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Current Policy and Legal Issues Affecting Recreational Use of Public Lands in the American West

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Abstract

Federally owned and managed public lands occupy approximately 30 percent of the land area of the United States, and anywhere from 50 percent to more than 80 percent of the land area of many of the western states. Determining the appropriate use of these lands involves balancing objectives related to economic, recreational, and conservation interests. This paper examines established and emerging conflicts within and across these objectives through both a narrative discussion of specific topics and a series of case studies. The authors find that new challenges, including pressures to devote portions of public lands to renewable energy project development and the multifaceted threats presented by climate change, will continue to test the public's and government policymakers' commitment to devote public lands to recreational and conservation purposes. The authors also consider how an extension of public trust principles to federally-owned public lands—and land managers—would influence resource management.

Key Words: public lands, western states, land use, recreation

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Introduction

Controversy over the management and use of public lands is as American as apple pie and as old as the nation. Ever since the 13 colonies acquired the crown lands after the American Revolution, publicly owned lands, whether state or federal, have been subject to controversies over their appropriate uses and ultimate disposition. In recent decades, the availability of the nation's public lands for recreational purposes has emerged as an important component of this larger debate.

These public policy conflicts have played out in all available forums: legislative, executive, and judicial. The debate rages at the national, state, and regional levels. Regardless of the forum, however, several broad themes underlie the discussions:

- *Opinion over the proper uses of publicly owned lands varies widely.* Public lands can be used any number of ways: timber harvesting, water resource development, fisheries, recreation (both active and passive), wilderness preservation, wildlife habitat, and mineral development. Although public opinion would probably oppose egregious abuses of nationally revered landmarks (such as billboards on Yosemite's Half Dome, oil derricks in Lake Tahoe, a highway bridge across the Grand Canyon, or geothermal development of the Old Faithful Geyser in Yellowstone), fights over closer calls, such as lumber or mineral extraction versus species preservation, recreation or scenic vistas, or the development of transportation corridors through parklands, are still bitter and frequent.
- *Some public lands enjoy a more exalted status than others.* National forests are subject by federal statute to a broader range of uses than national parks and monuments are. The uses of the states' sovereign lands—the tide and submerged lands and the beds and banks

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of navigable waters—are even more severely restricted.[1] Lands granted to the states by the federal government are regulated in different ways, consistent with the terms imposed by Congress.

- *There may be conflicts between and even within economic, recreational, and environmental uses of public lands*. Competing constituencies value the public lands of the American West for often-conflicting reasons: oil drilling versus national park use or timber harvesting versus preservation as ecological habitat. But even within a single category, such as recreational use, conflicts can and do arise: snowmobilers and cross country skiers, hikers and off-road vehicle (ORV) riders enjoy the public lands in entirely different ways. The fly fisherman may not appreciate sharing the waters with swimmers, speedboaters, or kayakers. The reflective beachgoer may not share the interests of jet skiers offshore. It is usually the job of government to balance, accommodate, and occasionally choose between these conflicting interests.
- *Development and interpretation of the laws governing public lands and interest in land has been affected by changing circumstances*. Nothing better reflects U.S. Supreme Court Justice Oliver Wendell Holmes' famous observation that the law expresses the "felt necessities of the times" than the development of the law on public recreation and public land management. As private wealth accumulated in the gilded age of the later 19th century, public lands were considered a resource to be developed and put to use producing revenue. Commerce, navigation, and fisheries were the designated purposes under which the states' navigable waters were held, and recreation by the broad population was an afterthought, to be indulged in on those public lands not needed for other purposes when the nation's work was over.[2] Today, by contrast, environmental preservation occupies an exalted place, and recreation is recognized as a major use of public lands—one that enhances the economy and promotes the general health and welfare.

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[1] *Sovereign lands* are tide and submerged lands, and the beds and banks of navigable lakes and rivers. These lands are held by the individual states in trust, as an inherent attribute of state sovereignty. As a result, their sale or transfer is severely restricted, and they must be used for purposes included within the public trust: that is, commerce, navigation, fisheries, recreation and environmental preservation. *See, e.g.*, Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842); Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845); Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892); Marks v. Whitney, 491 P.2d 374 (Cal. 1971).

[2] Scranton v. Wheeler, 179 U.S. 141, 166 (1900).

A major change in the nation's felt necessities toward public lands became evident after World War II in a series of federal and state legislative acts that reflected growing appreciation of outdoor recreation over unbridled privatization and development. These new laws included the creation of wilderness areas "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain;"[3] the Federal Land Policy and Management Act of 1976, [4] which halted the 19th-century policy of privatization of public lands; the Endangered Species Act;[5] the Wild and Scenic Rivers Act;[6] the National Trails System Act;[7] and the National Environmental Policy Act.[8] A series of outdoor recreation plans were promulgated[9] and substantial federal funding made available through the Land and Water Conservation Fund.[10]

In the 20 years since the last comprehensive review of the nation's outdoor recreation needs and resources, American society has changed and new demands have been made on state, federal, and local public lands on which recreation occurs. Old conflicts have shifted in their focus and their intensity, and new conflicts have emerged. This paper examines these conflicts through both a narrative discussion of specific topics and a series of case studies designed to illustrate in some detail how these conflicts have been addressed and resolved.

U.S. Public Lands—A Brief Overview

Today nearly one-third of the nation's land is held by the federal government, immune from both taxation and, in large part, land use regulation by the states in which it lies. Nearly 94 percent of these lands lie west of the hundredth meridian, in the western states.[11]

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[3] Wilderness Act of 1964, 16 U.S.C.S. §1131(c) (LexisNexis 1964).

[4] 43 U.S.C. § 1701 et seq.

[5] 16 U.S.C. § 1531 ff.

[6] 16 U.S.C. §1271 (1982).

[7] 16 U.S.C. §1241 et seq.

[8] 42 U.S.C. § 4321 ff.

[9] G. Siehl, *The Policy Path to the Great Outdoors: A History of the Outdoor Recreation Review Commission* (Resources for the Future, Oct. 2008), *available at* http://www.rff.org/Documents/RFF-DP-08-44.pdf.

[10] Land and Water Conservation Fund Act of 1965, Pub. L. No. 88-578, 78 Stat. 897 (1964).

[11] U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics* (2004); *see also* http://strangemaps.files.wordpress.com/2008/06/map-owns_the_west.jpg.

The lands are distributed unequally. In California, the nation's most populous state, some 48 percent of the land area is public, 44 percent federal and 4 percent state.[12] In Nevada, the nation's most rapidly growing state in terms of population, more than 77 percent of the land is federally owned.[13] In Alaska, 89 percent is federal.[14]

The public land system originated with cessions to the central government by former colonies with extensive claims to western lands. These lands were considered, as James Madison wrote in Federalist Paper 38, "a mine of vast wealth to the United States." It was contemplated that these lands would be sold to finance the Revolutionary War debt, eventually leading to the formation of new states. It was never imagined that the territory would be permanently retained by the federal government.[15] As new territories were acquired by treaty or conquest, however, Congress became increasingly reluctant to relinquish the enormous resources. It became a common practice to condition a state's entry into the Union on recognition of federal claims to the public domain, and the state's promise not to question the title of the United States to those lands.[16]

Throughout the early years of the nation, it was assumed that these lands would ultimately be distributed to the states for sale.[17] By the end of the 19th century, however, reaction to the excesses and corruption of the federal land disposition programs had set in, and public land policies shifted to emphasize conservation and retention.[18] Yellowstone National Park was

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[12] *See* Ruben N. Lubowski, et al., *Major Uses of Land in the United States, 2002*, 35 (U.S, Dept. of Agric., Economic Information Bulletin No. EIB-14, 2006), *available at* http://www.ers.usda.gov/publications/EIB14/eib14j.pdf; *see also* California Protected Areas Database (CPAD), http://www.calands.org/home.php.

