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The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?

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ARTICLE

THE RISE OF URBAN ARCHIPELAGOES IN THE AMERICAN WEST: A NEW RESERVATION POLICY?

BY

JAMES R. RASBAND*

During the nineteenth and early twentieth centuries, the public lands were managed primarily on behalf of those interested in using and extracting the timber, minerals, and grass. Native Americans were removed from the lands in favor of farmers, grazers, loggers, and miners. During the last half-century, the American West has been undergoing a dramatic transformation with significant consequences for our approach to the public lands. The West's population has been growing rapidly and forming a number of what demographers have called "urban archipelagoes." This population movement has been accompanied by an increasing preference that the public lands be devoted to preservation and recreation rather than extraction. The Article discusses how the law should respond to this new preference. It does so by examining some of the similarities between federal Indian and public lands policy in the nineteenth century and public lands policy today. The Article suggests that although those of us who have flocked to the West's urban archipelagoes have a different view of how the West's natural resources are best used, many of us seem to share with our nineteenth century counterparts the view that those who were here before we arrived are an obstacle to achieving our desired uses of the West's resources. The Article uses the analogy to the nineteenth century to suggest that we more thoughtfully consider the impact of public lands policy on the rural communities of the West and that we exhibit less certainty and more

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skepticism about the superiority of our public lands aspirations. The Article suggests that participation of rural communities in public lands decision-making is a critical component of a principled public lands policy. It concludes by discussing several ways of enhancing rural participation and offers a brief critique of the Clinton Administration's adherence to the participation norm.

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I. VENIMUS, VIDIMUS, VICIMUS¹

In the nineteenth century, Americans looked out upon the vast West and its abundant natural resources and saw the possibility of great wealth and opportunity. One obstacle presented itself to national aspirations: the Indian tribes. The tribes were little match for the resource hunger of the growing country. Their numbers were relatively few; their military resources were relatively paltry; their political power was almost non-existent; and their ties to the land had little legal recognition, consisting only of the right of use and occupancy, which Congress could terminate at will and without

¹ We came, we saw, we conquered. This language is the first person plural of Caesar's oft-quoted statement: "veni, vidi, vici" (I came, I saw, I conquered). See Seutonius, *Divus Julius*, xxxvii. 2, *THE OXFORD DICTIONARY OF QUOTATIONS* 180 (5th ed. 1999).

compensation.² As fast as homesteaders, miners, grazers, railroads, timber companies, and others came West, laws and policies were adopted to prevent Indian interference with the aspirations of these newcomers.³ Whether the United States's policy was relocating tribes farther west, isolating them on reservations, or attempting to assimilate them into American society,⁴ federal Indian policy was characterized by one primary goal: pushing aside Indian tribes to facilitate the exploitation of the West's bountiful natural resources.

This description of federal policy and its primary goal is, of course, rather pejorative and was not the way it was characterized at the time. As many Americans in the nineteenth century saw it, the West's natural resources were not being exploited. Instead, they were being put to productive use, in contrast with the "unproductive" uses of hunting, gathering, and subsistence agriculture that largely characterized Indian peoples' use. Although many would have conceded that Indian tribes were being pushed onto Indian reservations, most argued that it was for their own good and that ultimately Indians would benefit by departing from their unproductive use of the land in favor of more productive activities such as farming, ranching, and mining.⁵ To the extent these policy justifications were insufficient or uncomfortable, the law was a helpful ally. The law of the land gave Congress nearly plenary control over Indian tribes and the lands on which they resided,⁶ and the Supreme Court had limited Indians' property rights in their aboriginal lands.⁷ Removal of tribes from their land required no compensation unless the United States deemed it wise.⁸

Most Americans now look back on this era with discomfort and regret. Federal Indian policy is roundly criticized as self-interested, cruel, and often deceitful.⁹ And the panoply of public land laws disposing of public lands—among which were the 1872 Hard Rock Act,¹⁰ the 1902 Reclamation Act,¹¹

² See *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823) (Marshall, C.J.) (setting forth the doctrine of discovery under which the United States holds fee title to aboriginal lands and Indian tribes hold the right to use and occupy their lands subject to purchase or conquest by the United States).

³ See *infra* Part II (examining dispossession of Indian tribes). See generally CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* 37–38 (1992) (discussing the dispossession of Indian tribes as a result of the various gold rushes in the mid and late nineteenth century).

⁴ See *infra* Part II (reviewing various federal Indian policies).

⁵ See, e.g., Letter from General William T. Sherman to W.A.J. Sparks, Chairman of the House Subcomm. on Indian Affairs, (Jan. 19, 1876), in *DOCUMENTS OF UNITED STATES INDIAN POLICY* 147 (Francis Paul Prucha ed., 2d ed. 1990) [hereinafter *DOCUMENTS*] ("[T]he habits of the Indians will be gradually molded into a most necessary and useful branch of industry—the rearing of sheep, cattle, horses, etc. In some localities they may possibly be made farmers."). See also *infra* notes 48–56 and accompanying text (discussing this view of federal Indian policy).

⁶ See generally FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* 207–20 (1982 ed.) (discussing broad federal power over Indian affairs).

⁷ *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 587 (1823).

⁸ See generally COHEN, *supra* note 6, at 486–93.

⁹ See *infra* Part II (examining nineteenth-century visions of federal Indian policy).

¹⁰ General Mining Law of 1872, ch. 152, 17 Stat. 91 (codified as amended at 30 U.S.C. §§ 22–

and the various railroad land grants—are routinely disparaged as leading to the Great Barbecue, a period of unequaled despoliation of the natural resources on the public lands.¹²

Barbecue or not, the result of public land policy in the nineteenth and early twentieth centuries was the establishment of a number of rural communities throughout the West.¹³ These rural communities were largely dependent upon using the natural resources on the public lands to sustain their livelihoods. Much of the rural West suffered from the booms and busts endemic to mining, but farming and ranching generally provided a foundation for the development of stable communities of families that over multiple generations, developed an attachment to the public lands that went well beyond those lands' financial fruits.¹⁴

From the perspective of Native Americans, the demographic changes in the nineteenth century were surely enormous. However, in sheer numbers the migration into the West during the nineteenth century is dwarfed by that since World War II. During the last half century, the West has undergone massive growth and the Mountain West has grown more quickly than any other area of the country.¹⁵ The influx has occurred largely in the cities of

47 (1994 & Supp IV 1998)).

¹¹ Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 372-498 (1994 & Supp. IV 1998)).

¹² This term was first coined by historian Vernon Parrington and has since been used by many others. See, e.g., WILKINSON, *supra* note 3, at 18 (quoting Parrington): Oliver A. Houck, *The Water, the Trees, and the Land: Three Nearly Forgotten Cases that Changed the American Landscape*, 70 TUL. L. REV. 2279, 2293 (1996) (referring to "the heyday of the Great Barbecue in American resources").

¹³ The definition of the "West" has been much debated. See, e.g., GUNDARS RUDZITIS, *WILDERNESS AND THE CHANGING AMERICAN WEST* 3-7 (1996). "Since 1910, the Census Bureau has defined 'the West' to include only the states of Alaska, Hawaii, Washington, Oregon, California, Idaho, Utah, Nevada, Arizona, Montana, Wyoming, Colorado, and New Mexico." Pamela Case & Gregory Alward, *Patterns of Demographic, Economic and Value Change in the Western United States: Implications for Water Use and Management* 7 (Report to the Western Water Policy Review Advisory Commission) (1997). In literature discussing the West, however, the dispute is typically about how much of California, Oregon, and Washington should be included in the "West" (most often the issue is whether the "West" extends west of the Cascades and Sierra Nevadas) and about how far east the West extends beyond the Rocky Mountains. See RUDZITIS, *supra*. But almost any definition of the West would include the area between the Cascades and Sierras on the west and the Rocky Mountains on the east with the states of Montana, Idaho, Wyoming, Utah, Colorado, Arizona, Nevada, and New Mexico solidly at the core of the West. This Article focuses on the Intermountain West and this latter group of states.

¹⁴ See generally Paula M. Nelson, *Rural Life and Social Change in the Modern West, in THE RURAL WEST SINCE WORLD WAR II* (R. Douglas Hart ed., 1998).

¹⁵ "The percentage change in population in the mountain region was 37.2% for 1970-80, 20.1% for 1980-90, and 14.5% for 1990-95. The corresponding percentage increases for the entire U.S. w[ere] 11.4%, 9.8%, and 5.6%, respectively." Jan G. Laitos & Thomas A. Carr, *The Transformation of the Public Lands*, 26 *ECOLOGY L.Q.* 140, 241 (1999) (citing BUREAU OF THE CENSUS, DEP'T OF COM., *STATISTICAL ABSTRACT OF THE U.S.* 1996, 29 (1996)). See also Quinton Johnstone, *Major Issues in Real Property Law*, 55 *MO. L. REV.* 1, 41 n.80 (1990) (noting that many of the states in the West greatly exceeded the national population growth rate: "from 1950 to 1987 the population of Nevada increased by 529%, Arizona by 351%, . . . California by 161%, Colorado by 149%, Utah by 144%, New Mexico by 120%, and Texas by 118%").

the West, and the suburban and exurban¹⁶ areas that surround them, resulting in a number of what demographers have called "urban archipelagos."¹⁷ In fact, the Western United States is now the most urbanized portion of the country.¹⁸ The in-migration experienced in the West has not, of course, come simply to Colorado's Front Range, Utah's Wasatch Front, and the West's other urban archipelagos. It has also come to a variety of small towns in the West, like southeastern Utah's Moab, which serve as gateways to the West's national parks, monuments, wilderness, and recreation areas. During the last twenty years, Moab has experienced explosive growth, predominantly in the service and tourism sector, as people have come to mountain bike on the nearby slickrock and to drive, hike, and explore the area's sublime canyons and red rock country.¹⁹ No single motivation has spurred the migration into the West,²⁰ but like their nineteenth century counterparts, many have come to enjoy the fruits of the West's magnificent natural resources.

Although those who have come to the Moabs of the West, and those others of us who have flocked to the West's urban archipelagos, have a different view about how the West's natural resources are best used, often many of us seem to share with our nineteenth century counterparts the view that those who were here before we arrived are an obstacle and hindrance to achieving our desired use of the West's resources. This time it is not Native Americans and their hunter-gatherer lifestyle that stand in the way of farming, ranching, and extraction, but rather rural Westerners and their cattle, sheep, mines, and roads that seem to stand in the way of recreation

¹⁶ Exurban communities are generally prosperous communities situated beyond the suburbs of a city. RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 70 (2d ed. 1999). Adding more detail to the meaning of exurban, one commentator has noted:

[A] vast *exurbia* now extends outward from the built-up suburban frontier in most large urban areas, which is a semirural home for millions who daily travel 50 miles or more to maintain a full range of economic and social contacts within the metropolis. Exurban growth has proceeded most swiftly in countrysides endowed with superior natural amenities.

PETER O. MULLER, CONTEMPORARY SUBURBAN AMERICA 5 (1981).

¹⁷ See, e.g., Case & Alward, *supra* note 13, at 8; A. Dan Tarlock & Sarah B. Van de Wetering, *Growth Management and Western Water Law: From Urban Oases to Archipelagos*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 163, 165 (1999):

[T]he new residents of the interior West have dispersed throughout much of the region, with the exception of the Great Plains, into a series of 'urban archipelagos' or areas of high population density surrounded by large rural areas with sparse and declining populations. In contrast to the older, and initially more confined 'urban oases' such as Denver, Salt Lake City, Phoenix and Albuquerque, each of the new Western archipelagos is characterized by a number of central cities typical of a metropolitan area surrounded by a ring of (often quite extensive) suburbs.

An archipelago is a "large group or chain of islands." RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 70 (2d ed. 1999).

¹⁸ See Tarlock & Van de Wetering, *supra* note 17, at 164 (noting that 86% of Westerners live in urban areas).

¹⁹ See *infra* Part IV.B (discussing Moab's growth).

²⁰ See *infra* Part III (discussing the different reasons for the West's population boom).

and preservation. Indeed, there are profound nineteenth century echoes in the goal of many of the West's new immigrants to wean rural Westerners of their dependence on the public lands and to train them in the arts of city-bound, service economies so that the public lands will be available for the new Westerners' preferred uses. This parallel goal is accompanied by parallel arguments about economic productivity and land use morality, with the law again serving as a useful ally for elevating the new majority's land use preferences.

In the nineteenth century, most were certain that leaving the West undeveloped and using its abundant resources for hunting, gathering, and occasional agriculture was economically irrational.²¹ Now a variety of persuasive economic studies show that traditional public land economies, dependent upon timber, grazing, and mining, are not efficient and that recreation and preservation are far more productive uses of the public lands.²² Such studies point out that the percentage of the national and Western economy represented by Western extractive industries is small and getting smaller,²³ making it less and less rational to devote the public lands to extractive interests. Likewise, the prevailing political and moral sentiment in the nineteenth century was that the yeoman farmer who mixed his labor with the soil and established community roots was engaged in an activity superior to the transitory act of hunting and gathering.²⁴ Extraction and consumption of resources to promote economic development were viewed as better than eking out a subsistence. Now, many of us tout ecosystem preservation—largely for recreation—as a morally superior land use, whether as a matter of intergenerational equity or ecological necessity.

Thoroughly confident in our political and moral sentiments and in our economic calculus, we have set out, both consciously and unconsciously, *de jure* and *de facto*, to move many of our rural communities away from their dependence on the public lands and to create a new West of urban archipelagoes surrounded by public lands preserved for our aesthetic and recreational enjoyment. As in the nineteenth century, the law does little to hinder our aspirations.²⁵ Grazers have no property rights in the lands on which they have grazed their cattle for multiple generations, but only a privilege to use and occupy the public lands until the United States decides to the contrary.²⁶ And where public land users have property rights—

²¹ See *infra* notes 52–57 and accompanying text (discussing this aspect of federal Indian policy).

²² See, e.g., THOMAS MICHAEL POWER, *LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE* (1996). See also E. Bruce Godfrey & C. Arden Pope III, *The Case for Removing Livestock from Public Lands*, in *CURRENT ISSUES IN RANGELAND ECONOMICS* 6, 6 (Oregon State Univ. Extension Service Special Report No. 852, 1990) (discussing five arguments for removing livestock from the public lands: "grazing programs are not cost effective, negative externalities, the value of alternative uses, this use is not needed, and unfair competition with other operators").

²³ See *infra* notes 116–17 and accompanying text (discussing this data).

²⁴ See *infra* notes 62–65 and accompanying text (discussing this sentiment).

²⁵ See *infra* notes 26–28.

²⁶ See Taylor Grazing Act of 1934, 43 U.S.C. § 315b (1994) (providing that "grazing

unpatented mining claims, federal mineral leases, state-created water rights, or rights of way²⁷—Fifth Amendment takings jurisprudence presents little hindrance to regulations that make the exercise of such property rights unattractive.²⁸

Although the analogy between current and nineteenth century public lands policies is not perfect,²⁹ it is useful in considering the impact of public lands policy on the rural West because such a contrarian lens may cause those in urban areas for whom preservation is the chief goal to exhibit a little less certainty about the superiority of our public lands aspirations. If the history of the American West has been “[c]onquest by certitude” as Charles Wilkinson suggests in his powerful and evocative book, *Fire on the Plateau*,³⁰ the perils of such certitude remain every bit as real. Can those of us in the urban West be so certain that our motives for changing the paradigm of public lands use are any less self-interested than those of our nineteenth century counterparts? Or are the motives much the same, different only in the particular public lands amenity that we seek? If our motives are similar, or at least have similarities, what then? Does it follow that transitioning from rural dependence on natural resource extraction is necessarily a bad thing? Does it mean that recreation and preservation should not be the preferred uses of our public lands? Not necessarily. What it means is that we should be a little less certain about that calculation and perhaps, a little less dismissive of rural arguments and interests. Moreover, it means that we should be thoughtful and scrupulous with respect to the manner in which we achieve our public lands aspirations.

This Article develops the analogy between the current shift in public lands use and the one that preceded it, argues in favor of less certitude, and then offers a few thoughts on how the transition away from extractive use might be handled better than it has been. Part II of this Article briefly recounts the effort to open the West to settlement and resource development and the Indian policies of removal and reservation that accompanied that effort. Part III discusses the increasing interest in preservation of the public lands during the last forty years and concludes that the increased desire to preserve is largely a function of the growth of the West into urban archipelagoes following World War II and the concomitant desire for increased recreational and aesthetic amenities. Part IV then investigates the various justifications that have been proffered for

privileges . . . shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit . . . shall not create any right, title, interest, or estate in or to the lands”).

²⁷ See *infra* notes 272–77 (discussing the nature of these property rights in federal lands).

²⁸ See GEORGE C. COGGINS & ROBERT L. GLICKSMAN, 1 PUB. NATURAL RESOURCES LAW §4.04 (2000) (discussing takings law and noting that “a compensable taking of private property in a public natural resource has been and most likely will continue to be exceedingly rare”).

²⁹ See *infra* Part V (discussing several reasons why the analogy is imperfect, including the much greater suffering and cultural distinctiveness of the Indian tribes, the difference in political power, and the fact that much of the current removal of rural Westerners from the public lands is *de facto* rather than *de jure*).

³⁰ CHARLES F. WILKINSON, *FIRE ON THE PLATEAU: CONFLICT AND ENDURANCE IN THE AMERICAN SOUTHWEST* 309 (1999). See also *infra* note 295 (discussing this certitude thesis).

the shift to preservation and recreation. It concludes that our foremost reason for desiring increased preservation is not for preservation's sake—in other words, not for purposes of protecting the public lands from harm caused by rural and extractive interests—but rather to secure the public lands for our own use and enjoyment. The Article suggests that one indication that our primary interest is not to protect the public lands from harm is the environmental impact of preservation and recreation uses of the public lands. The shift to preservation and recreation, and the removal of extractive and commodity users from the public lands that often accompanies it, also brings with it significant economic and cultural impacts on the rural communities of the West. Thus, Part IV also examines the impacts of this new removal policy and critiques the justifications offered for it. Part V then explores the distinctions and similarities between this new removal policy and the one visited upon the Indians in the nineteenth century. It concludes that although there are significant differences, the cultural distinctiveness and long ties to the land of the rural communities in the West merit increased consideration from public lands policy-makers.

Having concluded that the new public land use paradigm has significant detrimental impacts on rural communities and is largely a product of majority self-interest rather than majority enlightenment, Part VI offers a few suggestions as to how we might more appropriately achieve our public lands aspirations. The Article contends that rural communities' reliance interests and ties to the land suggest that greater skepticism and diminished certitude should inform the public land use transition that is underway. Skepticism, which implies a willingness to question and explore the viewpoints of others, in turn suggests that participation of rural communities in public lands decision-making is a critical component of a principled public lands policy. At a minimum, participation in decision making includes notice and the opportunity to object to public lands decisions. It also suggests that public land changes should largely be the result of legislative change where state and local interests are represented rather than the product of administrative fiat. Adherence to the participation norm could also include allowing rural communities to participate more directly in the management of the public lands. Participation could also entail privatizing certain privileges, like grazing permits, so that rural resource users themselves would have responsibility for changes in the use of the lands adjacent to their communities.

The Article concludes with a brief critique of the Clinton Administration's adherence to the norms of skepticism and participation. Although the Article finds the Administration wanting in this regard, it concludes that it is ultimately those of us in the West's urban archipelagoes who are the proponents of the new removal and reservation policy; and it is we who must take care to ensure that skepticism and participation, not certitude, are what characterize any effort to fulfill our new public lands aspirations.

II. "IT'S YOUR MISFORTUNE AND NONE OF MY OWN"³¹: A BRIEF REVIEW OF
WESTWARD EXPANSION AND FEDERAL INDIAN POLICY

From the earliest days of the republic, the United States and its citizens looked westward. For some, such as Thomas Jefferson, the frontier would be the cradle of a citizenry of yeoman farmers, steadfastly clearing and breaking an inhospitable wilderness³² and virtuously cultivating the reclaimed lands.³³ Others were drawn westward, not by agricultural land, but by other natural resources and opportunities. Early on, mountain men came to trap furs in the West's abundant mountain streams³⁴; miners then arrived to tap the West's incredible mineral wealth; cattlemen came to take advantage of the West's vast grasslands; and then others followed to service the miners, ranchers, and farmers.³⁵ Still others came to escape religious persecution³⁶ or to establish communal or utopian societies.³⁷ Although

³¹ See RICHARD WHITE, *IT'S YOUR MISFORTUNE AND NONE OF MY OWN: A HISTORY OF THE AMERICAN WEST* tit. p. (1991) (quoting "Whoopee Ti Yi Yo, Git Along, Little Dogies," in *COWBOY SONGS AND OTHER FRONTIER BALLADS* (John A. Lomax & Alan Lomax comps., 1948)).

³² During the eighteenth and for much of the nineteenth century, the almost uniform view of Americans was that wilderness was indeed inhospitable and in need of breaking and refining. It was not to be admired but controlled and put to use. For a discussion of Americans' early views of wilderness, see the classic work, RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* 8-43 (3d ed. 1967).

³³ Jefferson's belief that a country of yeoman farmers would produce a virtuous and engaged citizenry and ensure a republican form of government is well documented. See, e.g., Thomas Jefferson, *Notes on the State of Virginia*, QUERY XIX, at 157 (quoted in DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* 20 (1990)). Writing in 1785 to John Jay, Jefferson stated:

We have now lands enough to employ an infinite number of people in their cultivation. Cultivators of the earth are the most valuable citizens. They are the most vigorous, the most independent, the most virtuous, and they are tied to their country, and wedded to its liberty and interests, by the most lasting bonds.

Id.

³⁴ For descriptions of the mountain men's foray into the unexplored West, see DALE MORGAN, *JEDEDIAH SMITH AND THE OPENING OF THE AMERICAN WEST* (1953); *THE MOUNTAIN MEN AND THE FUR TRADE OF THE FAR WEST* (LeRoy R. Hafen ed., 1965).

³⁵ See *infra* notes 38-46 and accompanying text (discussing the various federal laws that encouraged miners, ranchers, and farmers to take up land in the West); *infra* notes 86-95 (discussing the demographics of the West at the turn of the century and the population growth thereafter).

³⁶ Fleeing persecution that had dogged them first in Ohio, then Missouri, and then Illinois, the Mormons came west in 1847 to the Valley of the Great Salt Lake and then proceeded to expand throughout the irrigable valleys of the Intermountain area. Brigham Young's proposed State of Deseret included a good portion of the Western United States. See LEONARD ARRINGTON, *THE GREAT BASIN KINGDOM: ECONOMIC HISTORY OF THE LATTER-DAY SAINTS 1830-1900* 85 (1958) (map of the State of Deseret including most of what is now Utah, Nevada, Arizona, parts of Southern California, Oregon, Idaho, Wyoming, Colorado, and New Mexico). For a discussion of early Mormon history and Mormon settlement in the West, see B.H. ROBERTS, *A COMPREHENSIVE HISTORY OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* (1930).

³⁷ For a discussion of utopian communities founded in the West, see ROBERT V. HINE, *COMMUNITY ON THE AMERICAN FRONTIER: SEPARATE BUT NOT ALONE* 200-31 (1980) (providing introductory overview of Western cooperative communities); DOLORES HAYDEN, *SEVEN AMERICAN UTOPIAS: THE ARCHITECTURE OF COMMUNITARIAN SOCIALISM* 261-85 (1976) (focusing on Nathan Meeker's Greeley experiment); MARK HOLLOWAY, *HEAVENS ON EARTH: UTOPIAN*

Americans came to the West for a variety of reasons, their decision to do so was almost uniformly encouraged and subsidized by the federal government.

That encouragement and subsidy took several forms. A variety of federal acts encouraged settlers³⁸ to come west by allowing them to take up land at little or no cost.³⁹ Concomitantly, the government subsidized the building of a transportation infrastructure, making large grants of land to railroads in support of their efforts to lay down track in the West.⁴⁰ Mining was encouraged with the passage of the 1872 Hardrock Act, which opened the public lands to mining without the payment of any fee to the federal government.⁴¹ Only if a miner wanted to obtain a patent (fee title to the surface of his location) was he obligated to pay, and even then the fee was a maximum of five dollars per acre.⁴² Grazing was also encouraged, initially by allowing grazing on the public lands by way of an implied license,⁴³ and later,

COMMUNITIES IN AMERICA 1680–1880 (1951) (overview of various utopian experiments).

³⁸ The use of the words "settlers" and "settlement" here and elsewhere in the Article should not be understood as connoting that the West was not already "settled" by the Indian tribes that peopled it.

³⁹ See, e.g., General Preemption Act of 1841, ch. 16, 5 Stat. 453 (repealed 1891) (allowing settlers to acquire 160 acres at \$1.25 per acre); Oregon Donation Act of 1850, ch. 76, 9 Stat. 496 (repealed 1933) (essentially a homestead act for the Oregon territory); Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. § 161) (repealed as to all lands except Alaska in 1976; repeal effective in Alaska in 1986) (allowing settlers who for five years occupied and cultivated 160 acres of land to take title to the land for free); Desert Lands Act of 1877, 43 U.S.C. §§ 321–329 (1994) (allowing settlers to claim 640 acres of land at 25 cents per acre upon showing that the land had been irrigated); Stock-Raising Homestead Act of 1916, 43 U.S.C. §§ 291–301 (repealed 1976) (allowing settlers to claim 640 acres of land labeled as "chiefly valuable" for grazing but retaining subsurface mineral rights for the United States). See generally B.H. HIBBARD, A HISTORY OF PUBLIC LAND POLICIES (Univ. Wis. ed. 1965); PAUL GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968).

⁴⁰ See, e.g., Act of July 1, 1862, ch. 120, 12 Stat. 489 (helping finance the Union Pacific and Central Pacific transcontinental line). The federal government granted over ninety-one million acres to private corporations and over thirty-seven million acres to states for purposes of facilitating railroad development. See ROY M. ROBBINS, OUR LANDED HERITAGE: THE PUBLIC DOMAIN, 1776–1970 223–25 (rev. 2d ed. 1976). For a comprehensive review of railroad land grants and subsidies in the West, see CARTER GOODRICH, GOVERNMENT PROMOTION OF AMERICAN CANALS AND RAILROADS 1800–1890 (1960) and LLOYD J. MERCER, RAILROADS AND LAND GRANT POLICY: A STUDY IN GOVERNMENT INTERVENTION (1982).

⁴¹ See General Mining Law of 1872, 30 U.S.C. § 22 (1994) (stating that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase"); *Id.* § 26 ("The locators of all mining locations . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations . . .").

⁴² 30 U.S.C. § 29 (1994) (\$5 per acre for lode claim); *Id.* § 37 (\$2.50 per acre for placer claim). For an overview of the General Mining Law of 1872, see JOHN D. LESHY, THE MINING LAW: A STUDY IN PERPETUAL MOTION (1987); ROCKY MOUNTAIN MINERAL LAW FOUND., AMERICAN LAW OF MINING (2d ed. 1991).

⁴³ As the Supreme Court remarked in 1890:

We are of opinion that there is an implied license, growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of government forbids this use The government of the United States, in all its branches, has known of this use, has never forbidden it, nor taken any steps to arrest it.

with the passage of the Taylor Grazing Act, by establishing a permit system giving established grazers preference to obtain and then renew grazing permits for a relatively low fee.⁴⁴ Moreover, farming, mining, and grazing were all promoted by making the water on federal lands available for those activities, first by federal deferral to state prior appropriation rules⁴⁵ and later by massive federal water projects under the Reclamation Act.⁴⁶

Preceding, accompanying, and underlying the entire federal policy of promoting the settlement and development of the West, was the federal program of acquisition. If the United States wanted to encourage its citizens to settle the West and develop its resources, it first needed to gain clear title to and control of the land. That effort faced two obstacles. First, other European nations claimed title to the lands, and second, Indian nations inhabited the land. The first problem was solved by a series of purchases, cessions, and treaties.⁴⁷ Once the United States cleared the title of any competing claims from European sovereigns, it was left to face the competing claims of the multitude of Indian tribes. With respect to the legal status of those claims, the "courts of the conqueror" were obliging, articulating what became known as the doctrine of discovery.⁴⁸ Writing for the Supreme Court, Chief Justice Marshall concluded that upon discovery of the New World, European powers acquired fee title to the land that could be consummated by possession.⁴⁹ This so-called "discovery title" was subject only to the right of the native inhabitants to use and occupy the land, but the

No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, *with its direct encouragement*.
 Buford v. Houtz, 133 U.S. 320, 326 (1890) (emphasis added).

⁴⁴ See Taylor Grazing Act of 1934, 43 U.S.C. § 315b (1994).

⁴⁵ In 1866, Congress recognized the validity of state-created water rights beneficially used on public domain lands. See Mining Act of 1866, ch. 262, § 9, 14 Stat. 251, 253, codified at 30 U.S.C. § 51 (1994):

[W]henever by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts the possessors and owners of such vested rights shall be maintained and protected in the same.

Then, in 1877, Congress passed the Desert Land Act, which had the effect of severing unappropriated waters from the public lands and allowing states to establish the rules by which that water would be allocated. See Desert Land Act of 1877, ch. 107, 19 Stat. 377, codified at 43 U.S.C. §§ 321-339 (1994) (as amended). See *generally* California v. United States, 438 U.S. 645 (1978) (relating history of federal policy toward water allocation in the West).

