far-reaching changes.⁸⁸

Among other things, that earlier Progressive movement laid down many of the foundations for today’s public lands. It also made significant structural changes in government and politics, like amending the Constitution to require direct election of Senators and to give women the right to vote.

Following that example, a second Progressive movement might try to curb the huge and mostly destructive influence money now plays in our politics.⁸⁹ It might seek to amend the Constitution to overturn the Supreme Court’s controversial 5-4 ruling in *Citizens United*, where the majority equated money with speech.⁹⁰

But Congress does not need a constitutional amendment to require immediate, complete disclosure of how money is raised and spent on political campaigns. Moreover, to the extent a rightward-leaning Supreme Court stands in the way of this and other reforms, the Constitution does not have to be amended to alter the Court’s size. Over the last 230 years, Congress has authorized a Supreme Court with as few as five and as many as ten Justices.⁹¹

The first Progressive movement was, notably, not captive to either political party. Republican Theodore Roosevelt was one of its biggest champions. That history leaves room to believe that Republicans might someday once again enthusiastically embrace the cause of protecting public lands. It was, after all, not that long ago when Richard Nixon, in his first State of the Union Address in 1970, called the “great question” of the age whether Americans would “make our peace with nature” and repair the damage we have done to “our land,” and make “open spaces” as well as clean air and water “the birthright of every American.”

⁸⁸ Lee Drutman, *Trump’s Election May Have Been the Shock We Needed*, N.Y. TIMES (Nov. 25, 2019), <https://nyti.ms/2QLdgt>; See also Joshua Zeitz, *Progressives Should Read Progressive History – So They Don’t Blow it This Time*, POLITICO (June 1, 2019), <https://www.politico.com/magazine/story/2019/06/01/progressives-history-227037>.

⁸⁹ As former Democratic Senator Mark Udall and former Republican House member Bob Beauprez lamented in a *Center for the American West* event at the University of Colorado Law School last December, a major reason the legislative process is broken is because members have to spend too much time and energy raising money for perpetual campaigns. Senator Mark Udall & Representative Bob Beauprez, Bipartisanship (and friendship) happen! Speaker Series at the Center of the American West (Dec. 10, 2019).

⁹⁰ *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

⁹¹ The Court is, as Justice Robert Jackson once famously put it, “not final because we are infallible” but rather “are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

Also instructive is the case of conservative western firebrand Barry Goldwater. He cast one of the few votes against the original Wilderness Act, shortly before he was swamped by Lyndon Johnson in the 1964 presidential election. Yet within two decades, Goldwater had come to enthusiastically support wilderness legislation and describe the vote he had cast in favor of building the Glen Canyon Dam in Utah's wild Canyon Country as the worst one he made in his thirty-year congressional career.⁹²

Party reversals on big issues are hardly unknown in our history. For a very long time, many Democratic Party policies were dictated by southern white supremacists. The Republican Party was once fierce in its condemnation of Russia, and strongly conservative in fiscal matters until it decided, as Vice President Dick Cheney reportedly said in 2002, "deficits don't matter."⁹³

My book explores how a desire to bind up the nation's wounds after the Civil War helped propel the nationwide movement that emerged to protect significant amounts of land in national ownership for future generations. Over the years since, the goal of protecting public lands has continued to bridge cultural and political divides like the ones that now separate rural from urban America and the nation's coastal regions from its interior.

Even with the hardening of partisan rhetoric in recent years, Congress has continued to work across party lines to craft legislation protecting public lands, including in some seemingly unlikely places like Idaho and Utah. The growing engagement of Indian tribes is another hopeful sign that public lands can be a catalyst for bringing people together.

Is it, then, too much to hope that, going forward, America's public lands might furnish a platform for rejuvenating civic engagement and small "d" democratic public discourse, and thus help to overcome the contemporary political climate's toxic polarization and cynical disillusionment with established institutions?⁹⁴ Politics is the art of the possible, Otto von Bismarck said, but the art of politics is enlarging what is possible and we are sorely in need of that artistry.

⁹² Brian Allen Drake, *The Skeptical Environmentalist: Senator Barry Goldwater and the Environmental Management State*, 15 ENVTL. HIST. 587, 600 (2010).

⁹³ O'Neil says Cheney told him, 'Deficits don't matter,' CHICAGO TRIBUNE (Jan. 12, 2004), <https://web.archive.org/web/20200111034834/https://www.chicagotribune.com/news/ct-xpm-2004-01-12-0401120168-story,amp.html>.

⁹⁴ Others have had similar thoughts. See, e.g., Mark Kenyon, *Public lands can unite a house divided in 2020*, THE HILL (Jan. 3, 2020), <https://thehill.com/changing-america/opinion/476652-public-lands-can-unite-a-house-divided-in-2020>.

Ultimately, whatever the outcome of the 2020 presidential election, public land policies will in the end be determined by how Americans express their will through the political system.

That said, let me throw down a challenge particularly to younger people and those who have some affection for our public lands. I urge you to fully engage politically in determining the future of these lands because you are among their owners, and it is you who will bear the consequences. Remember the lesson of Wayne Aspinall, who prompted advocates for protecting public lands to campaign relentlessly and ultimately persuade many members of Congress from both political parties all across the nation to join their cause.

I recall hearing, when I was sixteen, John F. Kennedy announce in his inaugural address that “the torch has been passed to a new generation.” Yet, as Denis Hayes—who a little more than nine years later would organize the first Earth Day—once wrote, “torches are not passed. Torches are seized!”⁹⁵

If you want to influence the direction of the nation’s public land policies, you need to seize that torch. That means engaging in the political process. This is not the time for hanging back or for yielding to the belief that you cannot make a difference. You can.

⁹⁵ Denis Hayes, *Environmental Law and Millennial Politics*, 25 ENVTL L. 953, 964 (1995).