[13] About Nevada, Public Lands Information Center, http://publiclands.org/explore/NV.php (last visited Mar. 8, 2009).

[14] Susan Todd, *The Alaska Public Land Planning Directory*, 4 (Agricultural & Forestry Experiment Station, University of Alaska Fairbanks, Dec. 2001), *available at* http://www.uaf.edu/salrm/afes/pubs/misc/MP_01_01.pdf. Alaska contains more than 200 million acres of federal public lands, of a total 365,500,000 acres of Alaska's vast land area. The Alaska Coalition, "Public Lands in Alaska," http://www.alaskacoalition.org/Public_lands.htm (last visited Mar. 8, 2009).

[15] Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 221 (1845).

[16] *See* C. Perry Patterson, *The Relation of the Federal Government to the Territory and the States in Landholding*," 28 TEX. L. REV. 43, 64–69 (1949).

[17] *See* S.T. DANA & S.K. FAIRFAX, FOREST AND RANGE POLICY 30–32 (McGraw Hill 2d ed. 1980).

[18] *See* DANA & FAIRFAX, *supra* note 19, at 10; LOUISE E. PEFFER, THE CLOSING OF THE PUBLIC DOMAIN (Stanford 1951).

established in 1872, and the Sequoia, Yosemite, and General Grant National Parks in 1890. By 1899, almost nine million acres of forest reserves had been created, a figure that rose to more than 150 million by 1910.[19] In passing the Mineral Leasing Act in 1920, Congress recognized a new policy of retaining valuable federal lands, in marked contrast with the old—and still on the books —General Mining Law of 1872.[20]

The nation's original public domain consisted of some 300 million acres. By 1867—after the acquisition of Florida, Texas, the Oregon Territory, the Mexican Cession, and the Gadsden and Alaska purchases—the federal government had become the proprietor of nearly two billion (1,807,533,440) acres.[21]

By 1970, the Federal Land Law Review Commission observed that the policy of disposal of unappropriated public domain lands had long been "rendered ineffective" by administrative policies.[22] With congressional enactment of the Federal Land Policy Management Act of 1976 (FLPMA),[23] the federal government's long-established policy of retaining public lands finally achieved formal legal recognition. Public lands were not to be disposed of unless their disposal would "serve the national interest."[24]

But statutory restrictions, even those of long duration, can be modified by Congress and, indirectly, by the executive branch. The efforts of the Reagan administration and Secretary of the Interior James Watt in particular to dispose of the public domain in the 1980s are well documented. So, too, are the multifaceted federal efforts over the last eight years to relax federal regulation of timber harvesting, roadless areas, and recreational uses. States, by contrast, are more restricted in their disposition of their sovereign lands by the public trust doctrine, found by the courts to be a fundamental incident and responsibility of state sovereignty.[25] Whether the

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[19] DANA & KREUGER, CALIFORNIA LANDS 45 (Arno Press 1958)

[20] 30 U.S.C. § 181 et seq; 30 U.S.C. § 22 et seq.

[21] U.S. Department of the Interior, Bureau of Land Management, *Public Land Statistics*, *supra* note 13 (2004), *available at* http://www.blm.gov/natacq/pls04/pls1-1_04.pdf.

[22] PUBLIC LAND LAW REV NATION'S LAND, iii (1970); *see also* George Cameron Coggins, *Some Disjointed Observations on Federal Public Land and Resources Law*, 11 ENVTL. L. 471 (1981).

[23] 43 U.S.C. § 1701 et seq.

[24] *Id.* at 1701.

[25] *See, e.g.*, J. Sax, *The Public Trust Doctrine in Natural Resources Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471 (1970); J. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 195 (1980).

federal government is or should be restricted by a comparable trust obligation in managing its federal lands remains an open question, one addressed at the end of this paper.

Conflicts over Competing Uses

Federally owned and managed public lands occupy approximately 30 percent of the land area of the United States, and anywhere from 50 percent to more than 80 percent of the land area of many of the western states.[26] To these figures must be added public lands owned and managed by the states themselves (e.g., state parks, reserves, and beaches) and their political subdivisions. The inevitable conflicts over the appropriate use of these public lands can thematically be organized into three broad objectives.

First, public lands contain significant natural resources, including timber, rangeland, and minerals, which are economically invaluable for the nation's welfare and economy. In particular, public lands are an important source of energy resources for the United States, both for traditional fossil fuels (oil, natural gas, and coal) and, more recently, renewable energy sources (wind, solar, geothermal, and tidal).[27] Many communities continue to rely on these land resources for extractive uses as important components of their local economies.

Second, these lands are not only important for the exploitation of natural resources, but also provide unparalleled recreational opportunities for a wide range of Americans, including fishing, backpacking, skiing, and off-road vehicle use. Indeed, those opportunities have become central to the quality of life of many of the residents of the rapidly growing Intermountain West cities such as Denver, Salt Lake City, Reno, Boise, and Missoula. They are a significant reason why so many people have relocated to those communities, as well as to many rural areas throughout the West generally.[28]

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[26] *See* CHRISTINE A. KLEIN, ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 37-38 (2005).

[27] *See* Bureau of Land Management, *Oil & Gas*, http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas.html (noting that federal public lands produce 11 percent of U.S. natural gas and 5 percent of U.S. oil); U.S. DEP'T OF INTERIOR, BLM, AND U.S. DEP'T OF ENERGY, ASSESSING THE POTENTIAL FOR RENEWABLE ENERGY ON PUBLIC LANDS (2003), *available at* http://www.nrel.gov/docs/fy03osti/33530.pdf.

[28] *See, e.g.*, J. Matthew Shumway & Samuel M. Otterstrom, *Spatial Patterns of Migration and Income Change in the Mountain West: The Dominance of Service-Based, Amenity-Rich Counties*, 53 PROFESSIONAL GEOGRAPHER 492 (2001) (describing the phenomenon of the "New West" that is built on environmental quality of life).

Third, and just as important, is the role public lands play as a reserve system that is perhaps unmatched in the world, protecting open space, breathtaking scenery, functioning ecosystems, wilderness, and a variety of flora and fauna—many of the latter threatened or in danger of extinction.[29] With the advent of climate change as a major societal and political concern, public lands are increasingly viewed as current or potential carbon sinks, sources of carbon sequestration that constitute an essential component of the nation's efforts to reduce aggregate greenhouse gas levels in the atmosphere.

The conflicts among these three broad sets of public land uses—and, indeed, within each set—are discussed in further detail in the following section.

Conflicts between Development and Recreational Uses

Mines versus Recreation

The largely uninhabited western frontier once beckoned pioneers with the allure of economic development and exploitation, drawing pioneers in pursuit of the American Dream. More recently, however, population and urbanization have increased exponentially, pitting the demand for economic development against the desire for recreational use.

This clash is highlighted by the widespread problem of abandoned mines and their growing status as hazards for recreationists. The passage of the General Mining Law of 1872 favored economic development and exploitation, allowing individuals to claim and mine public lands for mineral deposits, which resulted in thousands of mines developed across the West. Current environmental laws that require remediation of such mining sites were not in place during most of this period. As a result, once a particular mine had been exploited to its maximum economic potential, it was simply abandoned by its operators in favor of other, more promising sites.

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[29] *See* Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 14–15 (1997) (noting importance of federal public lands to biodiversity protection); *see also* DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS, 1396 (2002) ("The national forests and grassland constitute an extraordinary national legacy ... These lands provide many and diverse benefits to the American people. Such benefits include: clean air and water, productive soils, biological diversity" (quoting Committee of Scientists, U.S. Dep't of Agriculture, Sustaining the People's Lands. Recommendations for Stewardship of the National Forests and Grasslands Into the Next Century)).