⁴⁶ See Reclamation Act of 1902, 43 U.S.C. §§ 371-431 (1994). For an overview of the Reclamation Act, see DONALD J. PISANI, TO RECLAIM A DIVIDED WEST: WATER, LAW, AND PUBLIC POLICY, 1848-1902, 273-325 (1992).

⁴⁷ Prominent among these acquisitions were the Louisiana Purchase of 1803; the 1819 Treaty with Spain resolving title to Florida; the annexation of Texas in 1845; the 1848 Treaty of Guadeloupe Hidalgo under which Mexico ceded much of the Southwest, including the area comprising Nevada, Utah, Arizona, and California; the Oregon Compromise of 1846, resolving the boundary in the Northwest; and the 1867 purchase of Alaska from Russia. See *generally* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 45-49 (3d ed. 1993) (providing an overview of the acquisition of the public domain).

⁴⁸ See Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 588 (1823) ("Conquest gives a title which the courts of the conqueror cannot deny . . .").

⁴⁹ *Id.* at 585.

Indian tribes' right of use and occupancy (often called aboriginal title) could be extinguished "either by purchase or conquest."⁵⁰

Having cleared title from competing European powers and armed with the discovery doctrine, the United States had free reign to deal with the Indian tribes. It could negotiate with the tribes to purchase their lands, or it could simply take them by force. In other words, Congress, and by and large the President, were free to decide upon an "Indian policy" without interference from the courts. There was never much doubt as to what that policy would be—tribal lands and resources were to be opened for settlement and development.⁵¹ The only questions were the method by which the transfer would occur and the justifications that would be offered.⁵² With respect to methodology, the United States chose a combination of purchase and conquest. Generally, the United States purchased Indian lands or offered to exchange other, less desirable, lands for Indian lands. In the absence of any legal impediment, however, the price was often negotiated under a threat to forcibly remove uncooperative tribes, or at very least under the harsh light of the United States's vastly superior power.⁵³

United States Indian policy in the nineteenth century has been broadly divided into four periods, although there is considerable conceptual and chronological overlap among them.⁵⁴ The initial period, often referred to as The Trade and Intercourse Act period, was one during which the United States set out to establish federal control over Indian affairs through a series of Trade and Intercourse Acts, the key components of which were the prohibition of any trade, diplomatic relations, or purchase of land from Indian tribes without federal consent.⁵⁵ Professor Prucha describes this series of acts as

⁵⁰ *Id.* at 587.

⁵¹ COHEN, *supra* note 6, at 125 ("The civilization program, the removal policy, and the reservation system were intended to complement the broader goal of obtaining landholdings from the Indians, while incorporating them into American life.").

⁵² The story of the United States's westward expansion and its acquisition of the public lands from the indigenous Indian tribes has been told many times. See *infra* note 54 (listing various histories of federal Indian policy). Thus, that story is not recounted in great detail in this Article.

⁵³ As observed in the leading treatise on federal Indian law:

Whatever theory justified the action, the federal government had always required Indian tribes to surrender hunting grounds when the progress of civilization demanded Indian land for settlement. Although treaties memorialized formal consent to land cessions, [Secretary of the Interior Caleb B.] Smith argued, "it is well known that they have yielded to a necessity which they could not resist."

COHEN, *supra* note 6, at 105-06.

⁵⁴ For an overview of the history of federal Indian policy, see ROBERT N. CLINTON ET AL., *AMERICAN INDIAN LAW 137-65* (3d ed. 1991); FRANCIS P. PRUCHA, *THE GREAT FATHER* (1984) [hereinafter *GREAT FATHER*]; FRANCIS P. PRUCHA, *AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS* (1962) [hereinafter *FORMATIVE YEARS*]; FRANCIS P. PRUCHA, *AMERICAN INDIAN POLICY IN CRISIS: CHRISTIAN REFORMERS AND THE INDIANS, 1865-1890* (1964) [hereinafter *CHRISTIAN REFORMERS*]; WHITE, *supra* note 31, at 85-118.

⁵⁵ See CLINTON ET AL., *supra* note 54, at 142-43.

the legislative statement of the decisions made by the United States as it was feeling its way toward satisfactory solutions to the problems resulting from the presence of uncultured tribesmen in the path of aggressive and land-hungry whites The goal of American statesmen was the orderly advance of the frontier.⁵⁶

A more blunt and less flattering expression of federal policy is contained in an 1803 private letter from President Jefferson, who is generally considered to have been a promoter of policies friendly to Indian tribes, to William Henry Harrison, then governor of the Indiana territory:

When [the Indians] withdraw themselves to the culture of a small piece of land, they will perceive how useless to them are their extensive forests, and will be willing to exchange for necessities for their farms and families. To promote this disposition to exchange lands, which they have to spare and we want, for necessities, which we have to spare and they want, we shall push our trading houses, and be glad to see the good and influential individuals among them run in debt, because we observe that when these debts get beyond what the individuals can pay, they become willing to lop them off by cession of lands.⁵⁷

The ambition of advancing the frontier continued during the "removal period" when it was federal policy to remove Indian tribes voluntarily and then, under Andrew Jackson's administration, forcibly beyond the area of white settlement to Indian Territory west of the Mississippi River in what is now the area of Oklahoma and Kansas.⁵⁸ Although the basic foundation of removal policy was opening the frontier to settlement, the justifications for the policy were seldom expressed in such self-serving terms. Many argued, often with complete earnestness, that removal was a salutary step in accomplishing the long-standing national goal of turning Indians into Jefferson's yeoman farmers and instructing the tribes in what President Monroe termed "the arts of civilized life."⁵⁹ Removal would prevent the

⁵⁶ FORMATIVE YEARS, *supra* note 54, at 2-3. Prucha further explained:

To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature—aimed largely at restraining the actions of the whites and providing justice to the Indians as a means of preventing hostility. But if the goal was an *orderly* advance, it was nevertheless *advance* of the frontier, and in the process of reconciling the two elements, conflict and injustice were often the result.

Id. at 3. See also *id.* at 186-87 (discussing further this tension between protecting Indian rights and an orderly advance of the frontier); *id.* at 143, 149 (noting that the intercourse acts did provide a brake against some of the more ruthless and unjust efforts to expropriate Indian lands).

⁵⁷ Letter from President Thomas Jefferson to William Henry Harrison (Feb. 27, 1803), *in* DOCUMENTS, *supra* note 5, at 22.

⁵⁸ See CLINTON ET AL., *supra* note 54, at 144-46 (discussing removal period); COHEN, *supra* note 6, at 28-29, 78-92 (discussing removal policy); FORMATIVE YEARS, *supra* note 54, at 213-49; GREAT FATHER, *supra* note 54, at 179-314. Support for removal was not uniform, and many opposed the policy for both selfish and humanitarian reasons. *Id.* at 279.

⁵⁹ Message of President Monroe on Indian Removal (Jan. 27, 1825) (stating purpose of removal policy was "to teach [Indians] by regular instruction the arts of civilized life and make them a civilized people"), *in* DOCUMENTS, *supra* note 5, at 39. See also COMM'R INDIAN AFF. ANN. REP. (Nov. 22, 1832) (stating the Indian policy centered "in one grand object—the substitution

degradation and extermination of the tribes by the on-rushing settlers.⁶⁰ As Professor Prucha concluded:

It cannot be denied that the land greed of the whites forced the Indians westward and that behind the removal policy was the desire of eastern whites for Indian lands and the wish of eastern states to be disencumbered of the embarrassment of independent groups of aborigines within their boundaries But these selfish economic motives were not the only force behind the removal policy The promoters of the program argued with great sincerity that only if the Indians were removed beyond contact with whites could the slow process of education, civilization, and Christianization take place.⁶¹

Additional justifications for removal were also proffered. As far as most were concerned, agriculture was morally superior to the chase⁶² because taming and cultivating the land accorded with the biblical admonition that man "subdue" the earth.⁶³ Others contended that, aside from moral

of the social for the savage state"), in DOCUMENTS, *supra* note 5, at 63; FORMATIVE YEARS, *supra* note 54, at 213-49 (discussing United States's policy of civilizing and removing the Indian tribes).

⁶⁰ Message of President Monroe on Indian Removal (Jan. 27, 1825), in DOCUMENTS, *supra* note 5, at 39.

[T]he removal of the tribes . . . under a well-digested plan for their government and civilization, which should be agreeable to themselves, would not only shield them from impending ruin, but promote their welfare and happiness [W]ithout a timely anticipation of and provision against the dangers to which they are exposed, under causes which it will be difficult, if not impossible, to control, their degradation and extermination will be inevitable.

Id. See also Secretary of War Barbour to Congressman William McLean, Apr. 29, 1828 ("[T]he plan of collocating the Indians on suitable lands West of the Mississippi, contains the elements of their preservation; and will tend, if faithfully carried into effect, to produce the happiest benefits upon the Indian race.") (quoted in FORMATIVE YEARS, *supra* note 54, at 213); Annual Message of President Andrew Jackson to Congress (Dec. 7, 1835), in DOCUMENTS, *supra* note 5, at 71 ("The plan for their removal and reestablishment . . . has been dictated by a spirit of enlarged liberality. A territory exceeding in extent that relinquished has been granted to each tribe."); Elbert Herring, Report from the Office of Indian Affairs, H.R. DOC. No. 22-2, at 160 (1832) ("In the consummation of this grand and sacred object [removal] rests the sole chance of averting Indian annihilation. Founded in pure and disinterested motives, may it meet the approval of heaven, by the complete attainment of its beneficent ends!").

⁶¹ FORMATIVE YEARS, *supra* note 54, at 224-25.

⁶² The idea that Indian tribes were hunter-gatherer societies committed only to hunting was something of a fiction, particularly with respect to the Tribes in the East. Indians were also agriculturalists and fishermen. See Wilcomb E. Washburn, *The Moral and Legal Justifications for Dispossession of the Indians*, in SEVENTEENTH-CENTURY AMERICA: ESSAYS IN COLONIAL HISTORY 15, 23-24 (James M. Smith ed., 1959) (discussing the creation of the "myth" that Indians were merely nomadic hunters); David R. Lewis, *Native Americans: The Original Rural Westerners*, in THE RURAL WEST SINCE WORLD WAR II 12 (R. Douglas Hurt ed., 1998) ("Nearly half of all native groups participated in some form of agriculture, producing between 25 and 75 percent of their total subsistence needs.").

⁶³ *Genesis* 1:28 ("And God blessed them, and God said unto them, Be fruitful, and multiply, and replenish the earth, and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."). See generally FORMATIVE YEARS, *supra* note 54, at 240-41 ("The argument passed down through the decades. 'There can be no doubt,' Lewis Cass asserted in 1830, '... that the Creator intended the earth

concerns, hunting and gathering were simply unproductive and improvident uses of the land,⁶⁴ insufficient to create property rights under the Lockean ideal of mixing one's labor with the soil.⁶⁵ Moreover, many argued that it was not appropriate for such a small minority of Indians to use so much land.⁶⁶

The idea of a separate Indian Territory beyond the borders of the United States was abandoned as settlers pushed westward beyond the Mississippi and after "westward settlement leap-frogged the Indian Territory to California" during the gold rush.⁶⁷ The United States entered a third period of Indian policy and adopted what is commonly referred to as the "reservation policy." The reservation policy had the same basic goal as the removal policy: precluding Indian interference with the settlement and

should be reclaimed from a state of nature and cultivated,' and Thomas Hart Benton proclaimed that the white race had the superior right to the land because it 'used it according to the intentions of the CREATOR.'" (internal citations omitted). See also *id.* at 143 (quoting frontier leader John Sevier that "[b]y the law of nations, it is agreed that no people shall be entitled to more land than they can cultivate").

⁶⁴ See FORMATIVE YEARS, *supra* note 54, at 241. The influential Swiss jurist Vattel argued that

if each nation had resolved from the beginning, to appropriate to itself a vast country, that the people might live only by hunting, fishing, and wild fruits, our globe would not be sufficient to maintain a tenth part of its present inhabitants. People have not then deviated from the views of nature in confining Indians within narrow limits.

Id. (internal citation omitted); ROY H. PEARCE, *THE SAVAGES OF AMERICA: A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION* 57 (1953) (quoting President Jackson in his Second Annual Message: "What good man would prefer a country covered with forests and ranged by a few thousand savages to our extensive Republic, studded with cities, towns, and prosperous farms, embellished with all the improvements which art can devise or industry execute") (citation omitted); Washburn, *supra* note 62, at 22 ("The most popular eighteenth- and nineteenth-century justification for dispossessing [the Indians], was that they were wandering hunters with no settled habitations."); *id.* at 23 (quoting Theodore Roosevelt's assertion that "[t]he settler and the pioneer have at bottom had justice on their side" and that "this great continent could not have been kept as nothing but a game preserve for squalid savages").

⁶⁵ See, e.g., President Jackson on Indian Removal (Dec. 8, 1829), *in* DOCUMENTS, *supra* note 5, at 47-48 ("[I]t seems to me visionary to suppose that in this state of things claims can be allowed on tracts of country on which [the Indians] have neither dwelt nor made improvements, merely because they have seen them from the mountain or passed them in the chase."). See generally JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 329 (Peter Laslett ed., rev. ed. 1965) (3d ed. 1698) ("Whatsoever then he removes out of the State that Nature hath provided and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*"). In contrast to President Jackson's Lockean view, Senator Frelinghuysen of New Jersey opposed removal, arguing: "In the light of natural law, can a reason for a distinction exist in the mode of enjoying that which is my own? If I use it for hunting, may another take it because he needs it for agriculture?" Senator Frelinghuysen on Indian Removal (Apr. 9, 1830), *in* DOCUMENTS, *supra* note 5, at 49.

⁶⁶ FORMATIVE YEARS, *supra* note 54, at 162. A petition from citizens who had settled on Chickasaw lands stated that:

[T]hey have by estimation nearly 100,000 acres of land to each man Of their nation and of no more use to government or society than to saunter about upon like so many wolves or bares, whilst they who would be a supporte to government and improve the country must be forsed even to rent poore stony ridges to make a support to rase their famelies on whilst there is fine fertile countrys lying uncultivated

Id.

⁶⁷ CLINTON ET AL., *supra* note 54, at 146; COHEN, *supra* note 6, at 123-24.

development of the West. During this period, the United States began negotiating treaties with Indian tribes to remove them to reservations within the boundaries of newly established states and territories.⁶⁸ The reservations were established in areas then unoccupied by settlers but when settlers began to encroach upon these reservations in pursuit of a newly discovered resource—whether gold in the Black Hills within the Great Sioux reservation, or gold and silver in the San Juan mountains within the Ute reservation—it was common for new treaties to be negotiated, reducing the boundaries of a reservation.⁶⁹ As with the removal policy, the reservation policy was not generally articulated in selfish terms, but was viewed as a more beneficent way to facilitate the civilization and education of the Indian tribes.⁷⁰ Nevertheless, the motives of some for promoting the reservation

⁶⁸ See generally CLINTON ET AL., *supra* note 54, at 146–47 (describing reservation policy); see also COHEN, *supra* note 6, at 92–107; GREAT FATHER, *supra* note 54, at 315–18 (outlining reservation policy).

⁶⁹ See GREAT FATHER, *supra* note 54, at 562–81 (discussing United States policy of consolidating reservations). In 1868, the Ute bands of Indians had negotiated a favorable treaty securing to them some sixteen million acres, approximately one-fifth of the present state of Colorado. After gold was discovered in the San Juan mountains, the reservation was diminished by four million acres under the 1873 Brunot Agreement and then repudiated entirely in 1880 in the aftermath of the Meeker massacre. See generally WILKINSON, *supra* note 30, at 132–47 (telling this story). See also GREAT FATHER, *supra* note 54, at 564 (discussing consolidation of Ute reservation under Brunot Agreement). Similarly, after gold was discovered in the Black Hills, the United States “renegotiated” the 1868 Treaty of Fort Laramie and required the Sioux to relinquish the portion of their reservation that included the Black Hills. *Id.* at 632–33. Later, the reservation was further reduced and subdivided. *Id.* at 633–40. Mineral wealth was not, of course, the only reason for reducing reservations. More often, the articulated reason was to facilitate the civilization of the tribes and to open up lands for white agriculture. See *id.* at 580–81. Interior Secretary Henry Teller asserted that

[v]ery many of these reservations . . . contain large areas of valuable land that cannot be cultivated by the Indians, even though they were as energetic and laborious as the best class of white agriculturalists. All such reservations ought to be reduced in size and the surplus not needed ought to be bought by the government and opened to the operation of the homestead law, and it would then soon be settled by industrious whites, who, as neighbors, would become valuable auxiliaries in the work of civilizing the Indians residing on the remainder of the reservation.

Id.

⁷⁰ See, e.g., William P. Dole, COMM’R INDIAN AFF. ANN. REP. (Nov. 26, 1862), *in* DOCUMENTS, *supra* note 5, at 95 (stating that “confining the Indians to reservations, and, from time to time, as they are gradually taught and become accustomed to the idea of individual property, allotting to them lands to be held in severalty, is the best method yet devised for their reclamation and advancement in civilization”); Hiram Price, COMM’R INDIAN AFF. ANN. REP. (Oct. 24, 1881), *in* DOCUMENTS, *supra* note 5, at 155 (“It is claimed and admitted by all that the great object of the government is to civilize the Indians and render them such assistance in kind and degree as will make them self-supporting.”); COHEN, *supra* note 6, at 124 (quoting Commissioner of Indian Affairs Mix as stating that the reservation policy was “the only course compatible with the obligations of justice and humanity”); Luke Lea, COMM’R INDIAN AFF. ANN. REP. (Nov. 27, 1850), *in* DOCUMENTS, *supra* note 5, at 82:

In the application of this policy to our wilder tribes, it is indisputably necessary that they be placed in positions where they can be controlled, and finally compelled by stern necessity to resort to agricultural labor or starve. Considering, as the untutored Indian does, that labor is a degradation, and there is nothing worthy of his ambition but prowess

policy were simply venal,⁷¹ and selfish motives had a significant impact on federal policy.⁷²

As the wave of settlement continued to wash over the West, the idea of setting aside any separate geographical areas for Indian tribes became less attractive. The reservation policy gradually came to an end, and the United States adopted a policy of assimilation and allotment.⁷³ Allotment, the process by which tribal lands were allotted to individual Indians in fee simple, had long been a component of federal Indian policy,⁷⁴ as had the goal of assimilating Indians into "civilized" society,⁷⁵ but both policies took on

in war, success in the chase, and eloquence in council, it is only under such circumstances that his haughty pride can be subdued, and his wild energies trained to the more ennobling pursuits of civilized life.

⁷¹ George W. Mannypenny, COMM'R INDIAN AFF. ANN. REP. (Nov. 22, 1856), *in* DOCUMENTS, *supra* note 5, at 90:

The rage for speculation and the wonderful desire to obtain choice lands, which seems to possess so many of those who go into our new territories, causes them to lose sight of and entirely overlook the rights of the aboriginal inhabitants. The most dishonorable expedients have, in many cases, been made use of to dispossess the Indian; demoralizing means employed to obtain his property; and, for the want of adequate laws, the department is now often perplexed and embarrassed, because of inability to afford prompt relief and apply the remedy in cases obviously requiring them.

⁷² See Resolutions of Lake Mohonk Conference (Sept. 1884), *in* DOCUMENTS, *supra* note 5, at 165. Among the various resolutions at the conference was the following statement:

[C]areful observation has conclusively proved that the removal of Indians from reservations which they have long occupied, to other reservations far distant from the former and possessing different soil and climate, is attended by great suffering and loss of life These removals are usually made, not for wise reasons, but are instigated by the covetousness of the whites who desire possession of the Indian lands or wish to rid themselves of the Indians' presence.

Id.; ROY HARVEY PEARCE, THE SAVAGES OF AMERICA: A STUDY OF THE INDIAN AND THE IDEA OF CIVILIZATION 56 (1953) (quoting Henry Knox, Secretary of War, as saying in 1789, that "[a]lthough the disposition of the people of the States, to emigrate into the Indian country, cannot be effectually prevented, it may be restrained and regulated") (citation omitted); COHEN, *supra* note 6, at 132 ("The expanding white civilization continued to break down the reservations, and the federal government could not or would not prevent it.")

⁷³ See CLINTON ET AL., *supra* note 54, at 147-52 (discussing the allotment period); COHEN, *supra* note 6, at 105-07, 127-43 (describing the transition in U.S. Indian policy from formal treaty making to allotment and assimilation).

⁷⁴ See GREAT FATHER, *supra* note 54, at 659 ("No panacea for the Indian problem was more persistently proposed than allotment of land to the Indians in severalty."). For a discussion of allotment efforts prior to the 1887 Dawes Act, see COHEN, *supra* note 6, at 129-30; CLINTON ET AL., *supra* note 54, at 148.

⁷⁵ See *supra* notes 52-57 and accompanying text (discussing long-running efforts to "civilize" the Indian tribes). Prucha suggests that even during the reservation era, the ultimate goal was assimilation.

The reservations, however, were thought of as a temporary expedient, for whites dealing officially with the Indians in the 1850s all accepted the idea that the nation within its new continental limits would become the abode of enterprising and prosperous American citizens. They had no notion of a pluralistic society or a divided land occupied in part by European immigrants and their descendants and in part by American Indians adhering to their own customs.

GREAT FATHER, *supra* note 54, at 317.

new importance when geography began to limit the opportunity for separating the tribes from the settlers. The most noteworthy manifestation of this fourth period of Indian policy was the adoption of the 1887 General Allotment Act or Dawes Act⁷⁶ under which reservation lands were allotted to tribal members who, after a twenty-five year trust period,⁷⁷ obtained fee title to their allotted lands and became citizens of the United States.⁷⁸ The "surplus" lands not allotted to individual Indians would be ceded to the federal government upon negotiating compensation with the tribe.⁷⁹

The allotment policy was largely the brain-child of well-intentioned Indian advocates who argued that it would provide individual Indians greater security in their land than was the case with tribal ownership, which was constantly being breached by settlers.⁸⁰ Allotment was necessary, argued Commissioner of Indian Affairs Charles Mix, because "the assignment to [the Indians] of too great an extent of country, to be held in common" had prevented them from "acquiring a knowledge of separate and individual property."⁸¹ The reformers asserted that allotment would have the beneficent effect of breaking down tribal existence and thereby freeing individual tribal members to partake of the benefits of an Americanized and civilized lifestyle.⁸² The Dawes Act, of course, offered the additional benefit

⁷⁶ General Allotment Act, 25 U.S.C. § 331-358 (1887).

⁷⁷ The twenty-five year period during which the allotments were to be held in trust by the United States was designed to alleviate some of the problems that had plagued prior allotment efforts. See COHEN, *supra* note 6, at 130 ("The early experiments in allotment were recognized as failures, even by Congress. Much of the allotted land quickly passed from Indian allottees into the hands of white traders and land companies. Often Indians were defrauded of their lands.").

⁷⁸ See generally COHEN, *supra* note 6, at 130-32 (describing Dawes Act). For additional description of the Dawes Act, see CLINTON ET AL., *supra* note 54, at 148-52 and GREAT FATHER, *supra* note 54, at 666-71.

⁷⁹ See COHEN, *supra* note 6, at 131 (describing this provision in section 5 of the Dawes Act).

⁸⁰ See, e.g., GREAT FATHER, *supra* note 54, at 669 (discussing fear of many reformers that without allotment "the Indians would soon lose everything, for there seemed to be no way for the government to protect the tribal reservations from the onslaught of the whites"). See also *supra* note 72 (discussing federal failure to prevent the constant incursions on reservation land).

⁸¹ Charles E. Mix, COMM'R INDIAN AFF. ANN. REP. (Nov. 6, 1858), in DOCUMENTS, *supra* note 5, at 93. Secretary of the Interior Carl Schurz's argument in favor of allotment was similar. According to Schurz, allotment's purpose was

gradually to inspire [the Indians] with a sense of responsibility through the ownership of private property and a growing dependence for their support upon their own efforts; . . . to dispose of such lands as they cannot cultivate and use themselves, to the white settlers; to dissolve by gradual steps, their tribal cohesion, and merge them in the body politic as independent and self-relying men invested with all the rights which other inhabitants of the country possess.

Carl Schurz, SECRETARY OF INTERIOR ANN. REP. (Nov. 1, 1880), in DOCUMENTS, *supra* note 5, at 154. See also GREAT FATHER, *supra* note 54, at 659 ("It was an article of faith with all the reformers that civilization was impossible without the incentive to work that came only from individual ownership of a piece of property.").

⁸² CLINTON ET AL., *supra* note 54, at 149-50; COHEN, *supra* note 6, at 131 ("Humanitarian reformers were convinced that termination of tribal life was necessary if the Indian was to participate fully in the American system."); GREAT FATHER, *supra* note 54, at 661-62 (statement

of again opening up more lands in the West.⁸³ In 1887, there were 138,000,000 acres of tribal land. By 1934, only 48,000,000 acres remained in tribal ownership.⁸⁴ The United States had emphatically achieved its dominant goal: opening the lands and resources of the West to settlement and development.

As with any story that unfolds over a long period of time, United States Indian policy in the nineteenth and early twentieth centuries is one with a variety of actors who had noble, ignoble, mixed, and uncertain motives. More often than not, however, the dominant motive of the actors—whether private or public, whether settler, senator, or president—was to push aside the Native Americans so that the West's land and resources could be put to more highly valued use, or at least the use more highly valued by the enfranchised citizens of the country. Even when federal policy can be partly credited with a sincere desire to benefit the Indians, such as in the case of the Dawes Act,⁸⁵ the result was often just as harmful, if not more harmful, to tribal interests. In part, the negative historical judgment on well-intentioned policies like allotment tells us something about the value of certitude in any effort to change existing culture and land use. The judgment, however, also tells us something about the dominance of the settlement and development motive. Whatever idealism may have accompanied the birth of the United States's various Indian policies, there was little political will to enforce the boundaries of Indian Country, to enforce the terms of treaties, or to change a policy that did not work as well as its promoters would have liked, because the competing goals of enfranchised settlers were so strongly contrary.

III. THE SECOND SETTLEMENT OF THE WEST AND THE NEW PUBLIC LANDS VALUES

For good and ill, the tangled mass of public land laws and Indian

of Senator Richard Coke (D-Tex.) in support of allotment bill); *Id.* at 670 (quoting Cinton B. Fisk, chairman of the Board of Indian Commissioners, who called the Dawes Act "the star of the East for the Indian tribes").

⁸³ See, e.g., COHEN, *supra* note 6, at 132 ("The pressure for Indian land was a powerful motivating force for the allotment policy. Private land speculators, timber interests, and railroads took part in its development."); GREAT FATHER, *supra* note 54, at 662. Interior Secretary Schurz stated that it was

not unnatural that the withholding of large tracts from settlement and development so as to maintain a savage aristocracy in the enjoyment of their chivalrous pastimes, should be looked upon by many as a system incompatible with the progress of civilization and injurious to the material interests of the country.

Id.; H.R. REP. NO. 1576, at 10 (1880). This Minority Report of the House Committee on Indian Affairs criticized a proposed allotment bill by suggesting that

[t]he main purpose of this bill is not to help the Indian . . . so much as it is to provide a method for getting at the valuable Indian lands and opening them up to white settlement . . . The provisions for the apparent benefit of the Indian are but the pretext to get at his lands and occupy them.

Id.

⁸⁴ WILCOMB E. WASHBURN, *RED MAN'S LAND/WHITE MAN'S LAW: THE PAST AND PRESENT STATUS OF THE AMERICAN INDIAN* 75, 145 (2d ed. 1995); CLINTON ET AL., *supra* note 54, at 152.

⁸⁵ CHRISTIAN REFORMERS, *supra* note 54 (discussing the development of the Dawes Act).

policies succeeded in opening and settling the West. The demographic result of these laws and policies produced, at the turn of the century, a predominantly rural region significantly dependent upon irrigated agriculture and natural resource use and extraction.⁸⁶ The West, of course, was not entirely rural. It was dotted with urban oases like Denver and Salt Lake City, but even the cities were significantly fueled by a natural resource-based economy. Indeed, in 1940 almost half of the West's population was directly employed in farming, ranching, and mining.⁸⁷ This began to change during and after World War II.

Since 1945, the West has experienced remarkable growth, jumping from fifteen million inhabitants to fifty-six million in 1996.⁸⁸ Most of that growth has come to the cities in the West. Phoenix, which had 65,000 inhabitants in 1940, grew to 2.1 million in 1996, and Las Vegas with 8,422 people in 1940 grew to one million people by 1996.⁸⁹ The increasing urbanization of the West has only accelerated in the last twenty-five years as people have begun moving out of the small towns and rural areas of the West and into the West's cities.⁹⁰ Agriculture, mining, timber, and ranching have declined⁹¹ while the service sector of the economy has seen significant growth.⁹² The

⁸⁶ It is commonplace to disparage as a "myth" the description of the West as primarily rural. See, e.g., ROBERT G. ATHEARN, *THE MYTHIC WEST* (1986). But as of 1900, this description was fairly apt. Approximately 70% of Westerners lived in a rural setting. See also BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE AND LABOR, SPECIAL REPORTS SUPPLEMENTARY ANALYSIS AND DERIVATIVE TABLES: TWELFTH CENSUS OF THE UNITED STATES: 1900 20 (1906); Marion Clawson, *Two Generations of History of Outdoor Recreation*, in *OUTDOOR RECREATION: A READER FOR CONGRESS* (1998) [hereinafter *A READER FOR CONGRESS*], S. REP. NO. 105-53, at 105-106 (1998) ("In 1900 the United States was a rural society, with well over half the total population living on farms and in small towns of less than 2,500 population."). The heavily rural West is now part of the past. See *infra* notes 88-102 and accompanying text (discussing the West's current demographics).

⁸⁷ Case & Alward, *supra* note 13, at 1.

⁸⁸ Charles F. Wilkinson, *The Public Lands and the National Heritage*, 3 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 225, 229 (1996). See also Case & Alward, *supra* note 13, at 7:

[d]uring the last 25 years, the population of the 17 Western States grew by about 32 percent as a whole, in comparison with a growth rate of 19 percent for the rest of the Nation. During the last 15 years, the population of the West has grown by about 18 percent, in comparison to 11 percent for the rest of the Nation.

A.E. Luloff & Richard S. Wannich, *Demographic Correlates of Outdoor Recreation: Trends and Implications*, in *A READER FOR CONGRESS*, *supra* note 86, at 144-54 (discussing national demographic trends and their potential impact on recreation). The population of the mountain states had grown from 1,674,657 inhabitants in 1900 to 4,150,003 in 1940. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957 12 (1961).

⁸⁹ Wilkinson, *supra* note 88, at 229; GERALD D. NASH, *THE AMERICAN WEST TRANSFORMED: THE IMPACT OF THE SECOND WORLD WAR* 10 (1985).

⁹⁰ Case & Alward, *supra* note 13, at 8.

⁹¹ See Nelson, *supra* note 14, at 38 ("A survey of 218 Western counties in 1940 indicated a farm or ranch population of 785,002; in 1990 only 172,243 still lived on farms and ranches."); Tarlock & Van de Wetering, *supra* note 17, at 169 (noting that in 1940 almost half of the West's residents were employed in natural resource industries, but by 1969 that number had dropped to 11%, and by 1991 that number had dropped to 6%).

⁹² See Raymond Rasker, *A New Look at Old Vistas: The Economic Role of Environmental*

resulting demographic picture depicts a Western population increasingly concentrated in a few areas of high population density, so-called urban archipelagoes, surrounded by a vast sea of rural areas "whose populations are sparse and declining."⁹³ In general, the only rural areas of the West that are not in decline are those communities, like Moab, Coeur D'Alene, and Jackson Hole, situated near national parks, monuments, forests, and wilderness and recreation areas. These communities are some of the fastest growing areas in the West⁹⁴ and could be thought of as smaller, gateway oases within the large area of declining rural population.⁹⁵

Why has there been this demographic upheaval in the post-war West? No single explanation or motive can explain such a large population movement but most return to the same basic theme: the geography and resources of the West. The advent of air-conditioning contributed, making the West's heat bearable and allowing people, among them numerous retirees,⁹⁶ to partake of the West's bountiful sunshine.⁹⁷ The reclamation movement and the dam-building era spread water throughout the West, mostly for irrigating its rich soils.⁹⁸ With the water came people, then industry, then more dams and coal-fired power plants to turn the turbines to

Quality in Western Public Lands, 65 U. COLO. L. REV. 369, 377 (1994) (discussing the rise of the West's service economy and noting that "[t]he Rocky Mountain West . . . has added over 2 million new jobs from 1969 to 1991, most of them in 'service-related' occupations").

⁹³ Case & Alward, *supra* note 13, at 8. Demographers distinguish these urban archipelagoes from so-called urban oases. An archipelago includes a number of urban, suburban, and exurban areas linked together in relatively close proximity—areas such as Utah's Wasatch Front and Colorado's Front Range—whereas an oasis better describes Western cities such as Salt Lake City, Denver, Phoenix, and Boise prior to the population boom of the last fifty years. *See supra* note 17 (discussing the distinctions between archipelagoes and oases).

⁹⁴ The counties in the West that contain wilderness have grown even faster than those without wilderness. *See ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION 97* (William Reibsame ed., 1997) (noting that counties with federally designated wilderness grew two to three times faster than all other counties in the nation); Gundars Rudzitis & Harley E. Johansen, *How Important Is Wilderness? Results from a United States Survey*, 15 ENVTL. MGMT. 227, 231 (1991) [hereinafter Rudzitis & Johansen, *How Important Is Wilderness?*] (noting that wilderness was listed as an important reason why 60% of the migrants came to the county and why 45% of the residents stay); Gundars Rudzitis & Harley E. Johansen, *Migration into Western Wilderness Counties: Causes and Consequences*, W. WILDLANDS, Spring 1989, at 19, 21 (indicating that 83% of recent wilderness county immigrants indicated that "scenery" was an important factor in their decision to come).

⁹⁵ Native Americans are the most rural of all ethnic groups in the United States, and thus reference to rural life necessarily includes reference to Native Americans. *See* David R. Lewis, *Native Americans: The Original Rural Westerners*, in *THE RURAL WEST SINCE WORLD WAR II 13* (R. Douglas Hurt ed., 1998) ("As late as 1980, 51 percent of American Indians still lived outside standard metropolitan areas, far exceeding . . . the national average (25.2 percent), making them the most rural of all major American ethnic groups.").

⁹⁶ Almost 25% of the West's new residents are retirees. *See ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION*, *supra* note 94, at 96.

⁹⁷ *See* WHITE, *supra* note 31, at 519 (discussing the contribution of air-conditioning to the post-war growth of the West).

⁹⁸ Almost 90% of the West's water is used for irrigated agriculture. The remainder is used for municipal and industrial use. *See* WAYNE SOLLEY ET AL., U.S. DEP'T OF INTERIOR GEOLOGICAL SURVEY DIV., ESTIMATES OF WATER USE IN THE WESTERN UNITED STATES IN 1990 14 (1994); *ATLAS OF THE NEW WEST*, *supra* note 94, at 82–84 (graphic display of water use in the West).

run the air-conditioning and the industries.⁹⁹ As the West's cities and labor pool expanded, more and more businesses located or re-located in the West.¹⁰⁰ Aside from the attraction of the sunshine, the resource extraction motive remained dominant for twenty-five to thirty years after the War, but in the last twenty-five to thirty years different motives have emerged. With the development of transportation infrastructure and the rise of the digital economy, more and more companies and individuals have come to the West because of so-called "quality of life" benefits,¹⁰¹ a rather ill-defined concept that typically includes proximity to recreational opportunities—camping, hiking, fishing, river-running, skiing, rock climbing, and the like—and enjoyment of the West's aesthetic characteristics, its cleaner air, wider spaces, and remarkable desert and mountain vistas.¹⁰²

Although their motivations are hardly monolithic, the people who dwell in the urban archipelagoes of the West increasingly place a different value on the public lands. Rather than valuing public natural resources because of their commodity uses, they value, or at least claim to value, the public lands and resources in place.¹⁰³ Poll after poll in the West reflects the public's interest in preserving the public lands.¹⁰⁴ And unsurprisingly, over the last

⁹⁹ The development of hydro-power dams and power plants that sprang up all over the West in the three decades following the war has been termed "the Big-Buildup" by Charles Wilkinson. See Wilkinson, *supra* note 88, at 229 (noting that between 1955 and 1975, "[a]most before anyone knew it, the Colorado Plateau was laced with dams and reservoirs up to 200 miles long, power plants with stacks 70 stories tall, 500- and 345-KV powerlines spanning hundreds of miles, and uranium operations that required mining, milling, and, almost as an after-thought, waste disposal").

¹⁰⁰ See generally POWER, *supra* note 22, at 34–36 (discussing how manufacturing follows population and how each begets more of the other).

¹⁰¹ POWER, *supra* note 22, at 41–43 (discussing economic analysis of quality of life benefits that flow from location and other public goods and amenities); John A. Baden & Peter Geddes, *Environmental Entrepreneurs: Keys to Achieving Wilderness Conservation Goals?*, 76 DENV. U. L. REV. 519, 526–27 (1999) (arguing that the West's cultural and economic future is "inextricably linked" to its environmental quality).

¹⁰² In this regard, it is not surprising that those counties containing wilderness have grown faster than those that do not contain wilderness. See Rudzitis & Johansen, *How Important Is Wilderness?*, *supra* note 94, at 231 (discussing the phenomenon of greater growth in wilderness counties). For others, ironically enough, it is the West's cultural aesthetic that draws them. They come to partake at some level in the mystique of rugged individualism, the pioneer, and the cowboy that is part of the fabric and traditional narrative of the West. See Patricia Nelson Limerick, *The Shadows of Heaven Itself*, in ATLAS OF THE NEW WEST, *supra* note 94, at 161. Limerick suggests several additional possible sources of Western growth, including its reputation for a healthful lifestyle and white flight. *Id.* at 153–62.

¹⁰³ See generally POWER, *supra* note 22, at 236–37. The increased interest in preservation is a world-wide phenomenon. "Since the 1970s, more protected areas have been established worldwide than during all preceding periods. By 1989, about 4,500 sites, totaling about 4.79 million square kilometers, or 1.85 million square miles—3.2 percent of the earth's surface—had been placed under some protection." MARTHA HONEY, ECOTOURISM AND SUSTAINABLE DEVELOPMENT 11 (1999).

¹⁰⁴ See, e.g., Gregory H. Aplet, *On the Nature of Wilderness: Exploring What Wilderness Really Protects*, 76 DENV. U. L. REV. 347, 348 (1999) (citing several polls showing support for additional wilderness preservation); The Wilderness Society Newsroom (July 27, 1999), *New England Voters Back More Wilderness Protection*, available at http://www.wilderness.org/newsroom/roadlesspoll/new_england.html (last visited Dec. 24, 1999) ("Nationwide, 63 percent

forty years, the law, like a great battleship, has slowly turned toward the public's interest in preservation.

Thus, preservation emerged as a significant or dominant motive in the Wilderness Act of 1964,¹⁰⁵ the Wild and Scenic Rivers Act of 1968,¹⁰⁶ the Endangered Species Act of 1972,¹⁰⁷ the Federal Lands Policy and Management Act of 1976,¹⁰⁸ the Public Rangelands Improvement Act of 1978,¹⁰⁹ and the Alaska National Interest Lands Conservation Act of 1980,¹¹⁰ to name just a few. During the Clinton administration, the legal changes have picked up momentum. Despite the fact that the Administration's legislative agenda generally has been stymied by a Republican-controlled Congress, Secretary Babbitt and President Clinton have aggressively promoted preservation. Among their efforts have been administrative reform of the mining and grazing laws, a directive to halt all road-building in the National Forests, and considerable use of the Antiquities Act to declare national monuments.¹¹¹ Although it took a while for the legal battleship to turn, it now seems to be steaming rather directly toward the preservation goal.

IV. THE NEW POLICY OF REMOVAL FOR PRESERVATION

Unlike the nineteenth century, when Indian tribes stood in the way of achieving the public's land use aspirations, now the occupying impediment is the very group that supplanted the Indian tribes on the public lands. If those in the West's urban archipelagoes and gateway oases are to fulfill their preservation aspiration, if they are to protect and enhance their quality of life, then the commodity and extractive interests, as well as the rural

of those polled believe there is not enough wilderness protected on public lands, versus just six percent who say too much has already been protected."); The Trust for Public Lands Newsroom, *Poll Results: Support for Land Protection* (July 14, 1999), available at http://www.tpl.org/newsroom/poll/poll_results.html (indicating that 61% of Americans think the federal government is not doing enough to create parks and open space); Land Trust Alliance, *Conservation of Land, Water, & Open Spaces is Congress's Chance to Shine on Environmental Issues* (Summer 1999), available at <http://www.lta.org/luntz.html> (last visited Dec. 24, 1999) (indicating that 77% of Americans would contribute out of their own pockets to local parks and 60% would contribute to national parks); Philip M. Burgess & Kara Steele, *Growth, Open Space and Wilderness: Colorado Opinion Research Shows Support for Wilderness Declines as Public Learns More About Restrictions*, POINTS WEST 3 (Nov. 1999), available at <http://newwest.org> last (last visited Dec. 24, 1999) (indicating that 78% of Coloradans favored a recent proposal to designate 1.4 million acres of wilderness); C. Arden Pope III & Jeffrey W. Jones, *Value of Wilderness Designation in Utah*, 30 J. ENVTL. MGMT. 157, 172 (1990) (finding that 79% of respondents in Utah supported designation of additional wilderness).

¹⁰⁵ 16 U.S.C. §§ 1131-1336 (1994 & Supp. 1997).

¹⁰⁶ *Id.* §§ 1271-1287 (1994 & Supp. 1997).

¹⁰⁷ *Id.* §§ 1531-1544 (1994 & Supp. 1997).

¹⁰⁸ 43 U.S.C. §§ 1701-1784 (1994 & Supp. 1997). *See id.* § 1782 (providing for review and inventory of wilderness study areas); *id.* § 1702(c) (including within the Bureau of Land Management's (BLM) multiple use mandate, management of the public lands for "wildlife and fish, and natural scenic, scientific and historical values").

¹⁰⁹ *Id.* §§ 1901-1908 (1994 & Supp. 1997).

¹¹⁰ 16 U.S.C. §§ 3101-3133 (1994 & Supp. 1997).

¹¹¹ *See infra* Part VI.B (discussing the public lands initiatives of the Clinton Administration).

communities dependent upon them, need to be removed from the public lands, or at least be relegated to those areas that the public does not desire for a different purpose. The justification for this new removal policy proceeds along two tracks. The first task is to explain the propriety of preservation; the second, to defend the task of removal. The various arguments of advocates and policy-makers in favor of preserving more of our public lands from commodity uses are many, and echo, sometimes loudly, the arguments in favor of settlement and development made over a century ago.

A. *Justifying the Need for Preservation*

1. *The Economic Argument for Preservation*

A common justification for preservation that parallels earlier arguments for a different use of the public lands is that preservation and recreation are the most economically beneficial uses of those lands. Whereas in the nineteenth century, hunting and gathering were deemed unproductive land uses in comparison to ranching, logging, and mining,¹¹² today, those same commodity and extractive uses are often derided as decidedly less beneficial, particularly in light of the subsidies afforded those activities.¹¹³ Perhaps the most thorough exposition of this argument is Thomas Power's *Lost Landscapes and Failed Economies: The Search for a Value of Place*.¹¹⁴ Power makes two fundamental points: first, that commodity uses of public lands make a modest contribution to the Western economy; and second, that preserving the surrounding landscape is in the long-run economic interest of Western communities because dollars will flow from recreational use of the public lands and because locational amenities will attract the companies that are the engines of growth.¹¹⁵ The numbers seem to support Power's arguments. Jobs from natural resource industries make up a relatively small percentage of jobs in the West¹¹⁶ and even that small number is declining.

¹¹² See *supra* notes 59–63 and accompanying text (discussing this justification for federal Indian policy).

¹¹³ Discussion of the subsidies afforded natural resource industries on the public lands are legion, as are criticisms of those subsidies. See, e.g., Paul Rogers & Jennifer LaFleur, *U.S. Subsidies Prop Up Cattle Grazing in West*, DESERET NEWS, Nov. 28, 1999, at A1; Todd Oppenheimer, *The Rancher Subsidy*, ATLANTIC MONTHLY, Jan. 1, 1996, at 26. A recent fund raising letter from the Sierra Club is rather typical:

We need your help right away to stop a terrible outrage that assures the continued destruction each year of millions of acres of our National Forest . . . unbelievably, at taxpayers expense . . . [L]ogging companies often owe nothing for the woodlands they destroy—even though they are reaping huge profits from the lumber they've harvested! In fact, American taxpayers lose as much as \$790 million a year on this ridiculous enterprise.

Fund Raising Letter from Sierra Club (July 2000) (emphasis omitted) (on file with author).

¹¹⁴ POWER, *supra* note 22.

¹¹⁵ See generally *id.*

¹¹⁶ Power found that of the total employment in the eleven Western states, .06% was in grazing and .15% in mining. See POWER, *supra* note 22, at 98, 184–85. There are, however,

Jan Laitos and Thomas Carr report in their recent study on the transformation of the public lands:

[L]ogging on national forest land is down from 12 billion board-feet a decade ago to less than 4 billion board-feet in 1998. Livestock grazing in the West is down from 17 million head in 1934 to 2 million today Between 1954 and 1998, the number of hardrock mines fell from 3,300 to about 1,000, and mining employment fell from 103,000 to 57,000.¹¹⁷

In contrast to the decline in natural resource industry employment, recreational use of public lands has skyrocketed in the last few decades.¹¹⁸ Recreation visits to our national forests went from 27.4 million in 1950 to 691,180,286 in 1992.¹¹⁹ Recreation visits to the national park system grew from 33 million visits in 1950 to 287,130,879 in 1999.¹²⁰ Indeed, between 1984 and 1994, visitation at Grand Canyon National Park went from approximately two to 4.7 million persons.¹²¹ The total visitor days on BLM lands has likewise boomed, climbing from 31,170,000 in 1972 to 65,657,000 in 1999.¹²² Recreational use of wilderness lands has increased steadily since the

important regional differences. Mining, for example, accounts for 1.74% of the jobs in Nevada and .01% in California. *Id.* at 98. Moreover, extractive industries make up a significant part of the employment in certain counties. *Id.* at 158 (discussing those counties in Oregon and Montana where the timber industry accounts for more than 10% of personal income in the county).

¹¹⁷ Laitos & Carr, *The Transformation of the Public Lands*, *supra* note 15, at 146 (citation omitted). See generally *id.* at 150-60 (detailing the decline in each of these various public lands industries). Depending on the dates selected for comparison, these decreases are not as great. See Jan G. Laitos & Thomas A. Carr, *The New Dominant Use Reality on Multiple Use Lands*, 44 ROCKY MTN. MIN. L. INST. 1-1, 1-34 to 1-41 (1998) (graphing change in commodity use of the public lands during the nineteenth century).

¹¹⁸ See generally Laitos & Carr, *The Transformation of the Public Lands*, *supra* note 15, at 160-66, 178-84 (detailing growth of recreation in the twentieth century); Laitos & Carr, *The New Dominant Use Reality on Multiple Use Lands*, *supra* note 117, at 1-42 to 1-46 (graphing increase in various recreational uses of the public lands).

¹¹⁹ See CHARLES I. ZINSER, *OUTDOOR RECREATION: UNITED STATES NATIONAL PARKS, FORESTS, AND PUBLIC LANDS* 301 (1995). With respect to "visitor days," which aggregates twelve visitor-hours, use of the national forests went from 160.3 million in 1965 to 341.2 million in 1996. Compare *id.* at 301 with *Agricultural, Conservation and Forestry Statistics*, available at <http://www.usda.gov/nass/pubs/agstats.htm> (last modified July 28, 2000).

¹²⁰ Compare ZINSER, *supra* note 119, at 89-90 (setting forth 1950 statistics) with National Park Service, U.S. Dep't of the Interior, National Park System Visitation Report, available at <http://www2.nature.nps.gov/stats> (last modified Sept. 6, 2000) (setting forth 1999 statistics). See also JARED FARMER, *GLEN CANYON DAMMED: INVENTING LAKE POWELL AND THE CANYON COUNTRY* 192 (1999) (noting that visitation at Arches National Park, near Moab, has increased from 15,726 in 1950, to 290,519 in 1980, and to 859,374 in 1995); Jilian Lloyd, *Environmental Alarms Sound As Tourism Extends Its Reach*, available at http://abcnews.go.com/sections/sciencedailynews/enviro_tourism981109.html (last modified Nov. 9, 1998) ("The national park system alone last year hosted 279 million visitors (by comparison, the total U.S. population is 245 million). 'It's a pile of people,' says David Barna, spokesman for the National Park Service. 'Every year for the past 40 years we've been getting about 10 million more visitors.'").

¹²¹ Richard C. Knopf et al., *Increasing Demand for a Nationally Renowned Outdoor Recreation Resource: What Is the Appropriate Managerial Response?*, in *A READER FOR CONGRESS*, *supra* note 86, at 690.

¹²² Compare BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, *PUBLIC LAND STATISTICS* 83 (1972) with Bureau of Land Mgmt., U.S. Dep't of the Interior, *PUBLIC LAND STATISTICS* 1999,

passage of the Wilderness Act, growing from 2,952,000 visitor days in 1965 to 16,988,000 in 1994.¹²³ Recreational visits to Bureau of Reclamation project areas have also exploded, increasing from forty-five million to eighty million between 1966 and 1990.¹²⁴ Between 1960 and 1995, the percentage of Americans who camped nearly tripled, the percentage of cyclists more than tripled, and the percentage of canoers and kayakers more than quadrupled.¹²⁵

Looking at these sorts of numbers, Jan Laitos and Thomas Carr concluded that during the last thirty years, the use of the public lands has undergone a fundamental change. Whereas the public lands had previously been managed primarily for extraction purposes, public land use, they observe, is now "dominated by two non-consumptive uses—recreation and preservation."¹²⁶ Hal Rothman states this same conclusion in harsher terms:

The truth is hard, but clear. The rural West has become a playground, a colony the rest of us visit when we want to relax or indulge our fantasies. We camp, hike, swim, boat, bike, ski, hunt, fish and ATV throughout the rural West, making our lives in its increasingly stretched out and stunningly dense cities¹²⁷

The new dominant recreation use of the public lands brings with it significant economic benefits. Travel and tourism in the West create

Estimated Recreational Use of Public Lands Administered by the BLM by Major Activity Grouping, Fiscal Year 1999, *available at* <http://www.blm.gov/natacq/pls99/99pl4-1.pdf> (last updated March 15, 2000).

¹²³ See DAVID N. COLE, WILDERNESS RECREATION USE TRENDS, 1965 THROUGH 1994 3 (U.S. Dep't of Agric., Intermountain Research Station, Research Paper INT-RP-488, April 1996) (noting that "[r]ecreation use of the National Wilderness Preservation System increased almost sixfold between 1965 and 1994" and that the "average annual increase in use over this period was 6.3%, and growth was remarkably constant"). Although some of the increased visitation is due to the increase in designated acreage, at least "one-half of all areas saw their highest use levels during the 1990s." See George Nickas, *Preserving an Enduring Wilderness: Challenges and Threats to the National Wilderness Preservation System*, 76 DENV. U. L. REV. 449, 451 (1999) (citing COLE, *supra*, at 9).

¹²⁴ See Laitos & Carr, *The New Dominant Use Reality*, *supra* note 117, at 1-3, n.4 (citing BUREAU OF RECLAMATION, U.S. DEP'T OF THE INTERIOR, WATER, LAND, AND RELATED DATA-SUMMARY STATISTICS 1990, at 11 (1990)).

¹²⁵ See H. Ken Cordell & Joseph O'Leary, *Trends in Outdoor Recreation*, in A READER FOR CONGRESS, *supra* note 86, at 141 (comparing the number and percentage of Americans who participate in various recreational activities); *id.* at 9 (table indicating participation trends in outdoor recreation activities between 1982 and 1992); Rodger Schmitt et al., *Outdoor Recreation and the Bureau of Land Management*, in A READER FOR CONGRESS, *supra* note 86, at 650 ("In the U.S. in 1997, . . . there are 7,500 bicycle shops. The circulation for Walking Magazine is 600,000.").

¹²⁶ Laitos & Carr, *The Transformation of the Public Lands*, *supra* note 15, at 144. See also Frank J. Popper & Deborah J. Popper, *The Reinvention of the American Frontier*, AMICUS J. 4, 4 (Summer 1991):

On the twenty-first-century frontier, extraction and preservation will change places: preservation uses such as tourism, recreation, and retirement will become primary; extractive activities such as ranching, farming, logging, and mining (including for oil) will become secondary.

¹²⁷ Hal Rothman, *Do We Really Need the Rural West?*, HIGH COUNTRY NEWS, Apr. 24, 2000, at 17.

tremendous revenues.¹²⁸ The gateway communities adjacent to public lands capture a significant portion of these revenues.¹²⁹ Outdoor recreation, for example, generated \$4.7 billion in equipment sales in 1996,¹³⁰ and when the multiplying effect of additional expenditures on food, lodging, and related items is considered, its impact increases to approximately \$40 billion per year.¹³¹ In fact, the Forest Service estimates that in the year 2000, 74% of the economic contribution from activities on Forest Service lands will come from outdoor recreation.¹³² The numbers certainly seem to indicate that recreation is the most economically productive use of the public lands. Ironically, playing on the public lands pays more than working on them.

The economic argument in favor of preservation is quite persuasive. What is troubling is that the same sort of arguments were made by nineteenth century presidents, administrators, and humanitarians on behalf of settlement and development of the West,¹³³ and the arguments were also quite persuasive to a majority of the nineteenth century public. Many would surely contend, however, that the two policies are vastly different. They would posit that the primary motives behind the nineteenth century's settlement and development policy were mostly selfish, whereas the new preservation policy goes beyond economic self-interest because preserving biodiversity is an ecological and moral command that we ignore at our peril. But is this characterization accurate, or are the two policies similarly mixed bundles of sincerity and pretext driven forward by a strong underlying current of public preference? It is to this question that the Article now turns.

¹²⁸ See ATLAS OF THE NEW WEST, *supra* note 94, at 125 (noting that "[m]ost Interior West states now reckon on recreation and tourism as the first or second largest part of their economies").

¹²⁹ The post-war increase in tourism is not, of course, limited to gateway communities or to the West. Tourism world-wide is on the increase. In 1991, the World Travel and Tourism Council

estimated that at the end of the 1980s, gross spending for tourism worldwide was \$2.5 trillion. It generated 112 million jobs—one out of every 15 jobs in the world is in the tourism industry. In the United States in 1991, tourism was the third-largest retail industry, second only to health services in [sic] employment.

Leslie Haysmith & John D. Hunt, *Nature Tourism: Impacts and Management*, in WILDLIFE AND RECREATIONISTS: COEXISTENCE THROUGH MANAGEMENT AND RESEARCH 203 (Richard L. Knight & Kevin J. Gutzwiller eds., 1995) [hereinafter WILDLIFE AND RECREATIONISTS].

¹³⁰ KMPG Peat Marwick LLP, *Human Powered Outdoor Recreation 1997 State of the Industry Report*, in A READER FOR CONGRESS, *supra* note 86, at 385 [hereinafter *Human Powered Outdoor Recreation*]. Sales included \$299.6 million of camping equipment (including stoves, flashlights, camp furniture, cookware, camp food, coolers, and water purification systems), \$180.5 million on tents, and \$183.3 million on sleeping bags. *Id.* at 386. See also Belinda Luscombe, *RV Having Fun Yet?*, in A READER FOR CONGRESS, *supra*, note 86, at 420–21 (noting that in 1996, sales of RVs hit a record \$12.4 billion, a full 50% higher than their 1990 levels).

¹³¹ *Human Powered Outdoor Recreation*, in A READER FOR CONGRESS, *supra* note 86, at 387.

¹³² *Id.* See also Andrew Laughland & James Caudill, *Banking on Nature: The Economic Benefits to Local Communities of National Wildlife Refuge Visitation*, in A READER FOR CONGRESS, *supra* note 86, at 403 (noting that in fiscal year 1995, recreational visits to national wildlife refuges generated \$401.1 million of sales in regional economies).

¹³³ See *supra* notes 62–71 and accompanying text (reviewing the nineteenth century arguments in favor of settlement and development).

2. "Taking Refuge in Claims of Ecological Necessity"¹³⁴

The contention that the preservation preference is grounded in ecological and moral necessity might be called an argument for preservation for preservation's sake. It has several manifestations. In contrast to the predominant nineteenth century view that subduing the earth and developing and reclaiming nature was morally superior to the chase,¹³⁵ preserving nature is now advocated as the superior land use. Building on Aldo Leopold's land ethic that an activity is right "when it tends to preserve the integrity, stability, and beauty of the biotic community" and "wrong when it tends otherwise,"¹³⁶ and on biologists' advances in understanding about the ways in which natural systems function, the common call now is for the public lands agencies to practice ecosystem management and to protect biodiversity.¹³⁷ The argument is that there should be a presumption against any harm to species or habitat because if all parts of the natural system are interconnected, our health and welfare depend upon the adequate functioning of every aspect of that system.¹³⁸ Humanity's role is no

¹³⁴ JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS 109 (1980) (remarking that the preservationist position "rests on a set of moral and aesthetic attitudes whose force is not strengthened either by contemptuous disdain of those who question [preservationists'] conception of what a national park should be, or by taking refuge in claims of ecological necessity"); *id.* at 104:

[t]he claim [of preservationists] is bold, and it has often been concealed in a pastiche of argument for scientific protection of nature, minority rights, and sentimental rhetoric. I have tried to isolate and make explicit the political claim, as it relates to the fashioning of public policy, and leave it to sail or sink on that basis.

¹³⁵ The fact that reclaiming nature was viewed as morally superior by most should not obscure the fact that not all had the same view. Authors and advocates such as Thoreau and Muir joined the argument in favor of preservation during the nineteenth century. See NASH, *supra* note 32, at 84-95, 122-40 (discussing Thoreau's and Muir's preservationist views).

¹³⁶ ALDO LEOPOLD, A SAND COUNTY ALMANAC 262 (1949).