As a result, there are currently at least 161,000 abandoned hard rock mine sites in 13 western states.[30] These sites have "at least 332,000 features that may pose physical safety hazards and at least 33,000 sites that have degraded the environment."[31] Even more alarming, a recent report by the Inspector General Earl Devaney of the Department of the Interior concluded that the Bureau of Land Management (BLM) and National Park Service (NPS) "are putting the public's health and safety at risk by not addressing hazards posed by abandoned mines on their lands," especially in California, Arizona, and Nevada.[32] Some mines have cavities "capable of swallowing an entire vehicle."[33] Between 2004 and 2007, at least 12 adults and children died in accidents at abandoned mines.[34]

Most were involved in recreational pursuits at the time. In 1999, for example, a young girl attending a cross-country race authorized by the BLM wandered away from her family and fell to her death in an open mine shaft in Nevada.[35] In 2007, 10-year-old and 13-year-old sisters were riding an all-terrain vehicle when they ran off the trail and fell into a 125-foot shaft in Arizona. One was killed and the other seriously injured.[36] No barriers were erected or notices posted at the site.[37]

The dangers that abandoned mines pose to recreationalists are not limited to accidents. They also include asphyxiation, unstable mine walls and rotting structures, explosive and toxic

[30] Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, South Dakota, Utah, Washington, and Wyoming.

[31] U.S. GOVERNMENT ACCOUNTABILITY OFFICE, HIGHLIGHTS: HARDROCK MINING: INFORMATION ON ABANDONED MINES AND VALUE AND COVERAGE OF FINANCIAL ASSURANCES ON BLM LAND. GAO–08-574T. (2008).

[32] EARL E. DEVANEY, FINAL AUDIT REPORT, ABANDONED MINE LANDS IN THE DEPARTMENT OF THE INTERIOR. C-IN-MOA-0004 (2007), *available at* http://www.doioig.gov/upload/2008-G-00241.pdf.

[33] *Id.* at 1.

[34] *Id.* at 3.

[35] Devaney, *supra* note 34, at 4.

[36] Devaney, *supra* note 34, at 5; *Girl Who Fell in Mine Remains in Serious Condition*, KPHO NEWS, Sept. 2, 2007, http://www.kpho.com/news/14032022/detail.html.

[37] KPHO, *supra* note 38.

chemicals (such as arsenic, lead, and mercury), and deadly gases.[38] They also contaminate groundwater, posing health risks for swimming and fishing.[39]

One notorious example of the contaminated groundwater is the long-running controversy over the former Iron Mountain Mine, near Redding, California, and that state's major waterway, the Sacramento River. The site was mined extensively for iron, silver, gold, copper, and other minerals from the 1860s to 1963. In the process, the mine generated extremely acidic drainage that carries large amounts of cadmium and other pollutants. One of the nation's most toxic waste sites, the Iron Mountain Mine has been listed as a federal Superfund site since 1983. Acid drainage from the mine has migrated into the waters of the Sacramento River, disrupting fisheries, water supplies, and recreational uses of the popular northern California watershed.[40]

President Obama has recently recognized these invidious harms by allotting $105 million in funding through the American Recovery and Reinvestment Act to clean up abandoned mines.[41]

The threat posed by the continuing legacy of such historic, development-related use is exacerbated by the growing public demand for recreational use of the same lands. The Bureau of Land Management reports that 80 percent of its contacts with the public relate to recreation, and that the number of recreational visitors to public lands has doubled over the last decade.[42] Between 2000 and 2007, the number of individuals driving off-road increased around 19 percent

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[38] Devaney, *supra* note 34, at 3.

[39] For a case example, the Pennsylvania Mine continues to pollute Peru Creek in Northwest Colorado. Jean Mackenzie, an EPA remedial project manager, attributes the decimation of the creek's rainbow and brook trout to the mine's pollution and the lack of fish in Peru Creek. Scott Streater, *Abandoned Mines: Water Supply, Fish Stocks, Recreation Propel Efforts to Clean Colo.'s Peru Creek,* LAND LETTER, Dec. 4, 2008, *available at* http://www.eenews.net/public/Landletter/2008/12/04/6.

[40] Government regulators reached a negotiated settlement with the abandoned Iron Mountain Mine owners in 2000, which has provided funding for a mine cleanup effort that will require more than a century to complete**.** U.S. Environmental Protection Agency, *U.S., State Announce Long-Term Settlement for Iron Mountain Mine*, Oct. 19, 2000, http://yosemite.epa.gov/opa/admpress.nsf/6427a6b7538955c585257359003f0230/6d8c6077be9d48d68525697d005f3ad3!OpenDocument.

[41] Scott Streater, *Mining: Polluted Mines as Economic Engines? Obama Admin Says 'Yes'*, LAND LETTER, Feb. 26, 2009, *available at* http://www.eenews.net/public/Landletter/2009/02/26/1.

[42] BLM, *People, Places, & Partners: Planning, Managing, and Enhancing Recreational Experiences on BLM Public Lands*, http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/general_publications/ppp.Par.31679.File.dat/blmRecHandout.pdf

in the number of participants, and the number of days 56 percent. Almost 146 million people viewed or photographed natural scenery in 2007, an increase of 14 percent in participants and 60.5 percent in days. Viewing or photographing wildlife, kayaking, big-game hunting, sightseeing, and visiting wilderness also rose between 2000 and 2007.[43]

R.S. 2477: Private Road Access versus Wilderness versus Recreation

Revised Statute 2477, better known as R.S. 2477, was enacted by Congress as part of the Mining Law of 1866. It provides simply that "the right-of-way for the construction of highways across public lands not otherwise reserved for public purposes is hereby granted."

R.S. 2477 granted states and counties a right-of-way across federal land when a highway was built. The definition of highway for R.S. 2477 purposes, however, has always been ambiguous, and the statute has generated considerable controversy among disparate public lands stakeholders in recent years. Although R.S. 2477 was repealed in 1976 as part of Congress's enactment of FLPMA, the repeal was subject to "valid existing rights." So the political and legal controversies continue, and interpretations of rights to the public lands conferred under R.S. 2477 vary widely among interest groups.

Perhaps the most well-publicized political controversy under R.S. 2477 arose when former President Clinton declared the Grand Staircase-Escalante in southern Utah a national monument in 2000. The designation prompted several Utah counties to file lawsuits asserting roadway claims under R.S. 2477 across the Grand Staircase-Escalante National Monument.[44]

Property rights advocates have similarly asserted rights under R.S. 2477, as members of the general public, to travel across closed, federally controlled public lands despite the lack of formal action by state or local governments to seek highway status under the law. In some cases, those individuals seek access for off-road vehicle use to public lands that have been reserved for wilderness or other preservationist purposes.[45]

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[43] H. Ken Cordell, *The Latest on Trends in Nature-Based Outdoor Recreation,* FOREST HISTORY TODAY 4 (Spring 2008).

[44] Norton v. S. Utah Wilderness Alliance, 542 U.S. 55 (2004).

[45] GENERAL ACCOUNTABILITY OFFICE, RECOGNITION OF R.S. 2477 RIGHTS-OF-WAY UNDER THE DEPARTMENT OF THE INTERIOR'S FLPMA DISCLAIMER RULES AND ITS MEMORANDUM OF UNDERSTANDING WITH THE STATE OF UTAH, B0300912 (2004), *available at* http://www.gao.gov/decisions/other/300912.pdf.

Transportation Projects versus Recreation: Harbinger of the Future?

As the population continues to increase, and western lands are increasingly urbanized, development pressures have increased on public lands devoted to park, open space, and recreational purposes. A recent controversy from southern California, the Orange County Toll Road project, brings this policy conflict into sharp focus. It also presents a compelling story of the clash between development interests and environmental and recreational proponents.