¹³⁷ See generally Laitos & Carr, *The Transformation of the Public Lands*, *supra* note 15, at 195-98 (discussing how ecosystem management and biodiversity have become important justifications for the preservation of wilderness). See also DEBRA DONAHUE, THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY (1999) (arguing that removing livestock from public lands with less than twelve inches of annual rainfall is necessary to conserve biodiversity).

¹³⁸ See generally Laitos & Carr, *The Transformation of the Public Lands*, *supra* note 15, at 196-98 (discussing the meaning of ecosystem management and biodiversity). One common component of the biodiversity argument has been the idea that species preservation is critical because plants and animals may contain chemical compounds that have medicinal value. See, e.g., Walter V. Reid, *Biodiversity and Health: Prescription for Progress*, 37 ENV'T 12, 14 (July-Aug. 1995) (arguing that preserving biodiversity has public health benefits because of "the value of particular species as sources of important medicinal products; the value of diversity itself as a source of new pharmaceutical products and as model systems for studying disease; and the potential for public health threats of human-caused changes in diversity"); John McCarry, *Suriname: Can the Rain Forest Save South America's Youngest Nation?*, NAT'L GEOGRAPHIC, June 2000, at 38, 41-42 (touting medicinal benefits of preserving Suriname's rain forest). *But see* David Ehrenfeld, *Why Put a Value on Biodiversity?*, in BIODIVERSITY 213 (E.O. Wilson & F. M. Peter eds., 1988):

Pharmaceutical researchers now believe, rightly or wrongly, that they can get new drugs

longer to subdue and cultivate nature but to strive to understand, and not unduly disrupt, natural systems.¹³⁹ Alongside the biological arguments in favor of preservation, more and more arguments have been made that preservation is a moral duty. For some, that moral duty is grounded in a rejection of anthropocentrism and the adoption of the belief that nature and animals enjoy rights to existence and dignity.¹⁴⁰ For others, the moral imperative of preservation is inter-generational equity, the idea that our public lands should be preserved so that future generations will be able to savor them just as we have done.¹⁴¹ Still others find a moral duty in the Bible. Harking back to verses once interpreted quite differently,¹⁴² they suggest that humanity has a duty to serve as a proper steward over God's creations.¹⁴³

faster and cheaper by computer modeling of the molecular structures they find promising on theoretical grounds, followed by organic synthesis in the laboratory using a host of new technologies, including genetic engineering. There is no need, they claim, to waste time and money slogging around in the jungle. In a few short years, this so-called value of the tropical rain forest has fallen to the level of used computer printout.

¹³⁹ See, e.g., LEOPOLD, *supra* note 136, at 240:

A land ethic of course cannot prevent the alteration, management, and use of these "resources," but it does affirm their right to continued existence, and, at least in spots, their continued existence in a natural state. In short, a land ethic changes the role of Homo Sapiens from conqueror of the land-community to plain member and citizen of it. It implies respect for his fellow-members, and also respect for the community as such.

¹⁴⁰ See generally RODERICK FRAZIER NASH, *THE RIGHTS OF NATURE: A HISTORY OF ENVIRONMENTAL ETHICS* (1989) (tracing the intellectual history of the argument about the rights of nature); BILL DEVALL & GEORGE SESSIONS, *DEEP ECOLOGY: LIVING AS IF NATURE MATTERED* (1985) (setting forth philosophy of deep ecology); PETER SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* (2d ed. 1990) (asserting that equality principles apply to animals as well as humans); WILLETT KEMPTON ET AL., *ENVIRONMENTAL VALUES IN AMERICAN CULTURE* 106-14 (1995) (discussing survey and focus group reaction to the ideas that "humans should not harm nature because we are part of nature; species have a right to continue; and nature has intrinsic rights broader than mere species survival"). But see Richard A. Watson, *A Critique of Anti-Anthropocentric Biocentrism*, 5 ENVTL. ETHICS 245, 253 (1983) ("The human species should be allowed . . . to live out its evolutionary potential.").

¹⁴¹ See, e.g., RICHARD B. PRIMACK, *ESSENTIALS OF CONSERVATION BIOLOGY* 247 (discussing responsibility to future generations as a reason to preserve biodiversity); KEMPTON ET AL., *supra* note 140, at 95-102 (discussing focus group and survey data indicating that the public has significant concern with protecting the environment for future generations).

¹⁴² See *supra* note 63 (discussing nineteenth century understanding of 1 Genesis 28's reference to humankind's "dominion").

¹⁴³ Michael Northcott has argued:

Dominion has frequently been misinterpreted as meaning domination and possession. But the Hebrew root of the verb translated subdue or rule means vice-regent or steward and not ruler. God puts humans over nature not as owner or exploiter but as the steward who shares the creative care of the creator.

MICHAEL NORTHCOTT, *THE ENVIRONMENT AND CHRISTIAN ETHICS* 181 (1997). See also Jeffery Smith, *Evangelical Christians Preach a Green Gospel*, HIGH COUNTRY NEWS, Apr. 28, 1997, at 1, 8-9 (discussing the message of environmental evangelicals who understand the reference to "dominion" in 1 Genesis 28 to imply an obligation to be a steward over God's creation); WESLEY GRANBERG-MICHAELSON, *A WORLD SPIRITUALITY: THE CALL TO REDEEM LIFE ON EARTH* 63 (1984) (asserting that "[o]ur call" is "to be stewards of [God's] creation"); KEMPTON ET AL., *supra* note 140, at 91 (discussing survey data showing that 78% of the public agree that "[b]ecause God

The preservation for preservation's sake arguments are also quite persuasive,¹⁴⁴ but again this sort of moral, scientific, and ethical argumentation was also common to nineteenth century public lands and Indian policy.¹⁴⁵ More significantly, it is not at all clear that preservation for preservation's sake is what has really animated the public's shift to a preservation preference.

As an initial matter, it is plain that biodiversity and ecosystem protection were not the driving force behind early preservation advocacy. Between 1950 and 1976, the *Sierra Club Bulletin* contained only "two references to ecology, four to endangered species, and five to wildlife conservation."¹⁴⁶ Likewise, at the Sierra Club's early biennial wilderness conferences, "there was little mention of ecology as having anything to do with wilderness protection"; instead, the focus was on recreation, spiritual, and aesthetic justifications.¹⁴⁷ Concern about biodiversity began to grow within the preservation and environmental community during the 1970s and 1980s and has continued in the 1990s,¹⁴⁸ but the dominant strain of preservation advocacy has remained on the recreation and aesthetic issues. The remarks of Bruce Babbitt at the Sierra Club's annual meeting in 1985, seven years before he became Secretary of the Interior, are illustrative. Observing that "[t]he great urban centers of the West are filled with citizens who yearn for solitude, for camping facilities, for a blank spot on the map, a place to teach a son or daughter to hunt, fish or simply survive and enjoy,"¹⁴⁹ he called for a "new Western land ethic" that would replace multiple use with public use.¹⁵⁰ "[W]e must," he said, "recognize the new reality that the highest and best, most productive use of Western public land will usually be for public purposes—watershed, wildlife and recreation."¹⁵¹ Babbitt's focus, like that of many other preservationists, was on how preservation would improve the quality of life of those who live in urban areas.

To note that biodiversity and ecological necessity have not been the dominant strains in preservation advocacy is not to suggest that biodiversity

created the natural world, it is wrong to abuse it"); NATIONAL RESEARCH COUNCIL, PERSPECTIVES ON BIODIVERSITY: VALUING ITS ROLE IN AN EVERCHANGING WORLD 83 (1999) (discussing how religious beliefs influence attitudes towards nature and biodiversity).

¹⁴⁴ For other explorations of the principles animating the preservation preference, see Laitos & Carr, *The Transformation of Public Lands*, *supra* note 15, at 193 (identifying four forces that have shaped the preservation preference: "(1) the rise of a wilderness ethic; (2) the emergence of biodiversity and ecosystem management; (3) a growing awareness that preservation lands hold economic value; and (4) the impressive political clout of environmental organizations that espouse preservation values"); Mark Sagoff, *On the Preservation of Species*, 7 COLUM. J. ENVTL. L. 33, 47-53 (1980) (discussing values of species preservation).

¹⁴⁵ See *supra* Part II (reviewing these arguments).

¹⁴⁶ R. Edward Grumbine, *Using Biodiversity as a Justification for Nature Protection in the U.S.*, in THE GREAT NEW WILDERNESS DEBATE 595, 604 (J. Baird Callicott & Michael P. Nelson eds., 1998).

¹⁴⁷ *Id.* at 604.

¹⁴⁸ See generally *id.* at 606-13 (describing this increased concern with biodiversity).

¹⁴⁹ COGGINS ET AL., *supra* note 47, at 1081.

¹⁵⁰ *Id.* at 1080.

¹⁵¹ *Id.* at 1081.

is not a sincere concern of many preservation advocates. But it does help show how implausible it is that the scientific weight of this argument is what has driven the shift in public lands values. Indeed, a 1993 survey sponsored by Defenders of Wildlife found that seventy-three percent of adults were simply unfamiliar with the issue of loss of biodiversity.¹⁵²

Some might contend that the apparently strong public support for wilderness¹⁵³ indicates the public really is concerned about biodiversity and ecosystem integrity,¹⁵⁴ but it is hard to believe that is the case. One of the dedicated purposes of wilderness is to provide opportunities for “a primitive and unconfined type of recreation,”¹⁵⁵ which, as explained more thoroughly below,¹⁵⁶ is not wholly calculated to preserve biodiversity. But even if primitive recreation was wholly compatible with biodiversity protection, it would be wrong to suggest that public support for wilderness amounts to a vote for preservation for preservation’s sake. More refined polling that goes beyond the simple question of whether a person supports wilderness consistently indicates that most citizens have very little understanding of the highly protective nature of a wilderness designation. For example, in an opinion survey of Colorado voters who were highly supportive of wilderness,¹⁵⁷ 42.1% of those surveyed thought that snowmobiling could take place in wilderness areas and 31.1% believed that energy production by wind and hydro facilities could occur,¹⁵⁸ despite the fact that motorized vehicles as well as structures and installations are generally prohibited in wilderness areas.¹⁵⁹ Of the respondents, 46.8% believed that Rocky Mountain National

¹⁵² MICHAEL E. KRAFT, ENVIRONMENTAL POLICY AND POLITICS: TOWARD THE TWENTY-FIRST CENTURY 78 (1996). See also *Spotlight Story—Biodiversity: Public Unaware of Problem, Poll Finds*, AMER. POL. NETWORK GREENWIRE, Jul. 21, 1993 (reporting on this and other data regarding public concern about biodiversity).

¹⁵³ See *supra* note 104 (citing a number of polls indicating significant public support for wilderness).

¹⁵⁴ See Land Trust Alliance, *Conservation of Land, Water, & Open Spaces is Congress’s Chance to Shine on Environmental Issues* (Summer 1999), available at <http://www.lta.org/luntz.html> (last modified Nov. 29, 2000) (equating support for wilderness and habitat preservation with the idea that “conserving the environment is its own reward”).

¹⁵⁵ Wilderness Act, 16 U.S.C. § 1131(c) (1994). Recreation is also included as an appropriate multiple use of the national forests and BLM lands in various statutes. See National Forest Management Act of 1976, 16 U.S.C. § 1604(e) (1994); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702(c) (1994); Public Rangelands Improvement Act, 43 U.S.C. § 1901 (a)(1) (1994).

¹⁵⁶ See discussion *infra* Part IV.A.3 (impact of recreation in wilderness areas).

¹⁵⁷ Philip M. Burgess & Kara Steele, *Growth, Open Space and Wilderness: Colorado Opinion Research Shows Support for Wilderness Declines as Public Learns More About Restrictions*, POINTS WEST SPECIAL REP. (Center for the New West, Denver, Colo.) Nov. 1999, at 4, 12, available at http://www.newwest.org/new_west/wilderness/wilder_intro.html (last modified Mar. 28, 2000) (indicating that 55.1% favored expanding wilderness and only 4.1% favored reducing it, while 40.3% thought the current amount “about right”).

¹⁵⁸ *Id.* at 13.

¹⁵⁹ See 16 U.S.C. § 1133(c) (1994) (providing that except for certain narrow exceptions, within wilderness areas “there shall be . . . no permanent road . . . no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanized transport, and no structure or installation within any such area”).

Park was a wilderness area.¹⁶⁰ Apparently, voters were not supporting wilderness because it was the designation most likely to protect biodiversity. Instead, their support seemed to be a function of a more generalized preference for parks and open space. In fact, when actually asked to compare parks and open space to wilderness, their clear preference was for the former.¹⁶¹

In other surveys analyzing attitudes toward wilderness in Utah similar results appear. A number of respondents indicated that they had used recreational vehicles within designated wilderness and wilderness study areas,¹⁶² and only one in five Utahns understood that bicycles were prohibited in wilderness areas.¹⁶³ Another interesting study in British Columbia of urban and rural attitudes toward wilderness found that when shown photographs of natural areas with varying levels of activity or human impact, urbanites "often regarded depicted areas as wilderness notwithstanding evidence of logging activity, ranging, grazing, villages, roads, and hydroelectric dams," whereas rural respondents "generally considered areas with any such activities as nonwilderness."¹⁶⁴

Interestingly, despite their support for preservation, people voice significant support for continuing commodity uses on the public lands, even though preservation, and particularly preservation of biodiversity, is often incompatible with such uses.¹⁶⁵ This sort of paradox in public opinion is not

¹⁶⁰ Burgess & Steele, *supra* note 157, at 13 (29.2% answered correctly that it was not and 24.1% did not know). Technically, 2922 acres of the Indian Peaks Wilderness is within Rocky Mountain National Park. See WILDERNESS.NET, NATIONAL WILDERNESS PRESERVATION SYSTEM: INDIAN PEAKS WILDERNESS, available at http://www.wilderness.net/nwps/wild_view.cfm?wname=Indian_Peaks (last visited Nov. 2, 2000). It is thus possible that some of the respondents were confused by the dual status of that acreage, although the number of such individuals would surely have been very small.

¹⁶¹ Burgess & Steele, *supra* note 157, at 14 (in choosing between "the designation of 1.4 million more acres of federal wilderness" and "a major expansion of parks and open space in our communities throughout the state," 67.9% opted for more parks and open space and 21.7% opted for more wilderness).

¹⁶² Chris Perri, *The Cost of Solitude*, in CONTESTED LANDSCAPE: THE POLITICS OF WILDERNESS IN UTAH AND THE WEST 203, 208 (Doug Goodman & Daniel McCool eds., 1999) (discussing people's misunderstanding of the wilderness concept). Another study of attitudes toward the Grand Staircase-Escalante National Monument found that those who indicated the strongest pro-wilderness position "may even have a slight preference" for campsites and visitors centers as compared to the rest of the respondents. See Julie Andersen et al., TOURISM INFRASTRUCTURE AND THE MONUMENT: REPORT TO THE BOARD OF COMMISSIONERS OF KANE COUNTY, UTAH 25 (Nov. 1, 1997) (on file with author).

¹⁶³ Jim Woolf, *Utahns Supporting Wilderness Ignorant of Facts, Official Says*, SALT LAKE TRIB., May 16, 2000, at B6. *C.f.* Wilderness Act, 16 U.S.C. § 1133(c) (1994) (prohibiting all forms of "mechanical transport"). See also Woolf, *supra* (noting that only one in three Utahns knew that the federal government owned more than half of the land (approximately 69%) in Utah).

¹⁶⁴ Allison R. Lutz et al., *Wilderness*, 31 ENV'T & BEHAV. 259 (1999).

¹⁶⁵ See, e.g., Burgess & Steele, *supra* note 157, at 12 (finding that despite broad public support for wilderness by Colorado voters, 67.5% of respondents thought that "mining, agriculture, ranching and other natural resource development" were "very important" to Colorado's economy and that 29.4% thought it "somewhat important"). In another nationwide survey in which people were asked "if it came to a simple choice between developing new energy resources and preserving publicly owned wilderness which do you think the nation

isolated. People often express approval for broad, value-affirming propositions that are difficult to reconcile. Thus, in one survey the public can agree that "protecting the environment" is necessary "regardless of cost,"¹⁶⁶ and in another the public favors less government and opposes any increase in a gasoline tax, which would promote energy conservation.¹⁶⁷ In general, people's preference for preservation weakens when preservation conflicts with their own well-being.¹⁶⁸ Thus, recreation users "indicate that opening new areas for . . . recreation is a good reason for building new roads, but they do not want more roads in the areas they visit."¹⁶⁹ Seemingly, we want to see our aspirations fulfilled but do not want to believe that we, or anyone else, must pay a price for the satisfaction of our desires. Surely if opinion polling had existed in the nineteenth century, a similar pattern would have emerged. If asked about whether they favored the settlement and development of the West, most would likely have responded positively; at the same time, when asked whether the Indian tribes should be forcibly removed from their historical lands, a good percentage would probably also have answered negatively, not recognizing the potential conflicts between their two sentiments.¹⁷⁰

Overall, what becomes evident from the polling data is that the public makes little distinction between various protective designations and that public support for preservation does not grow out of concern for biodiversity. The polling data, showing that biodiversity is not the primary concern of a public which strongly favors preservation, should not be particularly surprising because it correlates closely with the postulates of political self-interest theory. In a recent article exploring the application of political self-interest theory to environmental law, Michael Lyons identifies three types of environmental policies:

Type I policies are those intended to distribute *tangible* and *specific* benefits. Examples include the stocking of trout in a river, the operation of a national forest campground, and the preservation of "natural wonders" for national park visitors. . . .

Type II policies have the objective of providing relatively *tangible* but highly

should choose," the percentage choosing wilderness was 19% in 1978 and 47% in 1988. See Rudzitis & Johansen, *How Important Is Wilderness?*, *supra* note 94, at 228.

¹⁶⁶ KRAFT, *supra* note 152, at 77.

¹⁶⁷ *Id.* at 78.

¹⁶⁸ *Id.* at 78 (noting how people's support for environmental protection often weakens when they "face real and intense local or regional conflicts in which environmental measures are believed to adversely affect employment or economic well-being"). As Michael Kraft notes, "'tree talk' is cheap" and "creates a 'lip-service gap' when the public is unwilling to make the necessary personal sacrifices to clean up the environment." *Id.* at 77. Riley E. Dunlap & Rik Scarce, *The Polls - Poll Trends: Environmental Problems and Protection*, 55 PUB. OPINION Q. 651, 664, 666 (1991) (finding that 63% of people stated that environmental laws and regulations "should go further" but 51% opposed a ban on gasoline-powered garden appliances).

¹⁶⁹ David N. Bengston & David B. Fan, *Roads on the U.S. National Forests: An Analysis of Public Attitudes, Beliefs, and Values Expressed in the News Media*, ENV'T & BEHAV. 514, 517 (1999) (citation and internal quotation omitted).

¹⁷⁰ See *supra* text accompanying notes 78-81.

diffuse benefits. Most of the existing U.S. air and water pollution control programs fall into this category. So too do programs created to preserve wetlands wildlife habitat, and programs that strive to maintain the populations of "significant" endangered species, such as bald eagles.

Lastly, Type III policies are those designed to produce *diffuse* and currently *intangible* benefits. Most forms of natural preservation for preservation's sake belong in this category. Examples include the designation of wilderness areas for purposes other than visitation, the protection of "insignificant" endangered species, and the "natural regulation" to restore ecological balance within the national parks.¹⁷¹

Type I policies, Lyons explains, are most likely to enjoy political success for a couple of reasons: first, "voters are more likely to be aware of Type I environmental policies, with specific and tangible benefits, than Type II or Type III policies" because "the costs of becoming informed are relatively low when benefits are specific and tangible, but higher when the benefits are diffuse and intangible";¹⁷² second, extrapolating from David Mayhew's idea that reelection depends in part on "credit claiming," politicians will gain the most politically from enacting Type I policies that provide their constituents specific and tangible benefits.¹⁷³

Political self-interest theory explains well why increasing support for preservation has coincided closely with the massive growth in recreation and the increasing interest in scenic amenities and quality of life during the last thirty to forty years. Preserving the public lands for recreation and scenic value are classic Type I policies. They provide specific, tangible benefits (*e.g.* opportunities for hiking, camping, fishing, and viewing) to a public increasingly hungry for precisely those benefits. The theory also helps explain why the *Sierra Club Bulletin* for so long focused on the recreation and aesthetic benefits of preservation.¹⁷⁴ As Lyons explains, preservation advocates are most likely to achieve success if they "couple efforts to provide diffuse, intangible benefits to programs with specific and tangible

¹⁷¹ Michael Lyons, *Political Self-Interest and U.S. Environmental Policy*, 39 NAT. RESOURCES J. 271, 274 (1999).

¹⁷² *Id.* at 276.

¹⁷³ *Id.* at 284 (citing DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 52-61 (1974)).

¹⁷⁴ The idea that preservation advocacy enjoys success when it is tied closely to tangible benefits like recreation helps explain why environmental organizations have experienced such dramatic growth alongside the growing national interest in recreation and scenic amenities. Membership in the major environmental organizations has increased dramatically since the 1960s. Between 1960 and 1990, the Sierra Club grew from 15,000 members to 600,000 members, the Wilderness Society from 10,000 members to 350,000 members and the National Audubon Society from 32,000 members to 575,000 members. KRAFT, *supra* note 152, at 75. See also Helen M. Ingram & Dean E. Mann., *Interest Groups and Environmental Policy*, in ENVIRONMENTAL POLITICS AND POLICY: THEORIES AND EVIDENCE 135, 136-42 (James P. Lester ed., 2d ed. 1995) (discussing the growth in size and number of environmental interest groups). Linking recreation to protection of biodiversity was not simply a rhetorical ploy of preservationists. Many believed the two were compatible. It is hard to read Aldo Leopold's *A Sand County Almanac*'s evocative descriptions of hunting and camping and come away with a different impression. See LEOPOLD, *supra* note 136.

benefits such as recreational opportunities and jobs in the environmental protection industry."¹⁷⁵

National parks, monuments, and wilderness areas are the fruit of this approach. Each accomplishes significant biodiversity benefits, but is primarily attractive to the public for the more tangible benefits it produces.¹⁷⁶ Our first National Park, Yellowstone, was "set apart as a public park or pleasuring ground for the benefit and enjoyment of the people."¹⁷⁷ The National Park Service's Organic Act provides that the "fundamental" purpose of the nation's parks, monuments, and reservations is "to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations."¹⁷⁸ And one of the key functions of wilderness areas is to provide "opportunities for solitude or a primitive and unconfined type of recreation."¹⁷⁹

3. *The Myth of Recreation as a Non-Consumptive Use*

The fact that recreation is a significant part of the management mandate of almost all our public lands indicates that ecological necessity is not the driving force behind preservation advocacy for another reason: an increasing amount of research indicates that recreation has significant, negative impacts on biodiversity. This impact comes not just from intensive recreation activities like off-road vehicle use,¹⁸⁰ but also from those activities

¹⁷⁵ Lyons, *supra* note 171, at 293.

¹⁷⁶ Lyons remarks that the "national park system illustrates both the upside and the downside to this approach." *Id.* at 293. Although the park system often appears to focus on putting "natural wonders on display for hordes of tourists, boosting local economies," it also provides diffuse environmental benefits: "It preserves vast acreages of wilderness and old growth forests, and hundreds of miles of wild rivers and undeveloped coastlines. It also offers refuge to large populations of valuable, and sometimes rare, animal and plant species." *Id.* See also Robert E. Jones et al., *How Green Is My Valley? Tracking Rural and Urban Environmentalism in the Southern Appalachian Ecoregion*, 64 RURAL SOC. 482, 495 (1999) (referencing study in Appalachia that found rural support for environmental values was "particularly strong in gateway communities . . . located near the many national and state parks, wildlife refuges, and other outdoor recreation sites").

¹⁷⁷ Act of March 1, 1872 ch. 24, 17 Stat. 32 (codified at 16 U.S.C. § 21 (1994)) (establishing Yellowstone National Park).

¹⁷⁸ 16 U.S.C. § 1 (1994 & Supp. II 1996).

¹⁷⁹ Wilderness Act, 16 U.S.C. § 1131(c) (1994). Recreation is also included as an appropriate multiple use of the national forests and BLM lands. See *supra* note 155 (citing the recreation provisions of NFMA, FLPMA, and PRIA).

¹⁸⁰ See, e.g., David N. Cole & Peter B. Landres, *Indirect Effects of Recreation on Wildlife*, in WILDLIFE AND RECREATIONISTS, *supra* note 129, at 192 (discussing off-road vehicle impacts); *The San Rafael Swell Western Legacy District and National Conservation Act: Hearing on S. 2048 Before the Senate Subcomm. on Forests and Public Land Management*, 106th Cong. (forthcoming 2001) (prepared testimony of Larry Young, Executive Director of the Southern Utah Wilderness Alliance) (stating that ORV use causes "soil erosion, airborne dust, degradation of water quality, impacts to wildlife habitat and loss of native vegetation," particularly to the cryptobiotic soil of the desert ecosystem); Sam Curtis, *All-Terrain Destruction: All Terrain Vehicles Are Having Serious Impact on Wildlife and Forest Lands*, 11 EARTH ACTION NETWORK 18 (May 1, 2000) (discussing ORV impacts).

that have long been touted as benign and non-consumptive—camping, hiking, angling, nature-viewing, and the like.¹⁸¹ Although a single backpacker, angler, or bird-watcher may not have much impact, the cumulative effect of repeated visitation does. Thus, in wilderness areas where the “imprint of man’s work” is supposed to be “substantially unnoticeable,”¹⁸² frequently used camping locations, such as areas adjacent to alpine lakes, have turned into permanent campsites.¹⁸³ At such sites, ground vegetation has been worn away, tree roots exposed, and trash left behind, resulting in reduced numbers of ground and understory bird species in the area.¹⁸⁴ An increased number of backpackers has also led to an increase in the number of streams polluted with giardia.¹⁸⁵ Rock climbers in wilderness areas have left climbs littered with fixed anchors,¹⁸⁶ prompting the Forest Service to prohibit the use of fixed anchors in all Forest Service wilderness areas.¹⁸⁷ Climbing can also harm wildlife. Rock climbers typically

¹⁸¹ See, e.g., John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 870 (1994) (“preservation permits future nonconsumptive human usage of wild lands, including recreation”); Kelly Nolen, *Residents at Risk: Wildlife and The Bureau of Land Management’s Planning Process*, 26 ENVTL. L. 771, 775 (1996) (referring to preservation and recreation as “nonconsumptive uses”); John W. Ragsdale, Jr., *National Forest Land Exchanges and the Growth of Vail and Other Gateway Communities*, 31 URB. LAW. 1, 5 (1999) (same).

¹⁸² Wilderness Act, 16 U.S.C. §§ 1131(c), 1133(c) (1994).

¹⁸³ See generally DAVID N. COLE, CAMPSITES IN THREE WESTERN WILDERNESSES: PROLIFERATION AND CHANGES IN CONDITION OVER 12 TO 16 YEARS (U.S. Dep’t of Agric., Intermountain Res. Station, Res. Paper INT-463, 1993).

¹⁸⁴ See Kevin J. Gutzwiller, *Recreational Disturbance and Wildlife Communities*, in WILDLIFE AND RECREATIONISTS, *supra* note 129, at 174 (noting that “[c]ampers simplified the horizontal and vertical structure of the ground and understory vegetation, which reduced abundances of ground and understory [bird] species at campground sites”); COLE, *supra* note 183, at 2–12 (studying the deterioration of popular wilderness campsites); Steve Lipsher, *Campsites Under Pressure: RV Boom Driving Demand for Expensive Public Amenities*, DENV. POST, May 28, 1999, at A1 (quoting Forest Service representative as saying that “we have folks out there target shooting at trees. Throwing trash everywhere. Compaction of soil. Camping in areas that are very sensitive because they’re right on a creek.”); Stanley H. Anderson, *Recreational Disturbance and Wildlife Populations*, in WILDLIFE AND RECREATIONISTS, *supra* note 129, at 157 (“When trails and campsites are developed, habitat can be drastically altered. Discarded human food wastes provide different sources of food for animals, affecting population structure. As people intrude into an area, the effects on animals can include altered behavior, increased stress, or changes in productivity and diet.”).

¹⁸⁵ See, e.g., Tim Woodward, *More People Are Heading for Idaho’s Hills, Putting Stress on the Area’s Environment*, IDAHO STATESMAN, Oct. 28, 1996, at A1 (discussing how “[h]uman and pet waste in streams and lakes has made once-pure water [in Idaho’s Sawtooth National Recreation Area] undrinkable”). *But see* T.H. Delnea et al., *Influence of Llamas, Horses, and Hikers on Soil Erosion from Established Recreation Trails in Western Montana*, U.S.A., 22(2) ENVTL. MGMT. 255–62 (Mar.–Apr. 1998) (finding that hikers cause minimal soil erosion compared to llama and horse traffic).

¹⁸⁶ Climbers affix their ropes to “anchors” such as bolts and pitons which are placed into a rock wall to help protect themselves in case of a fall. A fixed anchor cannot be recovered or removed from the rock after the climb. See Timothy Dolan, *Fixed Anchors and the Wilderness Act: Is the Adventure Over?* 34 U.S.F. L. REV. 355, 358 (2000).

¹⁸⁷ See Notice of Intent to Establish Negotiated Rulemaking Advisory Committee on Fixed Anchors in Wilderness, 64 Fed. Reg. 58,368 (Oct. 29, 1999). See generally Dolan, *supra* note 186 (discussing the Forest Service’s ban on the use of fixed anchors).

choose routes that follow cracks and ledges which are precisely the areas used by wildlife for breeding, foraging, and roosting.¹⁸⁸ The problem is exacerbated by the fact that "the most popular time to climb mountains and cliffs coincides with the peak of the breeding season for many wildlife species."¹⁸⁹ With such impacts, it is not surprising that in a recent survey of land managers, the most commonly cited problem with wilderness management was recreation overuse.¹⁹⁰

Research on recreation impacts outside of wilderness areas shows similar and even more extensive impacts result from camping, climbing, and other recreation activities.¹⁹¹ One study in Germany, for example, found that "[i]ntensive angling reduced the number of waterfowl nests by 80%, and the remaining nests were found only in areas inaccessible to anglers."¹⁹² In addition, hiking near nests has been found to increase predation of bird eggs or young birds.¹⁹³ Unfortunately, nature viewing is not benign.¹⁹⁴ Indeed, one

¹⁸⁸ Richard L. Knight & David N. Cole, *Wildlife Responses to Recreationists*, in WILDLIFE AND RECREATIONISTS, *supra* note 129, at 57. See also Richard J. Camp & Richard L. Knight, *Effects of Rock Climbing on Cliff Plant Communities at Joshua Tree National Park, California*, 12 CONSERVATION BIOLOGY 1302, 1305 (1998) (discussing impacts of rock climbing on cliff plant communities).

¹⁸⁹ Knight & Cole, *supra* note 188, at 57.

¹⁹⁰ Nickas, *supra* note 123, at 451 (citing WILDERNESS EDUC. & TRAINING NEEDS ASSESSMENT SURVEY (Arthur Carhart Nat'l Wilderness Training Ctr., Hudson, Mont., 1997)). Among the recreational uses, "[m]ore wilderness managers cite campsite deterioration as a problem than any of the other potential problems in wilderness." COLE, *supra* note 123, at 1.

¹⁹¹ The influx of hikers in Nepal over the last twenty years provides an example.

The impact on this Himalayan kingdom's fragile environment has been tremendous. Careless trekkers wander off trails, destroy vegetation and leave behind tin cans, packaging, and other litter. . . . Over the last two decades, the explosion of trekking tourism has upset the delicate ecological balance and contributed significantly to the loss of cultural integrity in the Annapurna region.

HONEY, *supra* note 103, at 54 (internal quotation and citation omitted) (also discussing a variety of similar examples in other locations around the world).

¹⁹² Anderson, *supra* note 184, at 160. A number of studies have documented how other water-related recreation can "cause waterfowl to avoid prime nesting areas or abandon their nests once eggs are laid." *Id.* See also Thomas J. O'Shea, *Waterborne Recreation and the Florida Manatee*, in WILDLIFE AND RECREATIONISTS, *supra* note 129, at 299-330 (discussing harm to Florida Manatee from waterborne recreation, including snorkeling and boat strikes).

¹⁹³ Anderson, *supra* note 184, at 161 (noting that "[w]alking near a nest, whether to fish or just look at the bird eggs or young, can attract predators to an area" and describing research that "found that trails and tracks leading to nests and disturbance of nest cover caused predation on nests at levels intolerable to birds in Alberta wetlands"). See also Gutzwiller, *supra* note 184, at 172 ("eider ducklings encountered approximately five times as many predators within five minutes after anglers, hikers, windsurfers, and boaters disturbed them as they encountered five minutes before such disturbances"); *id.* at 174 (citing another study of shoreline recreation of boaters, cyclists, walkers, and moped riders that discovered that breeding numbers "for 11 of 12 species were lower in areas where recreation intensity was high than in areas with fewer visitors"); Joanna Burger, *Beach Recreation and Nesting Birds*, in WILDLIFE AND RECREATIONISTS, *supra* note 129, at 286-87 (discussing negative impacts of New Jersey beach recreationists on plover population); Scott G. Miller et al., *Influence of Recreational Trails on Breeding Bird Communities*, 8 ECOLOGICAL APPLICATIONS 162, 168 (1998) (discussing negative impacts of recreational trails on bird species).

¹⁹⁴ One study on the impacts of bird watching reported:

review of 166 articles containing data on the effects of "non-consumptive" outdoor recreation on wildlife found that 81% of the articles identified negative consequences.¹⁹⁵

Recreational impact can be particularly harmful in the fragile desert environments that abound in the Southwest. Again, Moab and southern Utah are illustrative.¹⁹⁶ A crucial component of the desert ecosystem is the cryptobiotic crust made up of mosses, fungi, and lichens. This crust grows on top of the sand, holds moisture, and stores carbon and nitrogen, in which larger plants can eventually take root.¹⁹⁷ As hikers, bikers, and campers have descended on the Moab area and dispersed themselves over the fragile cryptobiotic crust,¹⁹⁸ formerly stable systems have given way to wind-blown sands.¹⁹⁹ As Barbara Sharrow, BLM's lead recreational planner for the Grand

Songbirds may alter their behavior after repeated interactions with humans. Red-winged blackbirds, goldfinches, and American robins became much more aggressive toward humans who repeatedly visited their nests Wildlife may alter nest placement based on prior experience with humans. Black-billed magpies, in response to people climbing to their nests, altered nest placement in subsequent years in an attempt to make their nests less accessible to human beings Predators learn to follow human scent trails to nest sites. Avian predators apparently learn to forage in the vicinity of people who are visiting bird nests. Likewise, people who are visiting nests may decrease nest or nestling survivorship, provoke nest abandonment, or discourage re-nesting.

Knight & Cole, *supra* note 188, at 55; see also Gutzwiller, *supra* note 184, at 173 (reaching a similar conclusion).

¹⁹⁵ See Knight & Cole, *supra* note 188, at 51 (citing S.A. Boyle & F.B. Samson, *Effects of Nonconsumptive Recreation on Wildlife: A Review*, 13 WILDLIFE SOC'Y BULL. 110-16 (1985)). See generally WILDLIFE AND RECREATIONISTS, *supra* note 129 (essays outlining variety of conflicts between recreation and wildlife).

¹⁹⁶ See Jim Hughes, *Loving it to Death*, DENV. POST EMPIRE MAG., Sept. 7, 1997, at 14 (discussing how Moab is becoming "a textbook example of what happens when recreation gets out of control" and noting that around Moab "[a]reas of once-pristine desert wilderness are sliced by new trails" and "[c]ampgrounds along the Colorado River are devoid of driftwood—people take it and sometimes small trees for firewood").

¹⁹⁷ *Id.* at 17, 21 (describing ecosystem functions of the cryptobiotic crust and noting that the "fragile architecture of the cryptobiotic soil crust is easily disturbed—tank tracks made in California's Mojave Desert by Gen. Patton's armored unit are still visible after more than 50 years").

¹⁹⁸ The fact that recreation is more widely dispersed on the public lands than most extractive activities has been identified as an argument in favor of its low impact, but, in fact, its broad dispersal means that its impacts can be greater. See Curtis H. Flather & H. Ken Cordell, *Outdoor Recreation: Historical and Anticipated Trends*, in WILDLIFE AND RECREATIONISTS, *supra* note 129, at 3.

¹⁹⁹ One expert on cryptobiotic soils observed:

The last 10 years has been staggering. I never in my wildest dreams would have thought it possible. I would have said 50, a hundred years. We've turned perfectly stable systems into blowing-sand systems in just five years People think that anything is better than mining and cows and that's just not true.

Hughes, *supra* note 196, at 21 (quoting Jay Belknap). Camping in particular, she says, leads to massive destruction of crusts. *Id.* Recreation impact on desert ecosystems has been replayed in similarly fragile ocean reef ecosystems. See Emily A. Gardner, *A Victim of Its Own Success: Can User Fees Be Used to Save Hanauma Bay?* 4 OCEAN & COASTAL L.J. 81, 83 (1999) (quoting LISA KING, THE RECENT HISTORY OF HANAUMA BAY, at 1, Hanauma Bay Educ. Program, Univ. of Haw. Sea Grant Extension Serv., (1993)) (noting how at the Hanauma Bay Nature Park in

Staircase-Escalante Monument put it: "There's no doubt about it, recreation may have the same sorts of impacts that grazing did in the '20s and '30s and mining in the late 1800s."²⁰⁰

Not all advocates of the new public lands paradigm have facetiously declared recreation to be a non-consumptive use. Some who recognize recreation impact generally disagree with Ms. Sharrow and argue that whatever the impacts of recreation, they are much less than the impacts caused by such traditional extractive and commodity uses as grazing, mining and logging.²⁰¹ This point is hard to dispute, although the New West versus Old West calculus becomes a little less clear when the impacts of suburban and exurban development are added to recreation. As Richard Knight has observed:

[W]e are losing private lands to commercial and residential development at rates seldom equaled in history. Consider these numbers. From 1982 to 1992, over 1 million ha. of pasture lands were converted to residential and industrial development, roads, and shopping centers. Likewise, nearly 400,000 ha. of wetlands were developed (despite a national policy of "no net loss" of wetlands). Historically, we lost wetlands to agriculture; today wetlands reappear as golf courses and exurban development. Elsewhere, loss of rural, open space goes unchecked. From 1982 to 1992, over 5,606,000 ha. reappeared as urban or nonfarm rural residences.²⁰²

In a recent study, David Wilcove likewise found that land conversion for commercial and residential use was the leading contributor to habitat loss of threatened and endangered species.²⁰³

Hawaii "thousands of tourists were trampling on the living coral daily with their feet, flippers and booties. They were touching, bumping and holding onto the coral. Tourists accidentally or ignorantly broke off coral fragments As a result, over 90% of the nearshore reef has been killed."). Surely, to the first few Hanauma visitors, it must have seemed that they were having no impact on the magnificent bay, but the cumulative recreation impacts have been devastating.

²⁰⁰ See Hughes, *supra* note 196, at 14, 17 (quoting Ms. Sharrow). See also Max Oelschlaeger, *Taking the Land Ethic Outdoors: Its Implications for Recreation*, in WILDLIFE AND RECREATIONISTS, *supra* note 129, at 340 ("The recreation industry deserves to be listed on the same page with interests that are cutting the last of the old-growth forests, washing fertile topsoils into the sea, and pouring billions of tons of greenhouse gases into the atmosphere.").

²⁰¹ Thomas Power makes this point well:

While acknowledging that tourism has an environmental impact, it is important to ask, Compared to what? Backpackers and hunters may be so numerous that they start to damage the land and wildlife in a particular area, but they will probably never have as disruptive an impact as clear-cutting millions of acres of forest has had. . . . Or consider backpacking and mountain biking in deserts and canyon country. It is certainly true that these will cause some damage, but nothing approaching what a century of uncontrolled grazing has done to grassland and riparian areas. Modern chemical mining moves mountains to produce a few ounces of gold. Mountaineering, no matter how concentrated, could never make the same impact.

POWER, *supra* note 22, at 221.

²⁰² Richard L. Knight, *Private Lands: The Neglected Geography*, 13 CONSERVATION BIOLOGY 223 (Apr. 1999). Knight concludes by asking: "Is it possible that sprawl, defined as low-density, automobile-dependent development beyond the edge of service and employment areas, might be the single greatest threat to our precious natural heritage?" *Id.*

²⁰³ See David S. Wilcove et al., *Quantifying Threats to Imperiled Species in the United*

Ultimately, determining the relative environmental impact of the New West (with its emphasis on recreation and sprawl) and the Old West (with its focus on extractive and commodity uses of the public lands) is not the purpose of this Article. Whatever the relative impact, it is important to recognize that managing the public lands with a focus on their recreational and scenic amenities, and the development that accompanies such management, has real and substantial environmental impacts on the public lands. In light of that impact, it becomes harder to believe that the increasing public preference for preservation is a function of public concern about ecosystem integrity. If biodiversity were truly the operative concern of the public's interest in preservation, recreational use of the public lands would have decreased as interest in preservation increased. In fact, the opposite has been true. The two have grown hand in hand, as political self-interest theory would predict. Indeed, like commodity users, recreational users of the public lands have often opposed the implementation of, or increase in, user fees²⁰⁴ and they have been quick to object to limitations on their own uses of public lands.²⁰⁵ It all leads one to question whether preservation

States, 48 *BIOSCIENCE* 607, 609–12 (1998). Wilcove's study indicated that habitat degradation contributed to the endangerment of 85% of the species they analyzed and that the top five threats to plants protected under the ESA were "land conversion (*i.e.* development; 36%), agriculture (33%), grazing (33%), outdoor recreation (33%), and disruption of fire ecology (20%)." *Id.* at 612. A number of others have discussed the value of continued ranching to the preservation of open space. See, e.g., Bruce Babbitt, *High Fees and No Grazers Doesn't Help Range*, *PUB. LANDS NEWS*, Feb. 4, 1993, at 1 (arguing that subsidizing ranchers who use good grazing practices is important to the health of the public lands); Bureau of Land Mgmt., U.S. Dep't of Interior, *Rangeland Reform '94 Draft Environmental Impact Statement Executive Summary* 6 (1994) (suggesting that one consequence of eliminating grazing might be "more subdivisions and real estate development"). One commentator, however, contends the purported concern that removing commodity interests, particularly ranchers, from the public lands will diminish open space is little more than a rhetorical "ploy." See Debra Donahue, *The West 'Ain't No Cow Country'*, *HIGH COUNTRY NEWS*, Feb. 28, 2000, at 9. She points out that the majority of the West's ranches are on private land and that market forces, not federal public lands policies, lead to development. DONAHUE, *supra* note 137, at 274–75. Removing ranching, she suggests, and presumably other natural resource uses, from the public lands will not spur urban and exurban development. *Id.* at 274–75. This argument seems to ignore the fact that even if the removal of ranchers is not a direct spur to sprawl, the removal of ranchers and other users preserves the sort of recreational and scenic amenities that are one of the primary preconditions for growth. See *supra* notes 90–94 and accompanying text (discussing reasons for growth in wilderness counties). Once people come to partake of the amenities, growth tends to happen without too much federal intervention.

²⁰⁴ See, e.g., *Forest Appropriations Initiative: Hearing Before the House Appropriations Comm.*, 106th Cong. 72–163 (1999) (prepared testimony of Steve Holmer, Campaign Coordinator, American Lands Alliance) (noting that "[t]he Sierra Club, American Lands and over 75 other environmental groups oppose the imposition of recreation access and user fees on public lands"); *Information and Technology Management Practices at U.S. Forest Service: Hearing Before the House Gov't Reform and Oversight Comm. Field Hearing in Wenatchee, Washington*, 105th Cong. (1998) (testimony of Richard Tingelstad, Executive Director, Free the Forest) (arguing against user fees and in favor of general funding of the national forests); Rogue River Outfitters Ass'n, 63 I.B.L.A. 373 (1982) (protesting imposition of fees for commercial rafting on Rogue River).

²⁰⁵ See Robert L. Glicksman & George C. Coggins, *Wilderness in Context*, 76 *DENV. U. L. REV.* 383, 395 (1999) (discussing the increase in litigation over recent years); Nickas, *supra* note 123,

advocacy is about saving the land from the impact of extractive and commodity users or simply saving it for the impact of our own recreation.

4. *Preservation and Mixed Motives*

Recreation impact and polling data suggest that biodiversity is not a significant public concern. However, some will deny the seemingly strong connection between public interest in preservation and the public's increasing interest in recreation and scenic amenities by pointing to surveys showing that people value preservation for reasons beyond recreation. Concerned that the value of wilderness would be understated if its value were understood solely in terms of recreational use,²⁰⁶ a variety of economists have argued that public lands have both a recreation value and a wilderness preservation value that consist of option, existence, and bequest values—respectively the values “of retaining the option of possible future use . . . of the knowledge that a natural environment is protected by wilderness designation even though no recreation use may be contemplated, . . . [and] of the satisfaction derived from endowing future generations with wilderness resources.”²⁰⁷ Their studies, which rely on contingent valuation methodology,²⁰⁸ indicate that people are hypothetically willing to pay even more for the non-use values of preservation than they are for recreation.²⁰⁹ But contingent valuation methodology is the subject of

at 451–52 (describing objections to group size limits, restrictions on pack stock use, restrictions on the use of fixed anchors by climbers, and campfire closures); *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115 (8th Cir. 1999) (outfitters challenge to access and use restrictions in wilderness area); *Deschutes River Pub. Outfitters*, 135 I.B.L.A. 233 (1996) (outfitters challenge to restriction of motorized boat travel on the Deschutes Wild and Scenic River). The number of disputes between the preservation and recreation community has increased in recent years and will almost surely continue to do so. As Laitos and Carr and others have suggested, the next great series of public lands battles will be waged between high-impact recreation activities like OHV use and so-called low-impact activities like hiking and nature viewing. Laitos & Carr, *The Transformation of the Public Lands*, *supra* note 15, at 144; WILDLIFE AND RECREATIONISTS, *supra* note 129, at xv. See also *Northwest Motorcycle Ass'n v. United States Dep't. of Agric.*, 18 F.3d 1468 (9th Cir. 1994) (dispute between ORV users and wilderness users over ORV trail closure in the Wenatchee National Forest); *Southern Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205 (D. Utah 1998) (SUWA challenge to Backcountry Management Plan allowing limited ORV use in several canyons); *Washington Trails Ass'n v. United States Forest Serv.*, 935 F. Supp. 1117 (W.D. Wash. 1996) (hikers and preservation groups challenge to Forest Service decision to by-pass the National Environmental Policy Act (NEPA) with respect to a redesign of certain trails that made them more accessible to off-road vehicles).

²⁰⁶ See Richard G. Walsh et al., *Valuing Option, Existence, and Bequest Demands for Wilderness*, 60 LAND ECON. 14, 15 (1984) (discussing the genesis of economic studies explaining why people are willing to pay for wilderness preservation).

²⁰⁷ Pope & Jones, *supra* note 104, at 161.

²⁰⁸ Contingent valuation methodology is the measurement of people's willingness to pay based on hypothetical situations posed to respondents. *Id.* at 160–61 (discussing contingent valuation methodology).

²⁰⁹ See *id.* at 167 (noting that those who participate in outdoor recreational activities generally are willing to pay more for wilderness preservation, although the difference is relatively small and concluding that this finding was consistent with prior studies indicating that “existence, option, and bequest values or preservation values are more important than

some debate,²¹⁰ and for reasons discussed above, hypothetical value statements generally should be taken with a grain of salt when such altruistic aspirations cannot be tested against conflicting interests, aspirations, and behavior.²¹¹ It seems to be human nature to attempt to imbue our personal interests with more altruistic motives.²¹² Nevertheless, the contingent valuation data does suggest it is perhaps too facile to argue that support for wilderness preservation is solely a function of public desire for recreational and scenic amenities,²¹³ just as it would be too simple to

recreational values"); Walsh et al., *supra* note 206, at 26 (suggesting that preservation values exceed recreation values).

²¹⁰ See Daniel McFadden, *Contingent Valuation and Social Choice* 76 AM. J. AGRIC. ECON. 689, 706 (1994) (questioning the reliability of contingent valuation for measuring the existence values of natural resources and suggesting that responses to hypothetical value questions "are more easily explained by 'constructed' preferences than by rational individualistic stationary preferences"); Frank B. Cross, *Natural Resource Damage Valuation*, 42 VAND. L. REV. 269, 289 (1989) (observing that some are skeptical of existence value determinations because they are "demonstrated attitudinally, and not behaviorally"); Note, *Ask a Silly Question . . . : Contingent Valuation of Natural Resource Damages*, 105 HARV. L. REV. 1981, 1989 (1992) (suggesting that "[p]eople view the hypothetical bid as an imaginary gift to charity, and that gift creates the 'warm glow' associated with altruism").

²¹¹ See *supra* note 210 (citing articles that make this criticism of contingent valuation methodology) and notes 153-70 and accompanying text (discussing this phenomenon of public opinion surveys). The fact that people do not care much about the environment until they are able to feed themselves and reach a certain annual per capita income illustrates that other interests can take precedence over the desire to protect the environment. See, e.g., Edward D. McCutcheon, *Think Globally, (En)Act Locally: Promoting Effective National Environmental Regulatory Infrastructures in Developing Nations*, 31 CORNELL INT'L L.J. 395, 439 (1998) (citing a World Bank study showing that "as per capita income increases, so does regulation of the environment"); Thomas M. Selden & Daqing Song, *Neoclassical Growth, the J Curve for Abatement, and the Inverted U Curve for Pollution*, 29 J. ENVTL. ECON. & MGMT. 162, 162-63 (1995) (citing a number of economic studies indicating that economic growth leads to additional environmental regulation).

²¹² See generally 1 ERVIN STAUB, POSITIVE SOCIAL BEHAVIOR AND MORALITY 9 (1978) ("Since altruistic intentions are socially valued, actors are motivated to present their intentions as altruistic, and thus their reports might not be reliable."). Ultimately, this view of human nature is intuitive and personal, and does not pretend to resolve the long-running debate in Western philosophy about whether altruism exists at all or whether all behavior is in some measure self-interested. See, e.g., *id.* at 8-10, 42-43; C. DANIEL BASTON, THE ALTRUISM QUESTION: TOWARD A SOCIAL-PSYCHOLOGICAL ANSWER 2 (1991) (Introducing the issue of whether humans are capable of a motivation that is purely to benefit another); DANIEL BAR-TAL, PROSOCIAL BEHAVIOR: THEORY AND RESEARCH 39-50 (1976) (discussing social scientists' differing theories on the origins of altruistic behavior).

²¹³ A staple of editorial page arguments against preservation is that wilderness is a project of and for an elite few recreationists. See, e.g., Mark Tokarski, *It Is Time to Move Beyond the Endless, Unproductive Bickering*, IDAHO STATESMAN, Jan. 25, 2000, at 9B, available at 2000 WL 7087771 ("Environmentalists tend to be elitist. They demonize opposition and shun contrarians. Snowmobilers, four-wheelers, ATVers, loggers and miners are regarded as lower life forms."); *Shutting Ordinary Americans Out of Their Woods*, NEWS & OBSERVER, Jun. 5, 2000, at A12, available at 2000 WL 3931087 (letter from Ed Kessler, president of the North Carolina Forestry Association, criticizing the Clinton Administration's roadless policy initiative as "fine with the elitist preservation groups that care little for anything but their own special interest"). Although this argument goes too far, it is true that those who use (as opposed to merely support) wilderness "tend to be more highly educated and to earn more than the average for the U.S. population." See, e.g., LLOYD C. IRLAND, WILDERNESS ECONOMICS AND POLICY 109 (1979); Walsh et

suggest purely selfish motives animated nineteenth century public lands and Indian policy.

The conclusion that the preservation preference is a function of compound and complex motives is not particularly surprising. Surely any individual asked to write an honest essay on why she values the Grand Canyon, Michaelangelo's Pieta, or an original printing of the Declaration of Independence would be hard pressed to articulate a single, over-arching motive.²¹⁴ Attributing a single public motivation is even harder. Nevertheless, the polling data along with the fact that increased public interest in preservation has coincided so closely with the growth in both the West's population and in recreational use of the public lands suggest that the desire to preserve recreational and scenic amenities is a significant and perhaps the foremost reason for public support of preservation. Whatever the precise mix of motivations, it seems clear that preserving biodiversity is not prominent among them, and that they are not altogether altruistic.

B. *Defending the Need for Removal*

If fulfilling our aspirations was costless, the degree to which our motives were altruistic would be of little moment. However, preserving the public lands, whether as a result of the Endangered Species Act of 1973,²¹⁵ the Antiquities Act of 1906,²¹⁶ wilderness designation, or grazing or mining regulatory reform,²¹⁷ necessitates eliminating or curtailing commodity uses of those lands. That, in turn, imposes real costs on the rural communities of the West. Not only does the elimination of traditional uses often bring economic hardship,²¹⁸ but even in those instances where extraction and

al., *supra* note 206, at 23 (finding that the preservation value of wilderness was positively associated with household income, education, and willingness to pay for recreation).

²¹⁴ Cf. JOSEPH L. SAX, *PLAYING DARTS WITH A REMBRANDT* 1-4 (1999) (investigating the variety of reasons why we value art, antiquity, and other cultural treasures). Indeed, we might be deceived about our own motives. As Hal Rothman argues, there may be some self-deception in our recreational interactions with "wilderness":

The goal is not experience but fulfillment—making the chooser feel important, strong, powerful, a member of the right crowd, or whatever else they may crave. The people determined to leave mainstream society in search of an individual sense of travel are scripted into believing that backpacking in the Bob Marshall makes them unique or at least part of a rare breed, intellectually and morally above other tourists.

HAL ROTHMAN, *DEVIL'S BARGAIN: TOURISM IN THE TWENTIETH-CENTURY AMERICAN WEST* 14 (1998).

²¹⁵ Endangered Species Act of 1973, 16 U.S.C. § 1531-1544 (1994).

²¹⁶ Act of June 8, 1906, ch. 3060, 34 Stat. 225.

²¹⁷ See *infra* Part VI.B (discussing such reforms in the last decade).

²¹⁸ See Laitos & Carr, *The Transformation of the Public Lands*, *supra* note 15, at 150-60 (discussing decline in commodity industries); RAYE C. RINGHOLZ, *LITTLE TOWN BLUES: VOICES FROM THE CHANGING WEST* 107-34 (1992) (discussing the economic dislocation of Western "main streets" in the wake of the economy of the New West). See generally CONGRESS OF THE UNITED STATES OFFICE OF TECHNOLOGY ASSESSMENT, *RURAL AMERICA AT THE CROSSROADS: NETWORKING FOR THE FUTURE* (1991), available at http://www.wws.princeton.edu/~ota/ns20/year_f.html (last visited Nov. 2, 2000) (looking at the decline in rural communities nationally). Certainly, economic dislocation is not uncommon to Western rural communities well-versed in the boom or bust nature of many mining and timber operations. See, e.g., POWER, *supra* note 22, at 102-06,

commodity jobs are replaced by service jobs, as has been the case in many gateway communities, the change takes a toll on the culture of the rural community.²¹⁹

Moab is an example of the latter scenario. Originally founded by Mormon farmers and ranchers, Moab remained a quiet settlement until the twentieth century when intermittent discoveries of valuable mineral deposits, primarily uranium, vanadium and potash, led to a series of mini-booms and busts.²²⁰ Concerned about its fluctuating economic fortunes, Moab for years sought ways to attract industry and tourism to stabilize the economy.²²¹ But it was not until the 1980s that tourism took off.²²² Spurred by large visitation increases at Arches and Canyonlands National Parks and by the remarkable growth in the popularity of mountain biking, Moab has experienced exponential growth in the last fifteen years.²²³ Long-time residents now barely recognize their town. Bill Hedden, vice-chairman of the county council, laments:

Our community leaders went fishing for a little tourism to revive and diversify our economy and they hooked a great white shark. This monster has swamped the boat and eaten the crew. At stake is not merely the community we used to

134-38 (discussing historical instability and transience in timber employment as well as the booms and busts in the mining industry during the 1970s and 1980s).

²¹⁹ For an interesting analysis of how recreational tourism has impacted some of the former rural communities in the West, see ROTHMAN, *supra* note 214. He argues that tourism can "transform locals into people who look like themselves but who act and believe differently as they learn to market their place and its, and their, identity." *Id.* at 12. He also asserts:

As places acquire the cachet of desirability, they draw people and money; the redistribution of wealth, power, and status follows, complicating local arrangements. When tourism creates sufficient wealth, it becomes too important to be left to the locals. Power moves away from local decisionmakers, even those who physically and socially invest in the new system that tourism creates, and toward outside capital and its local representatives The new shape disenfranchises most locals even as it makes some natives and most neonatives—those who are attracted to the places that have become tourist towns because of the traits of these transformed places—economically better off and creates a place that becomes a mirror image of itself as its identity is marketed.

Id. at 11.

²²⁰ See RINGHOLZ, *supra* note 218, at 19-49 (discussing these successive boomlets). See generally FAUN MCCONKIE TANNER, *A HISTORY OF MOAB, UTAH* (1937); RICHARD A. FIRMAGE, *A HISTORY OF GRAND COUNTY* (1996).

²²¹ See RINGHOLZ, *supra* note 218, at 19-49 (describing efforts in Moab to promote mining, film-making, nuclear waste storage, and cycling); Timothy Egan, *Boon or Bane? Tourism Pays, But It's Costly to the Land and Way of Life*, *DESERET NEWS*, Nov. 27, 1994, at B2 ("In the 1980s, Moab's leaders decided to diversify their economy, vowing to free themselves from the extractive boom-and-bust cycle that ha[d] been such a scourge to many Western towns. They advertised the area as a desert paradise for the outdoor adventurer. It worked beyond anyone's wildest dreams.")

²²² See generally FIRMAGE, *supra* note 220, at 380 (noting that as of March 1983 unemployment in surrounding Grand County was at almost twenty percent and then describing the economic boom that occurred between the mid-1980s and 1996).

²²³ See generally FIRMAGE, *supra* note 220, at 380-417 (discussing Moab's growth during this time frame). See also FARMER, *supra* note 120, at 192 (noting that visitation at Arches National Park in Utah has increased from 15,726 in 1950, to 290,519 in 1980 and to 859,374 in 1995).

be but also some of the best and most fragile country anywhere.²²⁴

For many, Moab has become symbolic of growth gone awry. Rural residents voice the fear of their town becoming "another Moab" and talk about the "Moabization" of rural communities as if it was a plague.²²⁵ Whereas such sentiments had previously been reserved for ski tourist communities like Aspen, Jackson Hole, and Park City,²²⁶ Moab holds out the possibility that the undeveloped West alone holds sufficient attraction to be swamped by tourism and in-migration. Although this view of life before the bike in Moab is perhaps somewhat romanticized,²²⁷ it illustrates a genuine concern on the part of rural Westerners about the economic and cultural dislocations that are a by-product of the shift to preservation and recreation as the new dominant uses of the public lands.