The Transportation Corridor Agencies (TCA) was founded in 1986 to manage the financing, construction, and operation of new roads in Orange County, California. Representatives from 15 cities and counties are appointed to serve on the TCA board of directors, which makes financial, construction, and administrative decisions about the roads.[46]

In 2000, the TCA, along with the California Department of Transportation (CalTrans), and the U.S. Fish and Wildlife Service, Environmental Protection Agency, and Federal Highway Administration, began analyzing alternatives for extending the Foothill Toll Road (SR-241). In 2006, the TCA board of directors approved the Final Environmental Impact Report for what is called the green alignment option, supposedly the "least environmentally damaging, practicable alternative," and began submitting the necessary permit applications.[47]

The proposed project would extend the Foothill Toll Road 16 miles from its current end in the town of Rancho Santa Margarita to connect to Interstate 5 (I-5) at the north end of U.S. Marine Corps Base Camp Pendleton. According to TCA, the Foothill-South extension would relieve current and future traffic congestion in South Orange County and provide an alternative to I-5. The Orange County population is projected to grow by 24 percent over the next 30 years, and vehicle travel by nearly 40 percent over the next 20.[48] Even if the Foothill-South extension is built, Orange County Transportation Authority has predicted that most area freeways, including I-5, will be consistently if not severely congested without more and varied transportation planning.[49]

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[46] Transportation Corridor Agencies & the Toll Roads, *Twenty Reasons to Celebrate: Orange County Transportation Corridor Agencies Have Turned 20*, https://www.thetollroads.com/home/tca_20years.htm (last visited Mar. 12, 2009); 241 Completion, "FAQ," http://www.ftcsouth.com/home/faqs.asp (last visited Mar. 12, 2009).

[47] *Id.*

[48] Orange County Transportation Authority, *2006 Long-Range Transportation Plan, New Directions: Charting the Course for Orange County's Future Transportation System*, at 2.

[49] *Id.* at 47–48.

TCA's decision was immediately controversial, for reasons summarized shortly, particularly among environmental groups. A month after the TCA board approved the Foothill-South project, a coalition of environmental organizations and state government entities filed a lawsuit in California Superior Court in San Diego County against the Foothill/Eastern TCA for violations of the California Environmental Quality Act (CEQA).[50]

The plaintiffs challenged TCA's decision regarding the Foothill-South project, particularly its path through the popular San Onofre State Beach. San Onofre, "one of California's most visited state parks," has a famous surfing beach, Trestles, and a campground serving more than 100,000 campers each year. In addition, San Onofre provides rare and unique habitat for 11 threatened and endangered species, and houses historic and archeological sites. The plaintiffs called Foothill-South's potential effect on the area severe and alleged that TCA violated CEQA in its approval of the project.[51] This litigation is still pending in California state court.

Despite these and other protests, TCA set out to obtain the necessary permits from at least eight state and federal agencies, including the California Coastal Commission. On February, 6, 2008, in a controversial decision, the Coastal Commission dealt a blow to the project, voting 8-2 that the Foothill-South extension violates the California Coastal Act and therefore rejecting TCA's permit application.[52]

TCA appealed the commission's decision to the U.S. Secretary of Commerce, as permitted under the governing federal Coastal Zone Management Act.[53] On December 18, 2008, the secretary sustained the commission's objection to the Foothill-South project, holding that

[50] The coalition included California State Parks Foundation, Endangered Habitats League, Laguna Greenbelt, Inc., Natural Resources Defense Council, Sea and Sage Audubon Society, Sierra Club, Surfrider Foundation, the People of the State of California, and the State Parks and Recreation Commission; *see also,* Cal. State Parks Found. v. Superior Court, 58 Cal. Rptr. 3d 715, 717 (Cal. App. 4th 2007); Natural Resources Defense Council, Press Release, *Coalition Sues Transportation Corridor Agency to Block Toll Road through San Onofre State Beach*, Mar. 23, 2006.

[51] *Id.* at 717–18.

[52] Jennifer Steinhauer, *In California, Coastal Commission Wields Vast Power*, N.Y. TIMES, Feb. 23, 2008; David Reyes & Dan Weikel, *Panel Rejects Toll Road through San Onofre State Beach*, L.A. TIMES, Feb. 7, 2008.

[53] 16 U.S.C. § 1456(3)(A).

there is an "available and reasonable alternative" that would permit the project to be consistent with the state's Coastal Act.[54]

The secretary's decision is probably fatal for the Orange County Toll Road project. But the controversy likely represents a harbinger of future conflicts between development interests and conservationists-recreationists. Viewed purely through the prism of economics, traffic engineering and traditional cost-benefit analysis, using public lands to accommodate development projects may appear to be the most expedient course. But, as the Toll Road project indicates, such a course risks pitched political and legal battles with those who wish to preserve public lands for long-term conservation and recreational uses.

Passive versus Active Recreational Use Conflicts

Many federal and state land management laws recognize the need to balance and accommodate competing uses of the public lands. For example, the Federal Land Policy and Management Act requires the U.S. Bureau of Land Management to manage public lands "under principles of multiple use and sustained yield."[55] Multiple use management includes "the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including … recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'"[56]

Active recreational uses often directly conflict with passive uses, as demonstrated by ongoing political controversies over off-road vehicle use and the debate between hunters and wildlife preservationists.

Off-Road Vehicles versus Passive Enjoyment

In 1972, President Nixon issued an executive order to establish procedures for establishing policies to manage off-road vehicle use on the federal public lands. He recognized that off-road vehicles were often used for legitimate purposes but were also "in frequent conflict with wise land and resource management practices, environmental values, and other types of

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[54] United States Secretary of Commerce, *Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of the Foothill/Eastern Transportation Corridor Agency and the Board of Directors of the Foothill/Eastern Transportation Corridor Agency from an Objection by the California Coastal Commission* (Dec. 18, 2008).

[55] 43 U.S.C. § 1702(c).

[56] *Id.*

recreational activity."[57] President Carter strengthened the order by requiring closure of public lands to ORV use that caused "considerable adverse effects."[58] The Department of Interior responded by requiring all public lands to be designated as open, limited, or closed to ORV use, with designations devised to minimize conflicts among land users.[59]

The executive order's requirements and similar protective laws have led to significant controversy and litigation. In 2008, for example, a federal judge held that the National Park Service failed to properly weigh negative environmental impacts, such as increased air pollution and disturbance to wildlife, in the development of its Winter Use Plan (WUP), which permitted 540 snowmobiles a day into Yellowstone and Grand Teton National Parks.[60] The court found that the WUP "clearly elevates use over conservation of park resources and values."[61] The recreational uses preferred by the plaintiffs, including the Greater Yellowstone Coalition and Natural Resources Defense Council, were pitted against active use advocates such as the American Council of Snowmobile Associations. The plaintiffs argued that the active recreation of snowmobilers creates air pollution, negatively affects Yellowstone's landscape, creates undesirable noise, and disturbs wildlife in the winter months when they are most vulnerable—all adverse impacts that also negatively affect the enjoyment of passive recreationalists.[62]

Hunters versus Wildlife Preservationists

Ongoing discord between hunters and fishermen, on the one hand, and preservationists, on the other, surrounds government's management of valuable wildlife populations inhabiting public lands. The former seek to hunt and fish for recreational purposes and to regulate the numbers of wildlife, arguing that without hunting and fishing, animal populations would become unmanageable and entire species might succumb to the increasing number of predators. Wildlife preservationists, by contrast, generally prefer wildlife management policies that ignore or override the interests of hunters and fishermen. This conflict often manifests itself in

[57] Exec. Order 11644, 37 Fed. Reg. 2877 (Feb. 8, 1972).

[58] *See* Exec. Order 11989, 42 Fed. Reg. 26959 (May 24, 1977).

[59] *See* 43 C.F.R. § 8342.1.

[60] Jim Robbins, *Judge Rejects Plan for More Snowmobiles at National Parks*, N.Y.TIMES, Sept. 15, 2008; Greater Yellowstone Coalition v. Kempthorne, 577 F. Supp. 2d 183 (D.D.C. 2008).

[61] Greater Yellowstone Coalition v. Kempthorne, *supra* note 62, 577 F. Supp. 2d at 210.

[62] *Id.*

disagreements over whether to protect and preserve wildlife populations or to set hunting and fishing limits, seasons, and so on.

For example, in Nevada, environmentalists have attacked a recent Nevada Board of Wildlife Commissioners decision that sport hunters implement a "program of intensive, sustained predator reduction" of mountain lions to protect the state's dwindling mule deer population.[63] Conservationists prefer a hands-off approach, and some view the sports hunter plan as nonsense, a ploy to mask promoting hunting.[64]

Recreational Uses versus Private Property Rights

At times, recreational uses of federal and state public lands come into conflict with private property rights claimed by individual citizens. One such instance falls under the umbrella of R.S. 2477 (discussed earlier), which has been invoked by private landowners as affording them the right to cross public lands to access their otherwise inaccessible private parcels.[65] It is clear that R.S. 2477 has been invoked for a number of purposes other than the valid one of time-honored access to landowner holdings and traditional routes of commerce. Consideration should be given to redefining and restricting its scope.

Another prominent example of this conflict is the rails-to-trails movement. Earlier in the nation's history, the railroads were a dominant mode of transportation, encouraged and heavily subsidized by the federal government and the states. Beginning about a century ago, however, the number of miles of operating railroad lines began to decline as the railroads gave way to new alternatives, such as automobiles and airplanes. That created the problem of what to do with the thousands of miles of unused rail corridors.

With the advent of the environmental movement in the 1960s and 1970s came an appealing solution: converting unused railroad rights-of-way to recreational trails for hikers, bikers, cross-country skiers, and horseback riders. Congress responded favorably to this idea by enacting various rails-to-trails programs, most prominently under the National Trails System Act.[66] Some states, including Washington, have followed suit.[67]

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[63] Martin Griffith, *Nevada's Cougar Plan Pits Hunters, Advocates*, SACRAMENTO BEE, Feb. 16, 2009, at A4.

[64] *Id.*

[65] GENERAL ACCOUNTABILITY OFFICE, *supra* note 47.

[66] 16 U.S.C. § 1247(d). Implementing regulations can be found at 49 C.F.R. § 1152.29.

[67] *See, e.g.*, Lawson v. Washington, 107 Wash.2d 444, 730 P.2d 1308 (1986).

The burgeoning rails-to-trails movement has come into conflict with property rights interests, however, because private property owners of land abutting or traversed by the discontinued rail line may have long believed that when the railroad ceased operating, the abandoned railroad right-of-way would under applicable property law revert to them—and that they could exercise a private property owner's traditional right to exclude others, including recreationists. An example of this type of dispute, which found its way to the U.S. Supreme Court, involved an abandoned railroad right-of-way in Burlington, Vermont, that had been converted by government officials to a popular recreational public pathway.[68]

The question, then, is whether the abandoned railroad rights-of-way coveted by recreationists and their governmental sponsors are indeed public or privately owned. The question has at times spilled over into litigation and remains unsettled.[69]

Energy Development and Recreational Use

One of the longest-standing conflicts over appropriate uses of public lands in the American West is also among the most pressing today: recreational use versus energy development. As noted, historic American policies have tended to favor energy development. More recently, conservation and recreational interests have more forcefully and successfully asserted their positions in this public debate. And, yet, with the current focus on developing alternative energy resources to reduce America's entrenched addiction to oil and other traditional energy sources, this policy debate is as topical as ever.

Continuing Conflict

Resources from the public lands—oil, gas, coal, and other minerals as well as timber harvesting—have long been a major source of revenue for federal, state, and local governments.[70] At the same time, growing recognition of the value of these lands as open space, for recreation and environmental preservation, has pitted resource developers against environmentalists and recreationists. These conflicts were exacerbated in recent years by a presidential administration that placed great weight on mineral exploration.

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[68] Preseault v. Interstate Com. Commission, 494 U.S. 1 (1990).

[69] *See, e.g.*, Preseault v. Interstate Com. Commission, *supra* note 70; Lawson v. Washington, *supra* note 69.

[70] *See* S.T. FAIRFAX & C. YALE, FEDERAL LANDS (Island Press 1987).

Most recently, oil and gas exploration on tens of thousands of acres in Utah was blocked by a federal district court, which ruled that the U.S. Department of the Interior had failed to perform an adequate environmental analysis. "Because of the threat of irreparable harm to public land if the leases are issued," the court stated, "the balancing of equities also tips in favor" of the environmental groups. The lands involved were within sight of the Arches and Canyonlands National Parks.[71]

The Utah case, like many others, involved attacks on proposed development based on inadequate environmental review. The National Environmental Policy Act requires an environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment."[72] It has been the basis for many lawsuits challenging mineral development on the public lands. In addition, the National Historic Preservation Act[73] and the Federal Land Policy and Management Act[74] have been invoked to prevent federal leases that allegedly would adversely affect historic properties by virtue of air pollution,[75] or fail to protect the "quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values" of public land.[76]

It appears that many battles over the uses of public lands, national forests, and parks and monuments have been waged over the adequacy of environmental evaluations, rather than the way in which the government has exercised its trusteeship. This is questionable in principle, but has perhaps been necessary in practice. It is easier for courts to find that federal agencies have failed to study impacts and alternatives adequately than it is for them to conclude that these bodies have abused their discretion.

In 1970, the Public Land Law Review Commission gave the uses of the public lands another look. It emphasized the role of Congress in the management of public lands, and called for a new evaluation of the public lands in terms of their best uses and potential disposition.[77]

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[71] Memorandum Order, Southern Utah Wilderness Alliance. v. Allred, Civ. 08-2187 (RMU) Jan. 17, 2009; Felicity Barringer, 11th-Hour Court Order Blocks Oil and Gas Leases in Utah, N.Y. TIMES (Jan. 18, 2009).

[72] 42 U.S.C. §4312(2)(c).

[73] 16 U.S.C. § 470(f).

[74] 43 U.S.C. § 1712(c)(8).

[75] *See* Mark Clayton, *Why National Parks, Coal-Fired Power Plants May be Neighbors*, CHRISTIAN SCIENCE MONITOR, Apr. 24, 2008.

[76] Southern Utah Wilderness Alliance v. Allred, *supra* note 73.

[77] *See* DANA & FAIRFAX, *supra* note 19, at 231–34.

Since this report, the climate has changed drastically. A panoply of environmental legislation has passed, and federal lands policy has been recognized as one of retention, rather than disposition and development.[78] The Coastal Zone Management Act recognizes the need for coordinated planning and respect for state and local policies, and the National Environmental Policy Act and its state counterparts call for a hard look at the consequences of development. Nevertheless, events over the past eight years show that enough confusion exists in federal leasing and recreational policies to justify another comprehensive look at public land management.

Growing Debate

To an ever-increasing degree, public lands-related conflicts between environmentalists and recreationists on the one hand, and energy interests on the other, relate to nontraditional, renewable sources of energy such as geothermal, solar, and wind power. It is anticipated that these conflicts will increase in the future as renewables become a larger focus of government decisionmakers and a greater portion of the nation's energy portfolio.

The federal and state governments have until now been slow to encourage alternative energy development on public lands. This includes not only siting alternative energy production facilities such as solar and wind farms on public lands, but also access across public lands for transmission facilities in developing alternative energy throughout the West.

That is likely to change, because the Obama administration and several states have announced aggressive plans to site a variety of renewable energy projects, such as wind and solar farms, across western states. Such sites will continue to trigger controversy among those who wish to preserve the public lands for open space and recreational uses. Equally controversial will be the expanded transmission facilities necessary to deliver electricity generated by those often-remotely located facilities to population centers where the power is needed to serve growing populations and displace traditional generation sources.

There are, for example, so many current proposals to develop large solar power plants in California's Mojave Desert that, for a time, the BLM placed a moratorium on new applications. Wind farms and related transmission lines depend on public lands for siting. Secretary of the Interior Ken Salazar has declared his intention to redirect the government's emphasis for energy development on federal lands from oil and gas to renewable options such as wind, solar, and

[78] *See* Federal Land Policy and Management Act, *supra* note 6; FAIRFAX & DANA, *supra* note 19.

geothermal power. Further, many firms and western utilities are testing options for tidal and wave power facilities in federal and state-jurisdictional waters.