In light of these rural concerns about economic and cultural upheaval,

²²⁴ Egan, *supra* note 221, at B2. See also Sam Allis, *Moab's Mutation*, CHI. TRIB., Jan. 16, 2000, at 24 (quoting Jim Stiles, the publisher of a local alternative newspaper, on the conversion of a local diner into a Burger King: "What happened to the Star Diner is a real metaphor for what's happening to Moab, and that story is being repeated all over the West Moab is no longer a community. It has lost its soul.")

²²⁵ See, e.g., Brandon Griggs & Brent Israelsen, *Painted Land, Colorful People*, SALT LAKE TRIB., Sept. 14, 1997, at J1 (noting how residents of Boulder, Utah, a small community on the borders of the Grand Staircase-Escalante National Monument "don't want their town to become 'another Moab'—a less-than-complimentary term meaning congestion, overtaxed infrastructure and uncontrolled growth of motels, condos and fast-food chains" and how they are contemplating ways to "guard against 'Moabization'"); Jim Carrier, *The Last Place*, DENV. POST, Nov. 17, 1996, at 18 ("[G]roups from the Grand Canyon Trust to the Ford Foundation hope to 'save' Boulder from becoming another Moab or Park City."); David Gonzales, *Grand Staircase-Escalante National Monument: A First Look at the Last Frontier in the Southern Utah Wilderness*, DALLAS MORNING NEWS, Dec. 15, 1996, at 1G (quoting Escalante outfitter: "This place turns into another Moab and I'm outta here"). But see Jerry Spangler, *To Have and Have Not*, DESERET NEWS, Sept. 21, 1997, at B1 (noting how critics "don't want to grow as fast as Moab did," but find Moab's economic growth attractive). Concern about "Moabization" is not, of course, confined to Utah or Moab. It is a concern about many of these gateway communities in the West. See *infra* note 226 (noting similar concerns about other popular communities); Rocky Barker, *Conservation That Pays Its Own Way: Idaho Could Learn from Villagers Who Now Protect Wildlife Neighbors*, IDAHO STATESMAN, Aug. 16, 1998, at 1A (noting how residents of Ashton, Idaho, a small logging and farming community bordering Yellowstone, "don't want to become another West Yellowstone"); Patrick O'Driscoll, *Whiff of Truce Sensed in Bitter Land Battle; Peace Sought As '81 San Luis Suit Nearing Court*, DENV. POST, Jun. 7, 1991, at 1B (suggesting concern of San Luis Valley residents that their valley will "turn into another Taos").

²²⁶ See ROTHMAN, *supra* note 214 (evaluating the impact of tourism on these and other Western ski/resort communities). See also Deborah Frazier, *Telluride Residents Fight Development; Many Hope to Form Human Chain from Courthouse to Parcel*, DEN. ROCKY MTN. NEWS, July 1, 2000, at 30A (reporting how many in Telluride "don't want [to become] another Aspen or Vail"); Carrie A. Moore, *Ogden Valley: A Secret No More?*, DESERET NEWS, Mar. 26, 1998, at C2 (reporting on worry of rural residents of Utah's Ogden Valley worrying that their area "will become another Park City"); Tom Wharton, *Will Canyonlands Survive the Latest Boom?*, SALT LAKE TRIB., Mar. 24, 1991, at A1 (reporting a 1991 lament from a Moab river guide that the town would turn into "another Jackson Hole or Aspen").

²²⁷ Not all rural Westerners are so quick to accept such a romantic view of the history of the rural West. D.L. Taylor, whose family has been ranching in the Moab area for more than 120 years, remarked that although he did not really like the tourism, "it sure pays," and "[o]n the whole, I'd rather have a boomtown filled with bikers than a ghost town of old miners and ranchers." Egan, *supra* note 221, at B1-B2.

advocating preservation becomes more than just a task of showing that preservation itself is a good idea. It also requires defending the project of removal. Some would prefer to ignore this fact, just like some in the nineteenth century acted as if the decision to settle and develop the West had nothing to do with the Indian tribes that already occupied the land. Others, however, recognize that just as the project of settling and developing the West could not be divorced from Indian policy, our new project of preserving the West cannot be separated from its impact on rural communities. Not surprisingly, many of the justifications for the new removal project again parallel those offered by our nineteenth century counterparts.

Some contend that the small numbers of public lands ranchers, loggers, and miners should not be able to exclude such great numbers of the public from their lands.²²⁸ The idea that the few must yield to the many permeates writing about termination of public lands ranching in the West,²²⁹ just as the first settlers argued that such a small minority of Indians should not control so much land.²³⁰ Echoing the nineteenth century notion that "backward" and "savage" Indians, for their own benefit, should be made into productive, responsible, yeoman farmers,²³¹ it is also argued that preservation policy is of greatest benefit to rural communities themselves. Preservation will attract visitors and companies to the communities; extractive users of the public lands can be trained in the arts of the service economy,²³² and their towns

²²⁸ See, e.g., DONAHUE, *supra* note 137, at 289.

²²⁹ See, e.g., *id.*, *supra* note 137, at 289:

Where is the wisdom in borrowing from our future—in terms of land and water productivity, species diversity, and overall environmental health—in order to maintain a marginally economic lifestyle enjoyed at public expense by such a tiny minority of our population and to produce, on lands unsuited to the purpose, commodities that would scarcely be missed if their production ceased?

²³⁰ See FORMATIVE YEARS *supra* note 54, at 161 (discussing this justification for federal Indian policy); Hiram Price, COMM'R INDIAN AFF. ANN. REP. (Oct. 24, 1881), *in* DOCUMENTS, *supra* note 5, at 156 ("The few must yield to the many. We cannot reasonably expect them to abandon their habits of life and modes of living, and adopt ours, with any hope of speedy success as long as we feed and clothe them without any effort on their part.").

²³¹ See *supra* notes 56–61 and accompanying text (discussing this justification for federal Indian policy). Not only was there an effort to turn Indians into yeoman farmers but also into grazers, directly contrary to the current view of an appropriate use of the public lands. See Letter from General William T. Sherman to W.A.J. Sparks, Chairman of the House Subcomm. on Indian Affairs (Jan. 19, 1876), *in* DOCUMENTS, *supra* note 5, at 147 ("[T]he habits of the Indians will be gradually molded into a most necessary and useful branch of industry—the rearing of sheep, cattle, horses, etc. In some localities they may possibly be made farmers.").

²³² Sincere and thoughtful suggestions for retraining of those who make their living on the public lands are a staple of the literature. Commenting on the potential economic dislocation of ranchers under Secretary Babbitt's Rangeland Reform '94 proposal, two authors argue:

A better, more comprehensive reform proposal would offer consulting and counseling services to ranchers as to how to adjust to the world of ecologically-sensitive or fair market value ranching. Small ranches, lacking information or funds to allow good stewardship, could be eligible for subsidies and training on how to take better care of the public rangelands. In cases where better stewardship means a marginal ranch goes out of business, the government could ease the transition with information and training to

will grow and avoid the painful boom and bust cycle common to so many Western public lands communities.²³³ In some of the more virulent criticism of public lands users, the transition to the service economy is seen as a moral corrective to a backward culture of welfare cowboys,²³⁴ ranching

facilitate conversion of the business to tourism or recreation or for entering a new employment field. After allowing ecological damage and even encouraging it with subsidies for so long, the government should help guide ranchers away from such practices.

Karl N. Arruda & Christopher Watson, *The Rise and Fall of Grazing Reform*, 32 LAND & WATER L. REV. 413, 459 (1997). See also Rasker, *supra* note 92, at 397-98 ("[S]avings to the Treasury from phasing out below-cost timber sales, instituting a market price for grazing fees, instituting recreation user fees, and reforming the Mining Law of 1872 could all be applied to helping communities develop the infrastructure and leadership capacity to deal with the challenges of the New West."); Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND L. REV. 81, 98-99 (1993) (noting that the Forest Service "no longer touts community stability as a management objective. Instead, the agency is pursuing a variety of programs aimed at encouraging rural community initiatives for economic diversification and independence."); POWER, *supra* note 22, at 240-42 (praising the benefits of the service economy).

²³³ The idea that it is in the best interests of rural residents that they learn technology and the arts of the service economy is a common theme in public lands literature. See, e.g., Dana Clark & David Downes, *What Price Biodiversity? Economic Incentives and Biodiversity Conservation in the United States*, 11 J. ENVTL. L. & LITIG. 9, 81 (1996).

Local communities historically employed by [the timber and mining] industries feel threatened by efforts to preserve remaining ecosystems and protect natural areas. This may be a legitimate short-term concern, but it can be eased by demonstrating that the future economic health of a region depends on maintaining the amenities that make it an attractive place to live, work, and visit.

Id.; LYNN JACOBS, WASTE OF THE WEST: PUBLIC LANDS RANCHING 537 (1991).

Former ranchers could also turn their former base properties into dude ranches, bed-and-breakfast operations, hunting and fishing camps, or centers for environmental study, [n]ature appreciation, horseback riding, historical tours, and pack and float trips. Ex-ranchers could rent out cabins or provide meals and services to public land travelers.

Id.; POWER, *supra* note 22, at 57-88 (arguing for a demystification of the transition of local economies from goods to services and reviewing the economic data).

²³⁴ Edward Abbey's famous comments in *Harper's* magazine set the standard:

The rancher (with a few honorable exceptions) is a man who strings barbed wire all over the range; drills wells and bulldozes stock ponds; drives off elk and antelope and bighorn sheep; poisons coyotes and prairie dogs; shoots eagles, bears, and cougars on sight; supplants the native grasses with tumbleweed, snakeweed, povertyweed, cowshit, anthills, mud, dust, and flies. And then leans back and grins at the TV cameras and talks about how much he loves the American West.

Do cowboys work hard? Sometimes. But most ranchers don't work very hard. They have a lot of leisure time for politics and bellyaching. Anytime you go into a small Western town you'll find them at the nearest drugstore, sitting around all morning drinking coffee, talking about their tax breaks.

Is a cowboy's work socially useful? No. As I've already pointed out, subsidized Western range beef is a trivial item in the national beef economy. If all of our 31,000 Western public land ranchers quit tomorrow, we'd never miss them. Any public school teacher does harder work, more difficult work, more dangerous work, and far more valuable work than any cowboy or rancher. The same thing applies to registered nurses and nurses' aids, garbage collectors, and traffic cops. Harder work, tougher work, more necessary work. We need those people in our complicated society. We do not need

fundamentalists, and isolated extremists,²³⁵ who dwell in a "a rogue region" of the country.²³⁶

Many preservation advocates see Moab as just the sort of success story preservation promises. While admitting some concern that Moab has become Edward Abbey's nightmare of industrial tourism run amok,²³⁷ preservation and recreation have attracted both tourists and businesses to

cowboys or ranchers. We've carried them on our backs long enough.

Edward Abbey, *Even the Bad Guys Wear White Hats: Cowboys, Ranchers, and the Ruin of the West*, HARPER'S, Jan. 1986, at 55. Lynn Jacobs comes close to Abbey in his criticism of "welfare ranchers":

As for the ex-public lands rancher, he (though loath to admit it) has over the years become financially and psychologically dependent on government aid, like many other welfare recipients. Some of the poorer welfare ranchers are "trapped" in their "profession," just as some other welfare recipients come to depend permanently on government assistance as their means of survival.

[F]ormer welfare ranchers might be temporarily employed to help rehabilitate the public land they damaged; who would (should) know better the problems they caused? This positive work would provide them excellent karmic therapy. They could help round up feral cattle; reintroduce extirpated species; dismantle and recycle fences, corrals, stock tanks and other range detriments; close and revegetate ranching roads; restore riparian and sacrifice areas; manually remove exotics; and so on. Ranch structures could be disassembled and recycled, or turned into visitor and management centers. As restoration proceeded, former welfare ranchers could gradually be placed in other professions, some created by improved local environmental and economic conditions.

Other federal, state, county, and city welfare ranchers likewise could be placed in this rehabilitation program, as could many private lands (semi-welfare) ranchers. More than half of the West would then be freed from ranching.

JACOBS, *supra* note 233, at 538. See also Stephen Stuebner, *Jon Marvel vs. The Marlboro Man: Idaho Architect Gets Nasty in Hopes of Healing Public Lands*, HIGH COUNTRY NEWS, Aug. 2, 1999, at 1 (discussing the work of Idaho anti-grazing activist Jon Marvel who derides ranchers as "welfare queens," "champion whiners," and members of "a violent subculture"); Ed Marston, *We Can't Save the Land Without First Saving the West*, HIGH COUNTRY NEWS, Dec. 26, 1994, at 15 ("And we must keep telling America that many Western interests loot both the U.S. Treasury and the region's ecosystems.").

²³⁵ See, e.g., RUDZITIS, *supra* note 13, at 165:

But like the people of the South who resisted the civil rights movement, asserting constitutional and states rights as a rationalization for continuing what the rest of the country has already seen to be no longer sustainable as a social system, they must know in their hearts as did many Southerners, that the old ways are wrong and doomed Some environmental organizations have recognized that ignoring the people in the immediate vicinity of the public wildlands has been a mistake. There are efforts to reach out to small communities and to help them consider how they would like to adjust to the changes taking place around them as well as to larger global forces that are affecting them as well.

²³⁶ Ed Marston, *Beyond the Revolution*, HIGH COUNTRY NEWS, Apr. 10, 2000, at 1 ("The struggle for the public lands is ending. Now what happens? Will the interior West remain a rogue region, or will it choose to rejoin America?"). Another representative of a national conservation organization put it this way: "the role of environmental groups is to save the Colorado Plateau from the people who live there." Stephen Bodio, *Struck with Consequence*, IN THE NEXT WEST: PUBLIC LANDS, COMMUNITY, AND ECONOMY IN THE AMERICAN WEST 20 (John A. Baden & Donald Snow eds., 1997).

²³⁷ See Charles Wilkinson, *Paradise Revised*, IN ATLAS OF THE NEW WEST, *supra* note 94, at 22.

this area with a history of booms and busts.²³⁸ As one local environmentalist remarked, in a genteel expression of the idea that Moab's rather backward culture has been improved,

This is such a vital place. You can find any kind of person here, from ranchers to Navajos to river runners to the modern cowboys to the French. You'll hear more languages spoken on the main street sidewalk than in any town between San Francisco and Chicago. Its like a big river. All the currents feed into Moab.²³⁹

However, many rural Westerners view the same picture rather differently. They do not praise Moab because it now has chic European tourists and street-front cafes, and they see less advantage in recasting the rural West with coffee houses and outfitters to look like Jackson Hole and Aspen. They criticize their new service jobs as underpaid and demeaning and are uncertain about their status within the new economic and public lands paradigm.²⁴⁰ More than anything, they look upon the new Moab as a loss of their traditional culture.²⁴¹

C. *Is There a Distinctive Western Rural Culture?*

Instead of contending that the rural West is a backward culture in need of moral correction, other preservation advocates contend that Moab and other rural Western communities simply do not have a traditional culture to

²³⁸ See *supra* note 221 and accompanying text (discussing this aspect of Moab's historical economy).

²³⁹ Wilkinson, *Paradise Revisited*, *supra* note 94, at 22.

²⁴⁰ Pejorative references to the service economy are legion. See, e.g., Sandra Dallas, *Tourism Takes Its Lumps in "Discovered Country"*, DENV. POST, Nov. 20, 1994, at E12 ("Tourism is its own environmental disaster here in the West, the cause of strip development, clogged roads and towns, burger-flipper jobs and population increases."); Lee Davidson, *Utah Tourist Sites Aren't Big Money-makers*, DESERET NEWS, Jan. 21, 1998, at B7 ("Ranchers, miners and loggers say tourism jobs pay little and wilderness is hurting their more lucrative industries."). There is also evidence, however, that the transition to a service economy does more than produce low-paying positions in fast-foods, hotels, and retail. See POWER, *supra* note 22, at 69 (noting that the service sector produces not only more lower-paying jobs but also more higher-paying jobs than the goods-production sector, although "a worker shifting from goods-production to services would have to move into a higher-skilled service job to make the same money"). Although the service economy is not all burger-flippers, neither is it a panacea for economic ills. In fact, even though gateway communities' shift to tourism and recreation economies may smooth out the long-run variation of the boom and bust cycle, its seasonal nature tends to create greater short-run variation in the economy. See John Keith et al., *Recreation as an Economic Development Strategy: Some Evidence from Utah*, 28 J. LEISURE RES. 96 (1996) (finding that "in general, the economies of tourism-dependent counties are subject to annual variances which are relatively large and appear to be increasing in absolute value" whereas "counties whose economic bases are less dependent on the tourism industry appear to have less short-run variation, even though long-run variability may exist").

²⁴¹ For a discussion of the cultural impact of the development of gateway oases like Moab, see *supra* notes 219-27 and accompanying text. Hal Rothman's conclusion about the impact of our recreational and aesthetic enjoyment seems apt: "[W]e are all industrial tourists. Physically we take only pictures and leave only footprints. Psychically, socially, culturally, and environmentally, we inexorably change all that we touch." ROTHMAN, *supra* note 214, at 377.

lose. As they see it, the idea of a distinct rural, cowboy culture is a myth.²⁴² Although some aspects of the West's cultural narrative may be myth, suggesting that the rural West has no distinctive qualities seems just as inventive. The wide open spaces and soaring mountain ranges, the parching aridity,²⁴³ and the endless acreage of sagebrush, pinion pine, and juniper are more than just the geographical aesthetics that attracted so many of us to the West. There is, as Ed Geary remarked in his study of Utah's high plateau country,

a fundamental difference between *inhabiting* a landscape and coming to it as a visitor To be a native of a place like Escalante is a kind of fate, unchosen, inescapable. The scene of one's first consciousness—the shape of the horizon, the quality of the light, the taste of the air—forms the baseline of reality.²⁴⁴

This sense of place, the sense of being rooted in a geographical setting,²⁴⁵ helped create the distinctive qualities of the rural West. Distance and isolation dictated that the residents rely upon their families and one another to help with the hard work of farm and ranch.²⁴⁶ It also caused rural residents to draw together for sociality and companionship, resulting in a strong tradition of volunteerism and participation in community affairs.²⁴⁷ Churches became not only places of worship but also of recreation, education, and charity; local high schools became centers of community activity,²⁴⁸ as attested by any week-night drive on the rural highways of the

²⁴² See, e.g., DONAHUE, *supra* note 137, at 90–98, 112–13 (discussing the mythology of the Western cowboy and reviewing the “[m]any commentators” who “have undertaken to explain—and to debunk—the cowboy myth”); Ed Quillen, *The Mountain West: A Republican Fabrication*, HIGH COUNTRY NEWS, Oct. 13, 1997, at 8 (deriding as mythical the notion of the West as “a land of small family farms, skillful artisans and wholesome little towns, all populated by descendants of courageous rugged-individualist pioneers who moved into a vast empty space without any help from that pernicious federal government in Washington”); Rothman, *supra* note 127, at 17 (“discarding a myth that has deceived us for a century may be the healthiest thing this region can do”).

²⁴³ Wallace Stegner called the aridity of the West the “one simple fact” that is “more fecund of social and economic and institutional change in the West than all the acts of all the Presidents and Congresses from the Louisiana Purchase to the present.” WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN* 214 (1954).

²⁴⁴ EDWARD A. GEARY, *THE PROPER EDGE OF THE SKY: THE HIGH PLATEAU COUNTRY OF UTAH* 171 (1992). See also Nelson, *supra* note 14, at 39 (“For those whose livelihood depended on crops or cattle, the scenery, the ‘quaint’ dependence on nineteenth century technologies, and the facts of distance and the struggles with nature were not ‘atmosphere’ but life.”); WALLACE STEGNER, *Variations on a Theme by Crèvecoeur*, in *WHERE THE BLUEBIRD SINGS TO THE LEMONADE SPRINGS: LIVING AND WRITING IN THE WEST* 111–14 (1992) (discussing the inexorable influence of space on the culture of the West).

²⁴⁵ Daniel Kemmis has suggested that “[n]o real culture . . . can exist in abstraction from place.” DANIEL KEMMIS, *COMMUNITY AND THE POLITICS OF PLACE* 7 (1990).

²⁴⁶ See, e.g., Nelson, *supra* note 14, at 41–43 (describing this social organization); KEMMIS, *supra* note 245, at 70–72 (discussing the ethic of cooperation that long pervaded the rural West).

²⁴⁷ Nelson, *supra* note 14, at 42, 52–53 (discussing volunteerism and participation in rural West communities).

²⁴⁸ Nelson, *supra* note 14, at 46–49 (discussing the role of churches and local schools in the rural West). For a discussion of how timber communities in the Northwest claim the same sort

West, where high school sports are the primary fare.

Critics of the idea of a distinct Western culture would be quick to point out that modern society and technology have long been making inroads on all Americans' sense of place, including those in the communities of the rural West. Residents of the rural West travel outside the region with ease, eat the same food, watch the same videos and television shows, and root for the same sports franchises as residents of other parts of the United States.²⁴⁹ Even if the West at one point was culturally unique, critics might say, it is no longer.²⁵⁰ It is hard to dispute that the culture of the rural West is a diminishing resource, but my perception is that a sense of place still animates the rural West to a greater extent than elsewhere. This is particularly true of those communities primarily dependent on ranching and agriculture whose families often enjoy multigenerational ties to the land.²⁵¹ This conclusion may be a bit romantic, but as Charles Wilkinson has remarked: "Objectively justified or not, the West is a place where romance is unavoidable fact, a place you cannot talk about, cannot think about, without an overlay of romance."²⁵²

Perhaps more important than what commentators think about the distinctiveness of the rural West is what rural Westerners think. And the evidence is strong that many, if not most, view their way of life as distinctive and jeopardized. Witness the plethora of books and articles on the demise of the rural West.²⁵³ If rural communities value their distinctiveness, isn't that

of distinctive qualities as the farming and ranching communities of the Interior West, see Daniel S. Reimer, Comment, *The Role of "Community" in the Pacific Northwest Logging Debate*, 66 U. COLO. L. REV. 223, 231-38 (1995).

²⁴⁹ As Dan Tarlock points out, the pre-Enlightenment concept of community "as a group of people rooted into a specific, small geographic landscape . . . has been largely swept away by modern civil society and the mobility of modern life." A. Dan Tarlock, *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, 31 ARIZ. ST. L.J. 539, 555 (1999). To the extent not already accomplished by television and satellite dishes, the technology of the Internet is also increasingly immersing rural communities in popular culture.

²⁵⁰ See, e.g., DONAHUE, *supra* note 137, at 269 ("The 'way of life' argument is suspect not only on historical grounds, but as a matter of present reality."). See also *id.* (noting that many ranchers are "hobby type operators" whose primary source of income is off-ranch); *id.* at 268-73 (offering additional criticisms of the idea that ranching communities in the West have a distinctive culture).

²⁵¹ It is harder to argue that logging and lumber mill work are a similarly rooted way of life given the considerable turnover in employment in the forest products industry. See POWER, *supra* note 22, at 144-45:

In 1991, the median tenure of employment in lumber and wood products firms was 4.2 years, in sawmills, 4.6 years, and in miscellaneous wood products 2.7 years And the median tenure as a worker in the industry was only 5.3 years [T]hese job tenure statistics are lower than for the economy as a whole, where median job tenure is 4.5 years and median tenure in the industry is 6.5 years.

²⁵² Wilkinson, *Paradise Revised*, *supra* note 237, at 28-29.

²⁵³ See, e.g., RICHARD D. LAMM & MICHAEL MCCARTHY, *THE ANGRY WEST: A VULNERABLE LAND AND ITS FUTURE* (1982) (lamenting the loss of the West); RINGHOLZ, *supra* note 218 (reviewing the changes in Moab, Sedona, and Jackson Hole); Nelson, *supra* note 14, at 38-54 (discussing the decline in the rural communities of the West).

some reason to consider their claims regardless of definitional disputes? Given the nineteenth century's devaluation and demolition of cultural distinctiveness, isn't there danger in being so certain about a cultural valuation?

V. "COWBOYS AIN'T INDIANS; BUFFALO AIN'T COWS"²⁵⁴

Some will surely be quick to point out that even if the rural West has distinctive qualities that may be said to rise to the level of a culture, it is surely not as real or unique as the cultural heritage of Indian tribes.²⁵⁵ Professor Dan Tarlock, in an essay titled *Can Cowboys Become Indians? Protecting Western Communities as Endangered Cultural Remnants*, explores the question of whether rural communities in the West should receive some of the same cultural protections as Indian tribes. Initially, he observes that cultural claims of rural Westerners have not been given much credence "because we recognize cultural rights almost exclusively to protect defined religious groups or aboriginal minorities with non-Western value systems from oppression by the dominant culture; not to protect one segment of the dominant culture from another."²⁵⁶ Tarlock argues, however, that with post-modernism's recognition that culture is a construct,²⁵⁷ the distinctive culture claims of rural Westerners, who dwell in what he terms "at-risk" communities,²⁵⁸ are "more legitimate than many have assumed."²⁵⁹ He concludes that even if the distinctive culture claims of rural Westerners are different and not as strong as those of Indian tribes, their claims have enough merit that they should be "factored into efforts to re-envision the Western landscape and the legal institutions that will develop to manage and

²⁵⁴ Debra Thunder, *Cowboys Ain't Indians; Buffalo Ain't Cows*, HIGH COUNTRY NEWS, May 31, 1993, at 16.

²⁵⁵ See, e.g., *id.* at 16 (reporting Walter EchoHawk's argument that "ranchers haven't been here in the American West long enough to establish a set of cultures and customs within the meaning of federal laws that are intended to protect culture"). Others, however, have begun to see the similarity between the plight of rural Westerners and Indians in the nineteenth century. See David R. Lewis, *Native Americans: The Original Rural Westerners*, in *THE RURAL WEST SINCE WORLD WAR II* 28 (R. Douglas Hurt ed., 1998) (arguing that "increasingly Indian and non-Indian ranchers in the West have more in common with each other than with their urban counterparts"); PETER IVERSON, *WHEN INDIANS BECAME COWBOYS: NATIVE PEOPLES AND CATTLE RANCHING IN THE AMERICAN WEST* 207 (1994) (investigating Indian participation in cattle ranching and concluding that non-Indian cowboys (and ranchers) have become increasingly "like the Indians of old, surrounded by a society that knows little about them and cares less, except when it has other priorities for their land"); Peter Iverson, *Cowboys, Indians and the Modern West*, 28 ARIZ. & W. 107 (1986) (essay offering similar analysis); Nelson, *supra* note 14, at 39 (quoting T.J. Gilles, Agricultural Editor of the *Great Falls Tribune* as saying "Those of us who grew up here need to realize that we are now in the place of the Indians and the Eskimos Some new people have come to take the land from us. They [have] a higher and better use for it." (citation omitted)).

²⁵⁶ Tarlock, *supra* note 249, at 551.

²⁵⁷ *Id.* at 561-62.

²⁵⁸ *Id.* at 554 & n.59 (describing communities that are put "at risk" by government actions or market changes).

²⁵⁹ *Id.* at 539.

sustain this vision."²⁶⁰

Professor Tarlock focuses on the comparison between present-day Indian tribes and rural communities rather than on the historical analogy between our conduct today and that of our nineteenth century predecessors that is the focus of this article, but he has it about right.²⁶¹ Professor Tarlock is correct, for example, that rural Westerners do not have a history of oppression. Indeed, they participated in the dispossession of the Indian tribes and have long been politically powerful in the West. But the tribes' history of oppression only began with the first white settlement of the West. Moreover, the political power of rural communities has been dissipating since *Baker v. Carr*,²⁶² and the aggregation of voters in the urban archipelagoes of the West has generally reduced rural interests to a disfavored political position.²⁶³ Even in historical context, however, the rural

²⁶⁰ *Id.* at 582. With respect to protecting the culture of rural communities in the West, Tarlock, whose article focuses on water resources, suggests that communities may want to investigate land and water trusts that can serve to limit development rights as well as legislation restricting transfer of water rights from at-risk communities to developing urban and suburban areas. *Id.* at 580-82. In addition to Professor Tarlock, others have investigated the question whether rural communities have "rights" or are deserving of particular recognition in public lands policy-making. See, e.g., Reimer, *supra* note 248 (describing the Northwest logging community and suggesting the necessity of including that community in the forest policy dialogue); Joseph L. Sax, *Do Communities Have Rights? The National Parks as a Laboratory of New Ideas*, 45 U. PITT. L. REV. 499 (1984) (raising questions about preservation of the agricultural village of Boxley Valley within the Buffalo National River unit of the National Park System); Joseph L. Sax, *The Trampas File*, 84 MICH. L. REV. 1389 (1986) (discussing competing views of a proposal by the New Mexico Society of Architects that the northern New Mexican village of Las Trampas be incorporated into the National Park System); Diane M. Dale, *The Boundary Dilemma at Shenandoah National Park*, 16 VA. ENVTL. L.J. 607, 608-14 (1997) (reviewing the creation of Shenandoah National Park and the forced removal of persons dwelling within park boundaries); Bates, *supra* note 232 (proposing a definition of community that goes beyond geography).

²⁶¹ The cultural comparison of today's rural communities with nineteenth century Indian tribes risks losing some of the focus on the more important component of the analogy, namely the propriety of a removal policy, whether on behalf of preservation or on behalf of settlement and development.

²⁶² 369 U.S. 186 (1962) (holding that Tennessee's apportionment system violated the Fourteenth Amendment because it had failed to take account of the shift in population from rural to urban areas). *Baker* was followed by *Reynolds v. Sims*, 377 U.S. 533 (1964), which held that both houses of the Alabama state legislature had to be apportioned by population. *Id.* at 568. See also *id.* at 562 ("Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."). At the time *Reynolds* was decided, most of the Western states were apportioned geographically and none by population. See Eleanore Bushnell, *The Court Steps In, in IMPACT OF REAPPORTIONMENT ON THE THIRTEEN WESTERN STATES 1-2* (Eleanore Bushnell ed., 1970). Subsequent reapportionment by population has resulted in the flow of political power away from rural areas and toward the more populous urban archipelagoes. State legislatures, of course, do not make the rules for the public lands, so this particular shift in state legislative power has not had as much impact on the public lands as the general shift in population to urban areas. The population shift does, however, create a significant incentive for members of Congress, both from the House and Senate, to respond to urban interests because the cities are where the votes are found.

²⁶³ See *supra* note 262 (discussing this political impact of the demographic shift to urban archipelagoes). See also Popper & Popper, *supra* note 126, at 7 ("The urban areas will in fact provide the political impetus to protect the environment of the frontier ones The

West's claims to cultural identity do not seem as powerful as those of Indian tribes, particularly given the absence of blood ties and the pervasive influence of popular culture in the West. The rural West's culture claim may not be as strong, but it is not insignificant. Even though tribes' ties to their land date from time immemorial, that should not devalue the real ties to the land of some communities in the rural West which have families whose ties to the land go back six or seven generations.²⁶⁴

The questions about the analogy between Indian tribes and rural communities in the West go beyond the issue of whether the rural West has an equally distinctive culture. A number of other legitimate concerns arise with respect to whether the analogy works. Initially, it must be recognized that whatever pain is caused by the economic and cultural dislocations in the rural West, it pales by comparison to the suffering and hardships faced by Indian tribes. If ranchers and other commodity users are forced off the public lands to which they have become attached and into the urban archipelagoes and Moabs of the West, at least they can choose where to go and are allowed to live with relative dignity.

Another distinction is that certain components of the rural economy have been upheld by federal subsidy, which was not the case for Indian tribes in the nineteenth century. The mining law requires only the barest of payments for the right to locate valuable minerals on the public lands²⁶⁵; the fees charged for grazing on the public lands are generally below market price²⁶⁶; and timber on the public lands is often sold at prices below the

underlying political conditions are becoming continually less favorable for... anti-environmentalism, for the West's urban areas keep growing.").

²⁶⁴ Over the course of these generations, rural Westerners' ties to the land have perhaps become more like those of Native Americans. Stephen Bodio suggests that rural Westerners have gone from "Europeans with a fear of all that is wild to people with a quirky affection for all those strange things out there: the singing coyotes, dark, ominous eagles, and invisible mountain lions—all those fellow inhabitants that you have to put up with but that finally make your home a very different place from the suburbs of New York City." Bodio, *supra* note 236, at 18.

²⁶⁵ See General Mining Act of 1872, 30 U.S.C. § 28 (1994) (requiring only \$100 worth of assessment work to be performed each year to maintain an unpatented mining claim); *id.* § 28(f) (holders of more than ten mining claims must pay a \$100 per claim maintenance fee instead of assessment work). See also 30 U.S.C. § 29 (1994) (\$5 per acre for patent to lode claim); *id.* § 37 (\$2.50 per acre for patent to placer claim). See generally MAJORITY STAFF REPORT OF THE HOUSE SUBCOMM. ON OVERSIGHT AND INVESTIGATIONS OF THE COMM. ON NATURAL RESOURCES, 103d CONG., TAKING FROM THE TAXPAYER: PUBLIC SUBSIDIES FOR NATURAL RESOURCE DEVELOPMENT 13-21 (Comm. Print 1994) [hereinafter TAKING FROM THE TAXPAYER] (discussing federal subsidies to the mining industry).

²⁶⁶ See, e.g., Dale A. Oesterle, *Public Land: How Much Is Enough?*, 23 *ECOLOGY L.Q.* 521, 526-27 (1996) (discussing studies on federal subsidy of grazing); TAKING FROM THE TAXPAYER, *supra* note 265, at 85-91 (recognizing debate about whether grazing is subsidized but arguing that, among other factors, increased land values and profitable subleasing strongly suggest that it is). See generally Todd M. Olinger, Comment, *Public Rangeland Reform: New Prospects for Collaboration and Local Control Using the Resource Advisory Councils*, 69 *U. COLO. L. REV.* 633, 638-40 (1998) (discussing the subsidization of grazing and the arguments of ranchers). But see WAYNE HAGE, *STORM OVER RANGELANDS* 22-23 (1989) (arguing that grazing fees actually exceed the real value of public rangelands because they do not include the private owner's infrastructure like water rights, roads, fences, and corrals).

federal cost.²⁶⁷ It is one thing to encourage the demise of rural communities by stripping them of rights and privileges; it is quite another to facilitate that demise by ceasing to subsidize certain public lands uses.²⁶⁸ That said, the subsidies, particularly for public lands ranchers—the group best identified with a distinct rural culture—are not that large,²⁶⁹ and hardly distinguish commodity interests from other sectors of society. Moreover, if rural Western communities established themselves as a result of federal subsidies, it is only because they responded to the national goal of settling and developing the West.²⁷⁰

Whether rural communities have reason to rely on subsidy is a smaller part of a larger issue, namely whether rural communities have any right to rely on the continued use of the public lands. Some may believe that this issue is what separates current public lands communities from the Indian tribes of the nineteenth century. Indian tribes, whose presence preceded that of the federal government, had a valid claim to title that the United States, via the discovery doctrine,²⁷¹ failed to honor; whereas rural communities have no legitimate property interest in the public lands. Removing rural communities from the public lands is different, the argument could be made, because their use of the public lands has always been at the sufferance of the public. This distinction has some merit, but ironically, to make the argument is in some sense to make the analogy.

It is important to recognize that in some instances rural residents do have property rights in the public lands. Unpatented mining claims,²⁷² water

²⁶⁷ See generally Michael Axline, *Forest Health and the Politics of Expediency*, 26 ENVTL. L. 613, 619 (1996) (discussing subsidies to timber industry and arguing that “the price of federal timber frequently does not reflect the administrative or road costs of selling and removing the timber”); TAKING FROM THE TAXPAYER, *supra* note 265, at 71–83 (arguing that public lands logging is heavily subsidized). But see K. David Hancock, *‘Goliath’ Answers Andy: Lumber Exec Explains the Other Side of the Clearcutting Issue*, INDUS. WK., Feb. 18, 1991, at 68 (noting that timber harvests in the forests of the Pacific Northwest actually return significant profits to the United States Treasury).

²⁶⁸ Even if one were to accept the argument that long-standing rural communities are just as entitled to use adjoining public lands without payment as were the Indian tribes before them, those communities still often benefit from subsidies. Even if land uses such as below-cost grazing and unpatented mining claims are not considered subsidies, projects like Forest Service roads and Bureau of Reclamation dams most surely are.

²⁶⁹ Whereas in 1998 federal spending was \$1.65 trillion, see Office of Management and Budget, *A Citizens Guide to the Federal Budget*, at 12 (FY 2000), available at <http://w3.access.gpo.gov/usbudget/fy2000/pdf/guide.pdf> (last visited Nov. 2, 2000), even a partisan estimate of the subsidy to grazing is \$150 million per year. See TAKING FROM THE TAXPAYER, *supra* note 265, at 87 (discussing the 1992 Government Operations Committee Report).

²⁷⁰ See *supra* notes 32–46 and accompanying text (discussing nineteenth-century public lands policy to encourage settlement and development of the West).

²⁷¹ See *supra* notes 48–50 and accompanying text (discussing the discovery doctrine).

²⁷² Under the 1872 General Mining Law, once miners find a valuable mineral deposit on the public lands, they have “the exclusive right of possession and enjoyment of all the surface included within the lines of their locations.” 30 U.S.C. § 26 (1994). Until the claim is patented, it is known as an “unpatented mining claim,” and it is a property right protected by the Fifth Amendment. See generally GEORGE C. COGGINS & ROBERT L. GLICKSMAN, 3 PUB. NATURAL RESOURCES LAW § 25.03 (2000) (discussing the nature of an unpatented mineral claim and the

and ditch rights,²⁷³ and R.S. 2477 rights-of-way²⁷⁴ are examples. But with respect to the largest and most frequently trumpeted property rights claim of rural communities—namely a property right in grazing allotments—it is accurate to say that there is no private property interest in the public lands.²⁷⁵ The reason there is no property interest is what makes the analogy interesting. Although those who adhere to the Lockean notion that property is an inalienable right²⁷⁶ might disagree, most others would contend that

requirements for acquiring and retaining one).

²⁷³ Congress first confirmed the right to appropriate water, in accordance with state law, from federal lands in the Mining Act of 1866, ch. 262, § 9, 14 Stat. 253 (as codified at 43 U.S.C. § 661 (1976)), and then in the Desert Land Act of 1877, ch. 107, § 1, 19 Stat. 377 (as codified at 43 U.S.C. § 321 (1986)). See generally Amy K. Kelley, *Federal-State Relations in Water*, in 4 WATER AND WATER RIGHTS § 36.02 & nn. 22–23 (Robert E. Beck ed., 1996) (briefly reviewing the statutes and case law by which Congress left allocation of water to the states). With those water rights came the ditch rights necessary to access the water. See generally COGGINS & GLICKSMAN, *supra* note 272, § 10E.05[2][c].

²⁷⁴ R.S. 2477 rights-of-way are the product of a provision of the Mining Law of 1866, which stated that “the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.” Act of July 26, 1866, ch. 262, § 8, 14 Stat. 253 (later recodified at 43 U.S.C. § 932 (repealed Oct. 21, 1976)). This self-executing grant promoted construction of highways across public lands, primarily by local governments and private individuals, by assuring a vested right to any highway constructed. FLPMA repealed this open-ended grant of rights-of-way over public lands, but explicitly protected R.S. 2477 rights-of-way in existence at the time FLPMA was passed. See 43 U.S.C. § 1769(a) (1994). R.S. 2477 rights-of-way have been a source of dispute in the West because their existence allows access for development and diminishes the opportunity to designate wilderness which requires 5,000 *roadless* acres. See generally COGGINS & GLICKSMAN, *supra* note 272, § 10E.05[2][b] (reviewing R.S. 2477 right-of-way issues).

²⁷⁵ Despite the claims of some rural advocates to the contrary, the law has long been clear that grazers do not have vested rights in their grazing permits. See, e.g., *Buford v. Houtz*, 133 U.S. 320, 326 (1890) (recognizing only “an implied license” to graze the public domain); Taylor Grazing Act of 1934, 43 U.S.C. § 315b (1994) (stating that the issuance of a permit “shall not create any right, title, interest, or estate in or to the lands”). The most creative argument for property rights in grazing permits is that of Wayne Hage, who has been working to bootstrap ranchers’ water and ditch rights on the public lands into grazing rights. In *Hage v. United States*, 35 Fed. Cl. 147, 167–76 (1996), he argued that by canceling his grazing permit and thereby denying him access to water on federal land, the government had taken without just compensation not only his water rights but also the right to have cattle graze on the land associated with that water right. In a subsequent order styled as a preliminary opinion, Judge Loren Smith suggested that Hage had a property interest in both his ditch right-of-way and in the forage rights appurtenant (fifty feet on each side of the ditch) to the water right. See *Hage v. United States*, 42 Fed. Cl. 249, 251 (1998) (“[I]mplicit in a vested water right based on putting water to beneficial use for livestock purposes was the appurtenant right for those livestock to graze alongside the water.”). He requested further briefing on whether the government’s action constituted a taking, and no decision has yet been issued. The same argument was, however, rejected by the Tenth Circuit in *Diamond Bar Cattle Company v. United States*, 168 F.3d 1209 (10th Cir. 1999). It also will likely be rejected in *Hage*, particularly given the Supreme Court’s holding in *Fuller v. United States*, 409 U.S. 488 (1973), that the United States is not obligated to compensate for the additional value of property created by its attachment to a grazing allotment. *Id.* at 492–94. If an increase in the value of real property arising from a grazing permit is not compensable, the increased value of a water right arising from grazing being the beneficial use to which it is attached is also unlikely to be compensable.

²⁷⁶ See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, ch. 5 (1690) in TWO TREATISES OF GOVERNMENT (Peter Laslett ed., 2d. ed. Cambridge Press 1967) (articulating the theory that

property rights exist because the state chooses to recognize them.²⁷⁷ Traditionally, long-established ties to particular land have been a key element in the determination of a property interest; witness the rules of adverse possession.²⁷⁸ In the case of Indian tribes, however, the United States chose not to recognize their long-established ties to the land, except to permit use and occupancy until Congress decided upon purchase or conquest.²⁷⁹ In the case of grazing allotments, the United States has likewise chosen not to recognize ranchers' historical ties to the land, except to permit grazing until BLM decides otherwise under its land use planning procedures.²⁸⁰ Thus, it does not distinguish the two removal policies to argue that tribal property rights could have been recognized but those of rural communities could not. In fact, both are the result of a positive law determination.²⁸¹

Describing the United States's allocation of the tribes' property rights as a question of positive law is not intended to ignore the question whether the United States had any jural or legislative authority over the tribes as separate sovereigns. The argument that the United States had no such power is, however, a natural law, inalienable rights argument.²⁸² To the extent natural law is the basis of a criticism of the analogy between the two communities, it does not make sense to distinguish rural communities' claim to a property interest in the public lands on the positive law strength of those claims. Rather, rural communities' claims would need to be judged on the same basis, namely whether rural communities have the sort of

because "every Man has a *Property* in his own *Person*," when he mixes his labor with land he "thereby makes it his *Property*" (emphasis in original); Joan L. McGregor, *Property Rights and Environmental Protection: Is This Land Made for You and Me?*, 31 ARIZ. ST. L.J. 391, 399-409 (1999) (summarizing Locke's theory of man's natural and inalienable right to property).

²⁷⁷ See McGregor, *supra* note 276, at 414-15 (summarizing this Kantian view of property rights that "there are no property rights in the state of nature, that society or the civil condition is necessary for property rights" and that "[f]or ownership to exist, a community must recognize and approve that control over . . . a piece of land").

²⁷⁸ See generally Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 669-80 (1986) (discussing the justifications for the common law's frequent recognition of the first in time principle); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73 (1985) (critiquing the basic common law maxim that first possession is the root of title).

²⁷⁹ See *supra* notes 48-50 and accompanying text (discussing aboriginal title).

²⁸⁰ See *Public Lands Council v. Babbitt*, 929 F. Supp. 1436 (D. Wyo. 1996), *aff'd in part and rev'd in part*, 167 F.3d 1287 (10th Cir. 1999), *aff'd* 529 U.S. 728 (2000) (affirming the Interior Department's new grazing regulations and confirming the principle that grazing permits can be canceled or altered as necessary to fulfill the purposes of BLM's land use plans).

²⁸¹ Except for the disparity in the length of time to which they were attached to the land, it would also be difficult to distinguish the property rights on a natural law basis. Under a Lockean theory of property rights, neither hunting and gathering nor grazing would typically create a property right. See LOCKE, *supra* note 276, at ch. 5, §§ 28, 30, 32, 37 (asserting that hunting and gathering creates a property in the thing taken or gathered but not in the ground); JAMES TULLY, *STRANGE MULTIPLICITY* 70-78 (1995) (analyzing how Lockean theory justified the dispossession of hunter-gatherer Indian tribes).

²⁸² For a general discussion of the differences between natural law and positive law reasoning, see BAILEY KUKLIN & JEFFREY W. STEMPER, *FOUNDATIONS OF THE LAW: AN INTERDISCIPLINARY AND JURISPRUDENTIAL PRIMER* 141-43 (1994).

distinctive culture and longstanding ties to the land that merit some sort of recognition. As discussed above, the answer appears to be that the tribes had greater cultural distinctiveness and longer ties to the land but that the distinctiveness and rootedness of rural communities is not inconsequential.

Of course, the positive law status of ranchers and rural communities is not unrelated to the strength of their natural law claim because the determination that ranchers would have no property rights in the public lands adjoining their communities was arguably made before they arrived²⁸³; whereas the determination for tribes came after. Thus, public lands users today do not have as strong a reliance argument as did the tribes in the nineteenth century. But just as was the case with the distinctive culture question, to say that rural communities' reliance interest is less than that of the Indian tribes does not mean that rural communities can assert no reliance interest at all. That reliance comes not only from long use but also from the fact the federal government had long encouraged rural community use of public lands as a part of federal public lands policy.²⁸⁴ Despite the legal doctrine denying them property rights in their grazing lands,²⁸⁵ ranchers can also point to a longstanding federal practice of renewing their permits²⁸⁶ and the promise in the Taylor Grazing Act that their grazing privileges will be "safeguarded," albeit "so far as consistent with" the other provisions of the Act, including the denial or "any right, title, interest, or estate in or to the lands."²⁸⁷ In the end, even if the signals have been mixed, it is hard to blame rural communities for coming to rely upon their ability to continue using the public lands. If that reliance interest is not as pristine as

²⁸³ I use the word "arguably" because it would not have been clear to nineteenth century grazers of the public lands that they did not have some property right in the lands they were grazing. In light of the various federal preemption acts which had ratified unauthorized possession by settlers, see GATES, *supra* note 39, at 219-47 (describing preemption statutes which gave squatters preferential rights to buy public lands at bargain prices), it would not have been fanciful to assume that a similar ratification of their grazing privileges might be in the offing. See generally Robert H. Nelson, *How to Reform Grazing Policy: Creating Forage Rights on Federal Rangelands*, 8 FORDHAM ENVTL. L.J. 645, 648-49 (1997) (discussing how informal property rights often become accepted first as a matter of custom and later receive formal legal recognition); HAGE, *supra* note 266, at 183-84 (discussing how stockmen at the time of the passage of the Taylor Grazing Act believed they had rights in the land they had grazed).

²⁸⁴ See, e.g., *Buford v. Houtz*, 133 U.S. 320, 326 (1890) (noting that the government "has known of [ranchers' use of public lands], has never forbidden it, nor taken any steps to arrest it. No doubt it may be safely stated that this has been done with the consent of all branches of the government, and, as we shall attempt to show, with its direct encouragement"). See also *supra* notes 39-47 and accompanying text (discussing federal policy to encourage use of the public lands).

²⁸⁵ See *supra* note 275 (setting forth this doctrine).

²⁸⁶ See, e.g., WESLEY CALEF, PRIVATE GRAZING AND PUBLIC LANDS 43 (1960) ("Although the service has never abandoned the position that grazing 'privileges' can be revoked at its discretion, in actual practice permits are renewed year after year to the same individuals. Moreover, except in unusual circumstances they are renewed annually for the same number of a.u.m.'s."); Joseph Feller, *What Is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 570-81 (1994) (describing BLM's practices with respect to the issuance of grazing permits).

²⁸⁷ Taylor Grazing Act of 1934, 43 U.S.C. § 315b (1994).

that of Indian tribes, it still cannot be easily dismissed.

A final distinction between the two removal policies is that unlike the *de jure* removal and reservation policy of the nineteenth century reflected in statutes, treaties, executive orders, and judicial decisions, the move today from rural communities to urban archipelagoes and gateway oases is only partly *de jure* and often the *de facto* result of a variety of economic realities and social preferences. In contrast to the Indian tribes, ranchers and commodity users are not often being forced off the public lands. Rather, they are leaving of their own accord in pursuit of greater economic opportunity.²⁸⁸ The decline of the rural West is not solely attributable to federal public lands policy. It is also a result of markets and technology that for over a century have imposed a downward pressure on employment in rural communities.²⁸⁹ The mining, logging, and farming industries do not produce the same number of jobs they did fifty years ago, because they do not require the same number of employees. Technology has rendered many tasks obsolete.²⁹⁰ Economic dislocation in the rural West is not a new phenomenon,²⁹¹ and it will almost surely continue, regardless of whether the law continues to shift in favor of preservation.

That said, change and economic dislocation in communities dependent on public lands has not all been *de facto*. It has also been *de jure*. As

²⁸⁸ See, e.g., Jerry Spangler, *Rural Utah's Changing Faces*, DESERET NEWS, Feb. 5, 1998, at A1 (discussing rural Utahns' lament that "[o]ur biggest export is our children"); cf. Stephanie Simon, *Research Looks a Lot Like Hanging Out: Just Who Are We? Anthropologists Are Shadowing Everyday People to Find Out*, AUSTIN AM.-STATESMAN, Oct. 31, 1999, at K17 (noting how the Western Great Plains are "swiftly emptying out as young people leave for better jobs or smoother lives").

²⁸⁹ In 1900, the extractive industry and agriculture accounted for approximately 40% of total employment in the country; by 1990, that figure was 3%. See POWER, *supra* note 22, at 34. Between 1970 and 1990, extractive industry employment fell by half, from 6% to 3% of total employment. *Id.* at 35.

²⁹⁰ See Axline, *supra* note 267, at 622 ("Advances in milling technology made it possible for fewer people to mill the same amount of timber."); Lois J. Schiffer & Jeremy D. Heep, *Forests, Wetlands and the Superfund: Three Examples of Environmental Protection Promoting Jobs*, 22 J. CORP. L. 571, 582-83 (1997) (discussing how "significant job loss in the timber industry . . . can be partially attributed to technology"); POWER, *supra* note 22, at 105-06 (discussing increased productivity and decreased employment in the mining sector).

²⁹¹ Although he does not distinguish between *de facto* and *de jure* economic dislocation in public lands dependent communities, Professor Power states well the inevitability of economic change:

If over the years workers had not been released from such sectors as agriculture, horse-drawn transportation, wood-fuel production and leather manufacturing, the U.S. economy could not have modernized. In general, laid off workers are relatively quickly absorbed into other sectors of the economy This is not to suggest that layoffs and unemployment are not painful and disruptive to individuals, families, and communities. They are. But they are also inevitable in a dynamic economy.

POWER, *supra* note 22, at 26-27. As Professor Power sees it, the need for commodity users of the public lands to transition to new employment is no different than the need of any employee in the hurly burly of a market economy. See also *id.* at 190 (noting that operating any small business teaches just as much independence and self-reliance as operating a farm and concluding that "it is not clear what the current justification is for supporting small businesses more generously in agriculture than in other fields of economic activity").

discussed above, during the last forty years, the law has responded to the majority's demand for preservation and removal by limiting or eliminating commodity use on significant portions of the public lands.²⁹² Moreover, as discussed in more detail below, during Secretary Babbitt's tenure as Interior Secretary, this pattern has accelerated.²⁹³ It is precisely this *de jure* removal effort that prompts the analogy to nineteenth century Indian policy.

In sum, although a number of potentially legitimate questions could be raised about the analogy between the two removal policies, the similarities between the two policies remain significant. The current policy of removal for preservation is not as egregious as the removal for settlement and development in the nineteenth century, nor is it as direct as the removal for preservation policies advocated in other countries of the world where indigenous peoples have been the target.²⁹⁴ Nevertheless, the similarities between our current and our nineteenth century removal policies should be sufficient to prompt a critical examination of our approach to enshrining preservation and recreation as the new dominant uses of the public lands.

In *Fire on the Plateau*, Charles Wilkinson argues that the history of the American West has been one of "conquest by certitude."²⁹⁵ His conclusion

²⁹² See *supra* notes 105–10 and accompanying text (discussing these laws).

²⁹³ See *infra* Part VI.B (discussing the Interior Department's aggressive efforts to shift from extraction to preservation on the public lands).

²⁹⁴ Preservationists' support of removal has taken more extreme forms elsewhere. In Tanzania, for example, there was a long campaign by leading conservation organizations and naturalists to expel the Maasai from Serengeti National Park. Although the Maasai had lived in the area for generations, the organizations argued that the "Serengeti's soil was too fragile and its water too scarce to support both humans and wildlife." HONEY, *supra* note 103, at 223–24 (describing how the promise in the law creating the Serengeti National Park that the Maasai could continue to dwell there "didn't hold for a decade"). This policy continued after the colonial period. "Conservation practices were generally unsympathetic to the needs of the local communities, whose members were deprived access to ancestral homelands, grazing land, water, and wildlife and saw few tangible benefits from either the parks or tourism." *Id.* at 226 (citing International Institute for Environment and Development, *Whose Eden? An Overview of Community Approaches to Wildlife Management* 11–12 (London: Overseas Dev. Admin., July 1994)). Similar problems occurred with Kidepo National Park in Uganda, David Harmon, *Cultural Diversity, Human Subsistence, and the National Park Ideal*, in *THE GREAT NEW WILDERNESS DEBATE* 217, 222 (1998) (describing devastating consequences to the Ik tribe when the government removed the tribe to locations outside park boundaries and prohibited hunting), with Royal Chitwan National Park in Nepal, *id.* at 223–24 (discussing local resentment at being excluded from area where they had traditionally grazed livestock, hunted wildlife for food, and gathered elephant grass to thatch their roofs); and with several national parks in Australia. Fabienne Bayet, *Overturning the Doctrine: Indigenous People and Wilderness—Being Aboriginal in the Environmental Movement*, in *THE GREAT NEW WILDERNESS DEBATE*, *supra*, at 318–22 (describing reaction of Aboriginal peoples of Australia to several national park creations).

²⁹⁵ WILKINSON, *supra* note 30, at 309 (observing that many of the harms suffered by the Indian peoples and the lands of the Colorado Plateau were a result of "a large body of people from Brigham Young to Nathan Meeker to John Collier to Wayne Aspinall to Stewart Udall—men who knew to an absolute certainty what was right for the Colorado Plateau"). *But see id.* at 329 (expressing some reservations about the secretive process by which President Clinton designated the Grand Staircase-Escalante National Monument but concluding that he "had no doubt" that it "would bring much-needed protection to these lands and would, as well, make a bold statement about the values of BLM lands in southern Utah").

rings true with respect to federal public lands and Indian policy in the nineteenth century. Americans were confident in the moral, economic, and scientific wisdom of manifest destiny. Americans knew the best use of the public lands and what was best for the Indians who dwelled there. The tougher question is whether Professor Wilkinson's conclusion is an equally apt description of the current shift to preservation and recreation. Is that shift simply the latest chapter in a history of conquest by certitude? The purpose of the analogy is to make us wonder. Can we confidently declare our desire to preserve the public lands is more altruistic than the desire of our nineteenth century predecessors to settle and develop them, particularly when a significant, if not the foremost reason for setting aside those lands is to provide recreational and scenic amenities, both of which have significant negative impacts? Can we be so certain that removing commodity users from the public lands in favor of preservation is in the best interests of the adjacent rural communities? Are we sure the distinctive characteristics of the rural West and the residents' bonds to the land are not worthy of some recognition? I believe the answer to these questions is no. And if we cannot be certain that our new public land aspirations are so much more noble than those of our Nineteenth century counterparts, what should we do differently?

VI. SELF-INTEREST, CERTITUDE, AND PRINCIPLED CHANGE OF PUBLIC LANDS USES

If our motives for preservation are not wholly altruistic and if the satisfaction of our preservation preference requires rural communities to sever real and lasting attachments they have formed to the public lands—at least in part, because of their reliance on public policies that encouraged that attachment—must we reject preservation and recreation in favor of natural resource extraction? Not necessarily. To say the arguments on behalf of preservation and removal often disguise significant self-interest is not to say they are entirely without merit. What is important to recognize is that whenever our public lands prescriptions are infected by self-interest, we must be less certain about their correctness. Such uncertainty goes beyond a mere recognition that inherent in any project is some level of uncertainty about the outcome. Where self-interest is involved, uncertainty requires some skepticism. Skepticism about our public lands aspirations would, hopefully, manifest itself in at least two ways. First, skepticism implies questioning.²⁹⁶ Some of that questioning should be directed at rural communities. We must take the time to listen to rural concerns, to allow rural communities to participate in public lands decision-making, and to find ways to fulfill our aspirations with the least impact. A second and related benefit of skepticism is that we would more thoughtfully and scrupulously achieve our public lands aspirations. If our preservation goal is in any measure self-interested, the end cannot justify the means.

²⁹⁶ The dictionary defines "skepticism" as "[a] doubting or questioning attitude or state of mind . . ." THE AMERICAN HERITAGE DICTIONARY 1146 (4th ed. 2000).