A particularly high-profile recent example of this trend involves San Diego Gas & Electric Company's (SDG&E) Sunrise Transmission Project, a 500 kV line that the company proposed to site through the heart of California's Anza-Borrego Desert State Park.

It might seem self-evident that a large-scale electric transmission project would be antithetical to a wilderness area, but constructing through wilderness is exactly what SDG&E sought to do. Anza-Borrego, California's largest state park, is considered by many to be the crown jewel of the state park system. It is home to numerous threatened and endangered species, breathtaking vistas, and several major Native American cultural sites. Most of the land in the park carries a wilderness designation.

The proposed transmission line would have eliminated a popular campground, sliced through a large ancient village site, bisected Peninsula Bighorn Sheep habitat, and remained highly visible along the only major road running through the park. For the project to go forward as proposed, California would have had to decertify wilderness (something it has never done before), and the State Parks and Recreation Commission likely would have needed to amend the park's general plan.

Under these circumstances, why would the utility make such a proposal? It already has a 500 kV line that runs along the Mexican border, and now wants a second east-west line toward San Diego that would be separate from the existing line for reliability purposes. The Anza-Borrego State Park has a large north-south footprint, and there is very little space between the southern boundary of the park and the Mexican border. In addition, the company has an existing low-voltage line on wooden poles that predates the creation of the park. When the park was established, the land surrounding the wooden poles was designated as wilderness. SDG&E sought to replace the wooden poles with much taller and more massive lattice steel towers, and to replace the existing thin wires with thick high voltage cables.

It is questionable whether the company holds clear easements for the entire string of existing wooden poles through the park. As first proposed, the new project would have required a wider right-of-way and additional incursions into wilderness land to avoid cultural sites and

other permanent features. In addition, it would undoubtedly have a much more dramatic impact on the wilderness experience.

Relying on its obligation under the California Environmental Quality Act[79] to explore alternatives to the proposed project, the California Public Utilities Commission (CPUC) identified, studied, and ultimately approved a southern route that would avoid the park by running parallel to the existing high voltage line for a short distance before veering to the northwest beyond the park. However, to avoid the park and nearby tribal lands, the line must run through the Cleveland National Forest. Anticipating such a possibility, Congress in its Energy Policy Act of 2005 directed the U.S. Forest Service to identify a viable transmission corridor within its borders.

Although both California and BLM have approved the Sunrise Transmission Project in its alternative location, those approvals are still subject to internal review and likely court challenges. It nevertheless seems unlikely at this point that this particular line will bisect the Anza-Borrego State Park. The CPUC's December 2008 decision on the Sunrise Project, moreover, contains strong language that should discourage the company from considering Anza-Borrego land for future energy development.[80]

It appears likely that the public policy dispute illustrated by the Southern California Sunrise Transmission Project and Anza-Borrego State Park will resurface, more than once, as the region's newfound focus on renewable energy resources clashes with the longstanding, deeply held interests of recreationists and conservationists.

Notably, this debate has already shown signs of dividing environmentalists. The *New York Times* recently reported that various environmental groups are split in their opinions on whether, and to what extent, our public lands should be made available for renewable energy projects.[81]

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[79] Cal. Public Resources Code §21000 et seq.

[80] *See* December 18, 2009, Decision of California Public Utilities Commission, Docket # A.06-08-010, *available at* http://docs.cpuc.ca.gov/PUBLISHED/AGENDA_DECISION/95357.htm.

[81] *See* F. Barringer, *Environmentalists in a Clash of Goals*, N.Y. TIMES, Mar. 24, 2009, at A17.

Water, Recreation, and Western Public Lands

Water—and government-sponsored development of water resources—has been a critical use of public lands for well over a century. Particularly in the arid American West, exploiting and transporting scarce water resources has been key to the growth of population centers, a vibrant economy, and development of an agricultural system that feeds the world.

Nevertheless, over the past century increasing conflicts have developed between those who wish to perpetuate this tradition of water resource development and environmentalists and recreationists who view the lakes, rivers, and wetlands of the American West very differently. For the environmentalists and recreationalists, a reliable water supply is but one objective of the region's water resources, and must be balanced against their value in providing recreational pursuits and ecosystem stabilization.

Flat-Water versus Undammed River Recreation

Dams have been constructed on many of the rivers that transect the western United States. In 2009, there were more than 6,300 in Montana, Colorado, Wyoming, and California alone.[82] By the 1970s, every significant river in California had been dammed at least once.[83] Dams create reservoirs that recreationalists use for flat-water activities such as fishing, swimming, boating, waterskiing, and camping downriver from the dams. Conversely, undammed rivers afford other forms of recreational activity, such as whitewater rafting and kayaking. Flat-water recreationalists need only minimal water levels, whereas whitewater enthusiasts demand greater water flows. And dammed rivers sometimes are simply incompatible with ecological demands: when cold water is discharged from the bottom of reservoirs, it replaces the warm water fish habitat of some endangered fish and promotes conditions for cold water fish such as trout.[84] Moreover, the fluctuating water flows released from dams negatively affect the food supply, and can limit the spawning patterns and natural reproduction of fish.[85]

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[82] Specifically, there are 3,301 dams in Montana, 1,689 in Colorado, 1,484 in California, and 1,421 in Wyoming. U.S. Army Corps of Engineers (USACE), *National Inventory of Dams*, http://crunch.tec.army.mil/nidpublic/webpages/nid.cfm (last visited Apr. 3, 2009).

[83] John Cairns & Sarah E. Palmer, *Senescent Reservoirs and Ecological Restoration: An Overdue Reality Check*, RESTORATION ECOLOGY 212, 213 (1993).

[84] Joe Gelt, *Water Recreation Makes Big Splash in Arizona*, University of Arizona: Water Resources Research Center, http://ag.arizona.edu/azwater/arroyo/083recr.html; Cairns, *supra* note 85.

[85] Gelt, *supra* note 86.

An example of the conflicting interests of various parties is the scheduled demolition of the Marmot Dam on the Sandy River in Oregon. Fishermen, whitewater rafters, and river runners applauded the removal of the dam; the decision promises restoration of the threatened Coho salmon population, enhancement of whitewater rafting and kayaking by removing the barrier of 11 miles of the Sandy River,[86] and creation of additional river miles for scenic enjoyment. Flatwater fishermen and boaters, however, bemoan the loss of the 600-acre holding pond and fear the efforts to restore the salmon fishery would result in increased regulations and catch-and-release provisions.[87]

Increased recreational demand, coupled with newly developed scientific data on the deleterious effects of dams on fishery populations and habitats, make it less likely that new dams will be built on rivers and streams of the American West. Those same factors will complicate efforts by dam and reservoir operators to secure the requisite relicensing of existing dams and reservoirs. And, as illustrated by pending political controversies in Oregon, California, and elsewhere, they will likely increase pressure to actually remove certain existing dams that have been longstanding fixtures in the western United States.

The Public Trust and Mono Lake

One of the most well-known public lands conflicts in recent American history pitted water diversions against environmental and recreational concerns. It arose at Mono Lake in central California. Given the influence the Mono Lake controversy and its resolution have had on American public lands management policy generally, somewhat detailed analysis is merited here.

Mono Lake is a large saline water body on the eastern slope of the Sierra Nevadas that harbors a rich population of brine shrimp and brine flies, which in turn provide food for a large and varied population of migratory birds. The lake has historically been used by boaters and bird watchers, by fishing recreationalists, and as a brine shrimp fishery.

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[86] *PG&E Starts Marmot Dam Removal*, WATER POWER & DAM CONSTRUCTION, Aug. 14, 2007, at 8; Richard Lovett, *Northwest Power Co. to Demolish Two Dams in Sandy River Drainage*, PADDLER MAGAZINE, Nov. 1, 1999, a*vailable at* http://www.paddlermagazine.com/environment-access/features/northwest-power-demolish-dams-sandy-river-drainage.html.

[87] Lovett, *supra* note 88.

The lake bed is held by the state of California. The nature of this title and the burdens accompanying it are commonly characterized as a public trust, subject to legal restrictions of a constitutional nature. The U.S. Supreme Court described the public trust as:

> [a] title different in character from that which the state holds in lands held for sale … different from the title the United States holds in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.[88]

The reasons for distinguishing these lands from others have been described in various ways. In the 19th century, it was suggested that if the trust lands had not been held for all the people, the public lands would not have been settled, for access by water would have been precluded.[89] Later, the courts characterized their rationale in more environmentally oriented terms:

> The severe restriction upon the power of the State as trustee to modify water resources is predicated not only upon the importance of the public use of such waters and lands but upon the exhaustible and irreplaceable nature of the resource and its fundamental importance to our society and to our environment. These resources, after all, can only be spent once. Therefore, the law has historically and consistently recognized that rivers and estuaries, once destroyed or diminished, may never be restored to the public and, accordingly, has required the highest degree of protection from the public trustee.[90]

It was within this legal context that the California Supreme Court considered the protection of trust values as against established water rights. In 1940, the city of Los Angeles had obtained a state permit to appropriate virtually the entire flow of four of the freshwater streams feeding Mono Lake, which hosted numerous species of birds and scene of spectacular views. In 1970, a second diversion tunnel was completed for that purpose. As a result, the level of the lake began to drop, approximately one foot a year, and its surface area was diminished by one-third. An island used by gulls for nesting became peninsula, subject to the depredations of coyotes and other land-based predators. The shores of the dwindling lake receded for hundreds of feet,

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[88] Ill. Central R.R. Co. v. Ill., 146 U.S. 387, 452 (1892).

[89] Martin v. Waddell, 41 U.S. 367, 414 (1842).

[90] Morse v. Oregon Div. of State Lands, 581 P.2d 520, 521 (Ore. 1978), aff'd, 590 P.2d 709 (1979).

exposing large mud banks and tufa towers. It was then that environmental groups sued to enjoin the city's diversions, invoking the public trust doctrine.

The California Supreme Court held that the trust applied in an influential 1983 decision. The court stressed three basic principles:

- The public trust imposes a duty of "continuing supervision over the taking and use of appropriated water," a duty that includes the power to reconsider water allocations previously made, and to evaluate their effect on trust values.
- No one may acquire a vested right to appropriate water in a manner harmful to the interests protected by the public trust.
- The state has an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[91]

The decision to save Mono Lake's unique resources and to restore its degraded environment involved a number of legal and policy factors. Its principal impetus doubtless came from the California Supreme Court's public trust decision. Restoration was guided as well, however, by newly enacted statutory provisions protecting the fisheries, as well as by state and federal recognition of the region's environmental and recreational values, most notably with the creation of a state tufa reserve and the Mono Basin National Forest Scenic Area.

Meanwhile, the public trust has been applied to rivers and streams in a number of other western states and contexts. In Montana, the state supreme court held that fishermen and other recreationists must be given free access over rivers large enough to be used by small boats.[92] Public trust principles have also been held to apply to water diversions affecting trust values in Idaho, where the court held that water diversions for power uses are subject to the public trust, and that courts will take a "close look" at legislative or administrative determinations to determine whether their acts comply with the public trust doctrine." The public trust doctrine, the court stated, "at all times forms the outer boundaries of permissible governmental action with respect to public trust[93] resources."[94] In Hawaii, the state supreme court applied the consideration

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[91] Nat'l Audubon Soc'y v. Superior Ct., 658 P.2d 709, 712 (Cal. 1983).

[92] Mont. Coalition for Stream Access v. Curran, 682 P.2d 163 (Mt. 1984); *but see* State ex rel. Meek v. Hays, 785 P2d 1356 (Kansas 1990).

[93] In re Water Use Permit Application (Waihole Ditch) 9 P.3d 409 (Hawaii 2000). *See Symposium, Managing Hawaii's Public Trust Doctrine*, 24 U. OF HAWAII LAW REV. 1 (2001).

of public trust impacts on the diversion of water from one side of the island to another, and held, in a sweeping decision, that the doctrine applies to ground water as well as other kinds. And, in one of the earliest state trust decisions, the North Dakota Supreme Court held that the public trust requires consideration of overall impacts of water uses for power development.[95]

The Looming Challenges of Climate Change

No discussion of the appropriate uses of public lands in the American West would be complete without reference to the looming threats associated with climate change and global warming. Climate scientists, led by the United Nations–sponsored work of the Intergovernmental Panel on Climate Change (IPCC), advise that profound temperature changes and their multifaceted consequences have already begun manifesting themselves across the planet. They warn that the deleterious impacts of climate change will be felt unevenly by different regions and populations. They and other climate experts also predict that the consequences of climate change will fall disproportionately and adversely on major portions of the American West.

Climate change poses significant challenges for the managers of public lands. Forests, for example, are already under tremendous stress as temperature shifts result in increases in disease, pests, and mortality.[96] Forests are also being seen as important potential resources for offsetting the emissions of greenhouse gases through, for example, carbon sequestration. More broadly, temperature changes are already modifying both the range of multiple plant and animal species and their ability to survive in the face of hotter climates and altered ecosystems.

The effects of climate change on recreational uses of the public lands are similarly multifaceted. Several examples make this clear:

- In recent years, there has been a strong effort by the state of California, local governments, and recreational advocates to create a Bay Trail along the edge of San Francisco Bay for hikers, bicyclists, equestrians, and others. Current projections,

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[94] Shokal v. Dunn 707 P.2d 441 (Ida. 1985); Kootenai Env't Alliance, Inc. v. Panhandle Yacht Club, Inc., 671 P.2d 1085 (Ida. 1983). Since the Shokal and Panhandle Yacht Club decisions, the Idaho legislature attempted to exclude water rights determinations from the scope of the public trust in that state. This measure has been questioned by legal scholars. *See, e.g.,* M. Blumm, H. Dunning, S. Reed, *Renouncing the Public Trust Doctrine: An Assessment*, 24 Ecology L.J. 461 (1997).

[95] United Plainsmen Assn. v. N.D. State Water Conservation Com'n, 247 N.W.2d 457 (N.D. 1976).

[96] *See, e.g.,* M. Martin Smith and Fiona Gow, *Unnatural Preservation*, HIGH COUNTRY NEWS, Feb. 4, 2008; Paul VanDevelder, *West's Forests Will Never Be the Same*, HIGH COUNTRY NEWS, Jul. 16, 2008.

however, indicate that climate change will cause the water level of the bay—part of the largest estuary along the western coast of North and South America—to rise by more than a meter before the end of the 21st century. Such a rise in sea level would inundate major portions of the Bay Trail, rendering it unusable.[97]

- Whitewater boating and rafting are increasingly popular on many western rivers. As noted, however, many if not most of these rivers are dammed and are relied on for many uses other than recreation—including water supply, hydroelectric power generation, and flood control. Climate scientists advise that global warming is projected to reduce snowpack levels across the mountain ranges of the American West, thus placing increased stress on dams and reservoirs to prevent downstream flooding. That, in turn, is likely to disrupt many rivers' value and availability as recreational boating sites, and will increase use conflicts between recreational users and other stakeholders.[98]
- Salmon fisheries are in sharp decline along the West Coast of the continental United States. Although wildlife biologists believe the causes of the decline are numerous, a key factor appears to be increased acidification and other, deleterious changes to ocean waters triggered by climate change. The recent crash in salmon fisheries has prompted federal and state wildlife officials to cancel or severely limit recreational and commercial salmon fishing off the Oregon and California coast for the second year in a row. Prospects for long-term recovery of West Coast salmon fisheries, in light of climate change trends, are problematic at best.[99]

In sum, the looming, multifaceted effects of climate change pose an additional challenge to the long-term administration of our public lands generally, and to recreational uses of those lands in particular. Public land managers at the federal, state, and regional levels will have to be cognizant of both the potential, adverse effects of climate change on those lands and the potential for public lands to adapt to and ameliorate at least some of the more pernicious effects of climate change on both the natural and human environments.

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[97] Glen Martin, *Taking the Heat: Bay Area Ecosystems in the Age of Climate Change*, BAY NATURE (Jan.-March. 2009), *available at* http://baynature.org/articles/jan-mar-2009/taking-the-heat/taking-the-heat.

[98] Nancy Vogel, *California: Less Snowfall Could Spell Big Problems for State*, L.A. TIMES, Jun. 11, 2001.

[99] Sarah Skikne et al., *On the Edge: Protecting California's Fish and Waterfowl from Global Warming*, 3 (Nat'l Wildlife Fed'n & Planning and Conservation League Found., April 2008), *available at* http://www.nwf.org/westernclimateinitiative/pdfs/CaliforniaGlobalWarmingReport.pdf.

A Provocative Proposal: Applying the Public Trust Doctrine to Federal Public Lands

Many states recognize the public trust doctrine and apply it to managing public lands. But applying it as a principle in federal public land administration is far less straightforward. Is the public trust doctrine applicable to the federal government and its administration of federal lands? The law on this point is unsettled.

The public trust applicable to states has been characterized as an essential attribute of sovereignty, which passed from the British crown to the original colonies as a result of the American Revolution, and to other states under the terms of the U.S. Constitution.[100] The federal government, by contrast, lacks inherent sovereignty. Its powers are enumerated in the Constitution, and the Tenth Amendment makes it clear that the states hold residuary power.[101]

The U.S. Supreme Court, however, has been ambiguous in its rulings on federal trusteeship of the public lands. Analysts and jurists have suggested that public land law is so heavily dominated by statutes that it excludes room for the public trust doctrine to operate, and the lands themselves are so diverse as to preclude operation of a "single, unitary doctrine."[102]

Nevertheless, many court cases seem to indicate that the public trust doctrine does apply to federal lands.[103] The U.S. Supreme Court in *Pollard's Lessee v. Hagan* considered the United States a temporary custodian, with a trust duty to hold the lands for future states.[104] In an oft-cited statement of the Supreme Court in 1891, the Court declared that

> all the public lands of the nation are held in trust for the people of the whole country. And it is not for the courts to say how that trust shall be administered. That is for Congress to determine. The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes. In the same way and in the exercise of the same trust it may disestablish a reserve, and devote the property to some other national and public purpose. These are

[100] Pollard's Lessee v. Hagan, *supra* note 3.

[101] Kansas v. Colorado, 206 U.S. 46 (1907).

[102] Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. Davis Law. Rev. 269, 273 (1980); *see also*, District of Columbia v. Air Florida, 750 F.2d 1077 (D.C. Cir. 1984).

[103] Wilkinson, *supra* note 104, at 277, n. 32.

[104] Pollard's Lessee v. Hagan, *supra* note 3; *see also* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

> rights incident to proprietorship, to say nothing of the power of the United States as a sovereign over the property belonging to it.[105]

Later references to a trust responsibility have involved either efforts to justify federal power to protect the public lands or to compel federal agencies to undertake affirmative duties to protect them.[106] They cannot be characterized as the public trust doctrine as applied by states to their waters and water resources. When the Supreme Court stated that "all the public lands of the nation are held in trust for the people of the whole country," it did so to justify the invalidation of wrongfully issued patents to coal lands, not to impose a trustee duty on government to safeguard public trust values.[107] When it quoted that statement 21 years later, it did so to hold that Congress was the one to determine whether to reserve lands, that there was no duty to divest such lands to the states or their people, and that a cattleman had no right to let his cattle stray on to forest reserves.[108] Indeed, in *Kleppe v. New Mexico*, the court characterized the power of Congress over the public lands as "plenary, an expression somewhat inconsistent with the trustee duties defined and enforced by state courts on their land managers."[109]

Nevertheless, a number of cases have suggested the presence of a public trust duty on the part of the United States. Lower federal courts have used trust language to hold that the United States is limited in its ability to alienate state trust lands,[110] and have cited trust principles in support of federal actions to recover the value of wildlife lost on federal land.[111]

Litigation involving the Redwood National Park in California is perhaps the most interesting example of courts imposing trust duties on the federal government. There the federal district court found an affirmative duty to preserve and protect national park lands, ordering the Department of the Interior to take affirmative steps to protect a redwood forest park from

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[105] Light v. United States, 220 U.S. 523 (1911) (citations omitted).

[106] Wilkinson, *supra* note 104, at 280–90.

[107] United States v. Trinidad Coal Co., 137 U.S. 160 (1890).

[108] Light v. United States, *supra* note 107.

[109] Kleppe v. New Mexico, 429 U.S. 529 (1976).

[110] United States v. 1.58 Acres of Land, 523 F. Supp. 120 (D. Mass. 1981)

[111] In re Complaint of Steuart Transp. Co., 495 F.Supp. 38 (E.D, Va. 1980). *See also*, State v. N.J. Century Power & Light Co., 351 A.2d 337 (N.J. 1976).

damage by private logging in adjacent lands, in part on the ground that the secretary is under "a general trust duty" to manage the park.[112]

The public trust has over the years proven to be a powerful legal and policy doctrine for the states in their management of state-owned public lands. If the public trust doctrine were similarly and definitively applied to the national government's administration of *federal* public lands, federal land managers would similarly have an additional, important tool to ensure that environmental and recreational values are properly factored into their public land management decision-making processes.

Conclusion

Controversy over recreational use of the American West's public lands is multifaceted and longstanding. The enjoyment of the nation's magnificent open spaces for active and passive recreational pursuits has in recent years gained widespread public acceptance as a legitimate objective in comparison with more traditional uses such as mineral exploitation and highways of commerce.

But new challenges, including recent pressures to devote major portions of our public lands to renewable energy project development and the multifaceted threats presented by climate change, will continue to test the public's and government policymakers' commitment to devote public lands to recreational purposes.

Balancing those competing uses and charting the future of the magnificent, diverse public lands of the American West will no doubt test the creativity and leadership abilities of our nation's political leadership in the years to come.

Most of the nation's public lands remain in federal, rather than state, ownership. At the state level, the applicability of the public trust doctrine to public land resources has assisted state land managers and policymakers in protecting and preserving state public lands for this and future generations. Explicit extension of public trust principles to federally-owned public lands—

[112] *See* Sierra Club v. Dept. of the Interior, 376 F. Supp. 90 (N.D. Cal. 1974); Sierra Club v. Dept. of the Interior, 398 F.Supp. 284 (N.D. Cal. 1975); Sierra Club v. Dept. of the Interior, 424 F.Supp. 172 (N.D. Cal. 1976), discussed in Wilkinson, *supra*, note 104, at 284–90. The theory was rejected by another district court, however, in Sierra Club v. Andrus, 487 F.Supp. 443 (D.C. Cir. 1980). Another federal court construed the Redwood Park cases as involving unreasonable, arbitrary actions in abuse of the Secretary's discretion. Friends of Yosemite v. Frizzell, 420 F. Supp. 390 (N.D. Calif. 1976).

and land managers—would go far to ensure ongoing stewardship and protection of our nation's most precious natural resources.

Similarly, it is time for another comprehensive, systematic look—perhaps by a new Public Land Review Commission with representation from states, environmentalists, recreation interests and the general public—to define where we are coming from, and where we should be headed. This would afford government policymakers and public land managers a most welcome respite from ad hoc decisionmaking, in favor of a more thoughtful, long-term review of America's public lands.