A. *Authentic Participation in Public Lands Decision-Making*

A principled and environmentally "just"²⁹⁷ public lands policy that takes account of rural communities requires authentic participation from those communities. At the bare minimum, public lands communities should be given notice and an opportunity to be heard on public lands decisions affecting their community. Unfortunately, the opportunity to comment and attend public hearings that accompany many public lands decisions often does little to enhance local participation. As Daniel Kemmis points out:

[N]ext to the courtroom, the public hearing room is our society's favorite arena for blocking of one another's initiatives In fact, out of everything that happens at a public hearing—the speaking, the emoting, the efforts to persuade the decision maker, the presentation of facts—the one element that is almost totally lacking is anything that might be characterized as 'public hearing.' A visitor from another planet might reasonably expect that at a public hearing there would be a public, not only speaking to itself but also hearing itself. Public hearing, in this sense, would be part of an honest conversation which the public holds with itself. But that almost never happens.²⁹⁸

However ineffective the public hearing and comment process may be, it remains true that notice and the opportunity to be heard is better than no notice at all, as any rural community adjacent to the Grand Staircase-Escalante National Monument would be quick to affirm.²⁹⁹ Nevertheless, notice and comment are only the barest minimum precisely because they so

²⁹⁷ The idea that the local communities should participate in decisions that affect their living environment is at the core of the environmental justice movement and literature. See, e.g., DANIEL FABER, *THE STRUGGLE FOR ECOLOGICAL DEMOCRACY: ENVIRONMENTAL JUSTICE MOVEMENTS IN THE UNITED STATES 1* (Daniel Faber ed., 1998) (arguing that the "fundamental" claim of the environmental justice movement is that local communities "be afforded greater participation in the decisionmaking processes of capitalist industry and the state (at all levels), as well as the environmental movement itself"). The same basic tenets which suggest that well-off urban areas should not be able to off-load their waste and environmental problems onto poorer communities also suggest that they should not be able to set aside rural areas as their playgrounds. In this same vein, the environmental justice literature has been critical of mainstream environmentalism for its focus on preservation and recreation. See, e.g., Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 266 (1997) ("The environmental justice literature observes that the mainstream environmental movement's agenda reflects the interests of its members: preservation of nature, outdoor recreational opportunities, and, in recent years, a concern with ambient environmental conditions."); MARK DOWIE, *LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY 1-8* (1995) (arguing that the environmental movement is dominated by the social and political elite and must instead focus on themes of environmental justice).

²⁹⁸ KEMMIS, *supra* note 245, at 52-53. For another relatively critical view of the efficacy of public participation in federal land management decisions, see Gail L. Achterman & Sally K. Fairfax, *Public Participation Requirements of the Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 501, 507-08 (1979) (concluding that the basic assumptions underlying public participation—that public involvement will lead to wiser decisions and greater acceptance by the public—are "largely unfounded").

²⁹⁹ See James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?* 70 U. COLO. L. REV. 483, 498-514 (1999) (discussing the procedure used to declare the Monument).

seldom result in authentic participation from rural communities.

A step up from basic notice and comment, and a second means of affirming more authentic participation in public lands decision-making, would be a greater reliance on the legislative process instead of on administrative and judicial management of the public lands. When legislators from public lands, communities, and states are denied the opportunity to influence public lands decisions, rural residents' concerns are more easily missed or dismissed. Deferring more often to the legislature does not mean that rural concerns will trump preservation concerns, particularly given the long-run likelihood that the public's preservation and recreation preference will continue to increase, but at least the legislature would allow rural concerns to be weighed in the public balance.³⁰⁰ Deference to the legislature also has the benefit of hewing to the Framers' conception that Congress would be the primary arbiter of the rules and regulations governing the public lands.³⁰¹

It is possible that these steps to augment rural communities' opportunities to participate in public lands decision-making would slow down the preservation effort. But if one retained at least some skepticism about the nobility of that effort, some delay could be tolerated. Just like increasing social anonymity has seemed to give rise to road rage (honking, shouting, or in the worst cases, shooting at other drivers who in the least bit hinder us from quickly reaching our destinations), avoiding rural participation creates a sort of policy-making anonymity that can encourage administrative fiat and federal court orders³⁰² as a way to achieve our preservation objectives. Delay seems a worthwhile price of basic civility in either situation, but more than that, either activity done with respect for others is much safer and less likely to injure.

A third method of working toward authentic participation would be to emulate in the public lands context the various watershed management

³⁰⁰ The point is not that executive administration of public lands policy never considers the interests of rural communities. It can and will depending on the disposition of the administration. The point is that the legislative process does more to assure participation because narrower constituencies are sure to have at least some voice.

³⁰¹ See U.S. CONST. art. IV, § 3, cl. 2 (Property Clause) (giving Congress the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"). For a general overview of the Property Clause, see Eugene R. Gaetke, *Refuting the "Classic" Property Clause Theory*, 63 N.C. L. REV. 617 (1985); Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 806-07 (1993) (discussing the so-called "classical," "moderate classical," and "sovereign" views of the Property Clause and citing cases and articles).

³⁰² Discussing the concern of our increasingly litigious society, Robert Samuelson makes a similar point:

We are quietly delegating our democracy in unwise ways. Democracy—politics—is messy because it engages competing interests and attitudes. The conversion of difficult political choices into legal issues (disputes that can be litigated) usually involves a narrowing process that excludes important social considerations. Complex disagreements become simple questions of right and wrong. Compromise gives way to "winner take all" outcomes.

Robert J. Samuelson, *Lawyers Unchained*, WASH. POST, June 7, 2000, at A31.

initiatives, groups, and councils that have sprung up throughout the country.³⁰³ Although watershed management has a number of different meanings, it generally involves the inclusion of a variety of stakeholders in what Denise Fort has explained is "a flexible, responsive, 'bottom-up' consensus-building process rather than a universal, standardized, 'top-down' product"; the process stresses "negotiation and consent rather than command-and-control regulation."³⁰⁴ The advantage of making decisions from the bottom up is that the process is more likely to account for the unique sense of the particular public lands and community at issue. This sort of bottom-up process is the essence of the place-based collaboration advocated by Daniel Kemmis and others.³⁰⁵

Collaborative and bottom-up approaches have been the subject of some thoughtful critiques. Some have criticized efforts to allow local decision-making in the watershed context as an improper abdication of federal and state control over the environment.³⁰⁶ That concern, however, could be partially ameliorated by requiring the collaborative process to adhere to certain federal standards while leaving the details up to local decision-makers. Such an approach has been tried in the watershed context with some success.³⁰⁷ Applied in the public lands context, it could affirm the federal ownership of public lands while upholding in greater measure the interests of rural communities in the places they inhabit.³⁰⁸ Others have

³⁰³ For a description of some of the variety of watershed initiatives, see Betsy Rieke & Doug Kenney, *Resource Management at the Watershed Level: An Assessment of the Changing Federal Role in the Emerging Era of Community-Based Watershed Management*, REPORT TO THE WESTERN WATER POLICY REVIEW ADVISORY COMM'N (1997); William Goldfarb, *Watershed Management: Slogan or Solution?*, 21 B.C. ENVTL. AFF. L. REV. 483 (1994).

³⁰⁴ Denise D. Fort, *Restoring the Rio Grande: A Case Study in Environmental Federalism*, 28 ENVTL. L. 15, 16 (1998) (citing and quoting William Goldfarb, *Watershed Management: Slogan or Solution*, 21 B.C. ENVTL. AFF. L. REV. 483, 498-99 (1994)).

³⁰⁵ Daniel Kemmis suggests that the shared and repeated practices involved with inhabiting a place create a set of shared values that allow for true public participation. KEMMIS, *supra* note 245, at 79-80. See also *id.* at 116-17, 126-27 (arguing that true collaboration is most possible when the parties have a shared sense of place and that where divergent views inhabit the same space "they would soon discover that no one wants local sawmills closed, and no one wants wildlife habitat annihilated").

³⁰⁶ See, e.g., George C. Coggins, *Regulating Federal Natural Resources: A Summary Case Against Devolved Collaboration*, 25 ECOLOGY L.Q. 602, 603 (1999) (criticizing what he terms "devolved collaboration"). See generally Rena I. Steinzor, *The Corruption of Civic Environmentalism*, 30 ENVTL. L. REP. NEWS & ANALYSIS 10,909 (2000) (raising a number of concerns with "civic environmentalism" and the idea of delegating environmental decisions to local groups and interested parties).

³⁰⁷ In his study of the Truckee-Carson Settlement, Dan Tarlock identified federal mandates under the Endangered Species Act and Clean Water Act as an important component of effective watershed initiatives. See A. Dan Tarlock, *The Creation of New Risk Sharing Water Entitlement Regimes: The Case of the Truckee-Carson Settlement*, 25 ECOLOGY L.Q. 674, 681-83 (1999). See also Elizabeth Ann Rieke, *The Bay-Delta Accord: A Stride Toward Sustainability*, 67 U. COLO. L. REV. 341, 342 (1996) (also identifying as "critical" to watershed management the existence of federal mandates).

³⁰⁸ An approach that might do even more to empower local participation would be to allow local communities to participate in the management of preservation lands through some sort of trust arrangement. Again, the terms of the trust could specify certain preservation objectives

criticized collaborative processes as leading to endless talk and producing few tough decisions.³⁰⁹ That criticism has some merit, but if no consensus can be achieved, the real question is who should be the default decision-maker. The participation norm suggests that Congress, rather than an administrative agency or the courts, should make the public lands decisions that are not susceptible to more collaborative, place-based resolution.

Another way of affirming the interests of rural communities in the places they inhabit would be to ensure that they reap some of the economic benefits, or at least not merely the detriments, of any shift toward preservation and recreation. For instance, a number of statutes compensate public lands counties for the tax exempt status of federal land,³¹⁰ generally by paying counties based on federal revenues from commodity and extractive uses of the public lands.³¹¹ These statutes could be revised to provide more generous compensation to counties based on visitor days, recreation visits, or another figure related to recreational use.³¹²

but allow local inhabitants to implement those objectives in ways least harmful and most beneficial to their economic standing and cultural identity. For a discussion of how such a trust arrangement might work, see Terry L. Anderson & Holly Lippke Fretwell, *A Trust for Grand Staircase-Escalante*, POLITICAL ECONOMY RES. CENTER (PERC) POL. SERIES (Issue No. PS-16, Sept. 1999). Although Anderson and Fretwell suggest that the trustees be nominated from various interest groups without regard to residency in the local community, *id.* at 7, the basic principles would be the same. Such efforts to increase local participation in public lands management should survive challenges under the non-delegation doctrine. See *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905) (upholding provision of mining law entrusting the development of "minor and subordinate regulations" to local mining districts).

³⁰⁹ George C. Coggins, *Abdication Can Be Fun, Join the Orgy Everyone: A Simpleton's Perspective on Abdication of Federal Land Management Responsibilities*, in CHALLENGING FEDERAL OWNERSHIP AND MANAGEMENT: PUBLIC LANDS AND PUBLIC BENEFITS 14 (Univ. of Colorado School of Law, Natural Resources Law Center, Conference Proceedings, Oct. 11-13, 1995) ("Sitting down and feeling good are merely phony substitutes for real conflict resolution.").

³¹⁰ See generally COGGINS ET AL., *supra* note 47, at 223-26 (discussing the various federal acts by which Congress has sought to compensate states and counties for the tax exempt status of federal lands). The reasoning behind such compensation statutes was explained by the Supreme Court in a case involving the Payment-in-Lieu-of-Taxes (PILT) Act:

Where these [county] lands consisted of wilderness or park areas, they attracted thousands of visitors each year. State governments might benefit from this federally inspired tourism through collection of income or sales taxes, but these revenues would not accrue to local governments, who were often restricted to raising revenue from property taxes. Yet it was the local governments that bore the brunt of expenses associated with federal lands, such as law enforcement, road maintenance, and the provision of public health services.

Lawrence County v. Lead-Deadwood Sch. Dist., 469 U.S. 256, 262-63 (1985).

³¹¹ See generally COGGINS ET AL., *supra* note 47, at 224 (noting that a "common device is the payment of a percentage of proceeds from resource development"). Perhaps the most commonly cited of these acts, the Payment-in-Lieu-of-Taxes Act or PILT, is not, itself, dependent upon resource revenue and provides for a minimum payment to counties based on a formula of acreage and population (payments are greatest for counties with 5,000 or fewer inhabitants and decrease with population increase up to 50,000 inhabitants, over which all counties are treated as if they had 50,000 inhabitants). 31 U.S.C. § 6903 (1994 & Supp. I 1995).

³¹² Congress recently passed two bills increasing payments to counties. One allocates \$442 million per year as the counties' share of Forest Service and BLM revenues, doubling the

Allowing local residents to participate directly³¹³ in the preservation and recreation revenues generated by the public lands would do little to stem the tide of removal. Indeed, if the revenues were greater than those available from commodity uses, the removal process may even proceed more quickly. Economic participation must, therefore, be distinguished from the other forms of participation advocated. Rather than increasing rural communities' participation in decisions about management of the public lands, economic participation would serve primarily as an inducement to support the preservation agenda. Thus, economic participation should not be viewed as a sufficient substitute for participation in the decisions about how the public lands are to be managed; its purpose is a supplemental recognition of rural communities' cultural and economic dependence on the surrounding public lands. Nevertheless, if preservation is to proceed, as seems likely, it should at least carry a financial reward rather than a financial penalty, as is currently the case when payments are tied to revenues from commodity and extractive use of the public lands.³¹⁴

The surest but most controversial way to encourage authentic participation from local communities would be to allocate property rights in portions of the public lands. Some have advocated such privatization not only as a means of efficient management but also because they believe it would result in an increase in the higher-valued uses of preservation and recreation.³¹⁵ Theoretically, privatization guarantees rural participation in

existing payment. See *Congress Passes Final County Payments Bill Like Senate's*, PUB. LANDS NEWS, Oct. 13, 2000, at 4. The other increases the annual PILT payments to counties. See *CARA-Lite Beefs Up LWCF and PILT, Subject to Money Bills*, PUB. LANDS NEWS, Oct. 13, 2000, at 5. The latter was signed by the President, *id.*, and the former is expected to be signed soon. See *id.* at 4.

³¹³ Adjacent communities already benefit indirectly from preservation and recreation revenues in the form of tourism and development dollars spent to take advantage of the preservation and recreation amenity. See *supra* notes 118–25 and accompanying text (discussing the economic benefits of preservation and recreation). Additional direct payments could be made to local communities by, for example, sharing a portion of the revenue from entrance fees, user fees, and the like. This approach has been attempted with some of the indigenous communities in Africa displaced by preservation initiatives. See HONEY, *supra* note 103, at 12 (noting that the Kenyan government put several of its reserves “under the control of local county councils, which began receiving revenue from both park entrance fees and hotels and other tourism facilities”); *id.* at 243–44 (discussing how poaching of elephants in the Selous Conservation Project in Tanzania decreased once half of all legal hunting revenues were set aside for the local community); *id.* at 247 (relating similar experience with the villages outside of Kenya’s Maswa Game Reserve); *id.* at 365 (discussing a similar revenue-sharing arrangement implemented by the KwaZulu Department of Nature Conservation in South Africa where the Department “included elected representatives of local communities or community liaison officers on their management committees” and gave “25 percent of all profits from culling, sale of wildlife, park entrance fees, and tourism-related facilities and services to use for ‘social upliftment’ projects”). Ultimately, this sort of continuing transfer payment is a less appealing way of recognizing rural ties to the public lands than procedural participation or privatization because it is not tied to the costs imposed by recreation.

³¹⁴ As discussed in connection with the privatization option, if sharing revenue were to cause rural communities themselves to emphasize recreation and preservation, the shift would be more a function of local choice than federal fiat. See *infra* note 319 and accompanying text.

³¹⁵ See generally SCOTT LEHMANN, *PRIVATIZING PUBLIC LANDS* (1995) (advocating privatization

public lands decisions by allowing rural residents, individually or collectively, to price their interest in the public lands. Unfortunately, privatizing all the public lands by opening them to some sort of public bid would assign no value to rural communities' longstanding ties to the land. It would also fail to recognize the value of leaving certain lands open to the public. Whatever the inadequacies of federal agency management,³¹⁶ there is still something gratifying about recognizing Yellowstone, Yosemite, the Grand Canyon, and many other places, as public.

Not all our public lands, however, must remain public, or at least not wholly so. Thus, it may make sense to adopt a narrower privatization approach and to grant ranchers a property right in their grazing allotments, or to allow them to purchase their permits based on their current capitalized value. This narrower program, which some have advocated,³¹⁷ would recognize rural communities' long-standing ties to the public lands and would affirm the participation norm because once a rancher holds a right, she would be party to any negotiation over the status of the land.³¹⁸ Many preservation advocates have been critical of privatizing grazing rights,³¹⁹ but

of public lands); Richard L. Stroup, *Privatizing Public Lands: Market Solutions to Economic and Environmental Problems*, 19 PUB. LAND & RESOURCES L. REV. 79 (1998) (advocating privatization and arguing that it would improve environmental quality); Terry L. Anderson et al., *How and Why to Privatize Federal Lands*, 363 POL'Y ANALYSIS, Nov. 9, 1999, at 1; RICHARD L. STROUP & JOHN A. BADEN, NATURAL RESOURCES: BUREAUCRATIC MYTHS AND ENVIRONMENTAL MANAGEMENT 123-27 (1983) (advocating sale of the national forests).

³¹⁶ See generally Robert H. Nelson, *Government as Theater: Toward a New Paradigm for the Public Lands*, 65 U. COLO. L. REV. 335, 335-50 (1994) (pointing out a variety of errors in federal land management from administrations of both parties); Anderson et al., *supra* note 315, at 4-7 (discussing the ecological and financial mismanagement of the public lands by the federal land management agencies).

³¹⁷ John A. Baden, *The Great Grazing Grapple: Rangeland Reform Must Reflect Changing Realities*, DENV. ROCKY MTN. NEWS, Aug. 20, 1995, at 93A (advocating a procedure by which ranchers could purchase their grazing permits "for the current capitalized value of existing grazing fees," creating "property rights to the grass, not the land"); Nelson, *supra* note 283, at 650-54 (advocating private forage rights under either a federal leasing system or full privatization).

³¹⁸ Those who support privatization of the public lands as a matter of efficiency theory should not be disturbed that the right is assigned to the rancher rather than to the public. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 6-8 (1960) (theorizing that if the initial allocation of rights is well-defined, and if a free market with perfect information operates, resource allocation will ultimately be efficient regardless of where the initial property right is assigned).

³¹⁹ Joseph M. Feller, *Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy*, 25 ENVTL. L. 703, 714 (1995) ("Many ranchers are not interested in selling their grazing rights, and private funding is unlikely to retire more than a small fraction of the millions of acres of public lands that are currently being grazed where grazing makes no economic or environmental sense."); Mark N. Salvo, *The Declining Importance of Public Lands Ranching in the West*, 19 PUB. LAND & RESOURCES L. REV. 103, 103 (1998) (arguing that "with environmental damage caused by cattle grazing clearly established, there is little justification for continuing with the current public lands grazing scheme, or even adopting a new system such as privatization of the range"). Because many grazing permits are controlled by absentee individuals and corporations who are not residents of the rural communities, STROUP & BADEN, *supra* note 315 (pointing out the broad corporate ownership of grazing permits); DONAHUE, *supra* note 137, at 273 (same), some may argue that privatization

such an approach would likely be a net gain for preservation and recreation. The federal government could retain the underlying fee and a limited access easement for the public, and where grazing was incompatible with preservation and recreation, members of the public and preservation organizations could purchase the grazing right.³²⁰ Indeed, because privatization could well be a net gain for preservation and recreation, those who want to stabilize rural communities might even argue against it, viewing privatization as another misguided allotment plan,³²¹ and fearing that ranchers will succumb to economic temptation as have so many farmers in urban edge areas. But if public lands were privatized, at least the core constituents of the public lands communities themselves would decide upon the importance of maintaining their working ties to the land and help shape the view of how the lands they inhabit should be used. If the distinctiveness of the rural West is to be lost, it is better that it occur *de facto*, as the result of bottom-up, organic change, than *de jure*, as the result of federal certitude.

Whatever one thinks of privatization, raising it as a possibility should not obscure the broader point that participation of rural communities, not privatization of grazing permits, is the crucial ingredient of any means selected to achieve the objective of preservation and recreation. Again, it is not that the goal of preservation is inappropriate. Indeed, stopping or reversing the *de facto* transition occurring in the rural West should not be the goal of public lands policy.³²² Nor, however, should it be the purpose of

will do little to benefit rural communities. Although the absentee owner or company may employ residents of the local community who may make marginal participatory gains by their employer's private rights, there is no denying that privatization would also confer a windfall on those without significant ties to land or community. Although one could attempt to limit privatization only to those who dwelled on a base ranch in the adjacent communities, similar sorts of efforts under the Reclamation Act have a long history of circumvention and failure. Christine A. Klein, *On Dams and Democracy*, 78 OR. L. REV. 641, 676-77 (1999) (briefly recounting this history and citing sources). Thus, there is reason to suspect that a similar rule in the grazing context would produce a similar result. Ultimately, the question is whether the benefit to public lands communities should be foregone because some outside the community would also benefit.

³²⁰ Some would object that privatization will not increase preservation because individuals will not have a sufficient incentive to pay the full public preservation value to stop grazing (the collective action concern) or ranchers may act "irrationally" and refuse to sell (the hold-out concern). These theoretical objections must, however, be weighed against the current situation in which preservation advocates must generally rely on the federal government to restrict grazing, which presents its own set of difficulties. Moreover, even under the current regime, preservation groups have had some success paying ranchers not to graze certain areas. Lisa Church, *Fun Hogs to Replace Cows in a Utah Monument*, HIGH COUNTRY NEWS, Feb. 1, 1999, at 4 (discussing deal brokered by the Grand Canyon Trust between the BLM and five ranching families to stop grazing on about 120,000 acres within especially popular canyons in the Grand Staircase-Escalante National Monument); Sandra Chereb, *Deal Means Grazing Ends in Great Basin Park*, COLUMBIAN, Jan. 6, 2000, at 4 (describing how The Conservation Fund helped raise \$220,000 to buy out the grazing permits held by three ranchers within Nevada's Great Basin National Park). Finally, the federal route would still be available by way of condemnation.

³²¹ This allotment analogy would be somewhat misguided. It would be more appropriate if the rural community collectively held the grazing rights, and the proposal was to transfer the rights to individual members of the community.

³²² Increasing consumption of our natural resources would be only a temporary boon and

public lands policy to speed that transition along,³²³ or at least not to speed it along without regard to the burden imposed. The point is that the preservation aspiration should be pursued in a skeptical and virtuous fashion, which necessarily entails authentic participation from rural communities. Unfortunately, skepticism has not been the hallmark of the Clinton Administration's accelerating shift to preservation.³²⁴ Adherence to the participation norm has been sparse, with sporadic efforts at notice and comment and hardly any thought of the more generous steps of collaboration and privatization. In the sections that follow, the Article critiques this sparing adherence to the participation norm, with particular focus on the Department of Interior.³²⁵

B. *The New Certainty and the Perils of Administrative Change*

As foreshadowed by his comments to the Sierra Club,³²⁶ and his earlier leadership of the League of Conservation Voters,³²⁷ during his tenure at the Department of the Interior, Secretary Babbitt has worked diligently to diminish the emphasis on commodity uses of the public lands in favor of preservation and recreation. From the earliest days of the Clinton Administration, Secretary Babbitt has pursued an ambitious agenda to reform public land law to achieve this goal. His initial approach was legislative. The Administration proposed and supported grazing and mining reform legislation,³²⁸ as well as a number of other public lands changes.³²⁹

would not promote a sustainable community.

³²³ See *infra* Part VI.B (criticizing some of the Clinton Administration's *de jure* efforts to encourage the transition away from rural dependence on extractive and commodity use of the public lands).

³²⁴ See *infra* Part VI.B (discussing the Clinton Administration's vigorous administrative efforts to change mining and grazing laws and its aggressive use of the Antiquities Act to proclaim National Monuments).

³²⁵ The Department of the Interior is not the only agency within the Administration that has pursued an aggressive administrative program favoring preservation; witness the Department of Agriculture's National Forest Roadless Policy initiative as one example. For a discussion of this policy, see *infra* note 432. This Article focuses on the Department of the Interior because the Interior Secretary is traditionally understood as the primary federal official charged with public lands policy and because Secretary Babbitt has pursued such a committed and constant policy in favor of preservation and recreation.

³²⁶ See *supra* notes 149-51 and accompanying text (quoting Babbitt's speech to the Sierra Club).

³²⁷ Bruce Babbitt, *Interior Secretary*, available at <http://wpni.com/wp-srv/politics/govt/admin/babbitt.htm> (last visited Nov. 6, 2000).

³²⁸ Patrick Garver & Mark Squillace, *Mining Law Reform—Administrative Style*, 45 ROCKY MTN. MIN. L. INST. 14-1, 14-4 to 14-8 (1999) (discussing the Administration's early support for changes to the mining law); Arruda & Watson, *supra* note 232, at 428-29 (discussing the Administration's legislative efforts in the grazing law context).

³²⁹ See, e.g., 1993 *Summary of Major Legislation: Government & Commerce*, CONG. Q. WKLY. REP., (Dec. 11, 1993), available at 1993 WL 7767997 (noting the Administration's support for the California desert protection bill); H.R. REP. No. 396 (1995) (describing the Administration's support for Utah wilderness bills); 140 CONG. REC. S3311, 3320 (1994) (statement of Sen. Bumpers) (noting the Administration's support of S. 208, the National Park Service Concessions Policy Reform Act of 1994); *State Reports - Alaska: Sen. Stevens Bemoans*

These early legislative efforts, however, were largely unsuccessful. Their prospects for success were further diminished when the Republicans took control of Congress in 1994. Rather than be content with the incremental compromise steps that could have been achieved in negotiation with the Republicans, Secretary Babbitt turned to a unilateral, administrative approach that has become increasingly confident and aggressive in its promotion of preservation and recreation. Unfortunately, this approach to public lands issues has too often given little voice to the concerns of rural communities, and conscientious and principled means have too often taken a back seat to the preservation end. The examples from the last seven and one-half years have grown numerous.

1. *Administrative Changes to the Mining Law*

As soon as he took office in 1993, Secretary Babbitt offered his support of current legislative efforts to change the mining laws, signaling his strong support for the project by appointing John Leshy, a long-time critic of the mining laws, to serve as the Interior Department's Solicitor.³³⁰ As outlined by Pat Garver and Mark Squillace in their investigation of Secretary Babbitt's efforts to reform the mining laws,³³¹ the Secretary's agenda included six major objectives: he wanted to end patenting of mining claims; to assure a fair return to the government for the minerals in the public lands by charging a royalty and other fees; to give federal land managers more discretion to declare some areas unsuitable for mining; to impose more stringent environmental and reclamation standards; to establish a program for cleaning up old mine sites; and to obtain additional enforcement authority.³³² All these objectives were included in the legislation that passed the House in 1993, but the bill never made it out of the House and Senate conference committee.³³³ When the Republicans swept into the majority in 1994, the chances of Secretary Babbitt achieving all his objectives without compromise were further diminished, but the Secretary remained confident in his vision for changes in the mining law. Thus, as he had threatened to do,³³⁴ he began to pursue administratively what he had not been able to

Probable Preservation of ANWR, 2 AM. POL. NETWORK 194 (Feb. 18, 1993), available at WL ALLNEWSPLUS (noting the Administration's support for the designation of the Arctic National Wildlife Refuge as a protected wilderness); *Industry, Environmentalists Take their Cuts as Clinton OKs Logging Plan*, SAN DIEGO UNION-TRIB., July 1, 1993, available at 1993 WL 7497109 (discussing the Administration's plan to reduce logging on federal lands); 140 CONG. REC. S14,046, 14,046-14,047 (1994) (statement of Sen. Pell (D-RI)) (addressing the Administration's request that the Senate ratify the Convention on Biological Diversity).

³³⁰ Professor Leshy had earlier testified before Congress that the mining laws were "a national embarrassment," *Mining Law of 1872: Oversight Hearings Before the House Subcomm. on Mining and Natural Resources*, 100th Cong. 67 (1987) (statement of John D. Leshy) (forthcoming), and had authored a persuasive book calling for mining law reform. See LESHY, *supra* note 42.

³³¹ See Garver & Squillace, *supra* note 328.

³³² *Id.* at 14-6.

³³³ *Id.* at 14-6 to 14-7.

³³⁴ See *Mining Reform Dies; Blame Game Begins*, WKLY BULL.: ENVTL. & ENERGY STUDY

accomplish by legislation.

Instead of legislation ending the patenting of mining claims, Secretary Babbitt slowed the patent issuance process to a crawl by terminating the practice of allowing miners to contract out the mineral examination process and then by creating a byzantine and inefficient process of secretarial review.³³⁵ Likewise, rather than wait for legislation giving land managers more discretion to declare some areas unsuitable for mining, Solicitor Leshy issued an Opinion providing that patent applicants would henceforth be entitled to only one five-acre millsite per mining claim.³³⁶ This approach departed from long practice and the Interior Department's own position of at least twenty years under which patent applicants could make as many millsite claims as were necessary for their mining operation.³³⁷ With only one millsite available per mining claim, mining companies must now obtain discretionary federal approval to conduct their millsite activities on adjacent land not subject to patent.³³⁸ Undeterred by the considerable disagreement about whether multiple millsites should be allowed within the language of the mining law,³³⁹ and by years of practice and reliance by mining companies, the Secretary thus achieved his legislative objective without the trouble of notice and comment or compromise.³⁴⁰

More recently, the Secretary approved another opinion by Solicitor

INST., Oct. 3, 1994, at B1. (suggesting that if mining reform did not pass in 1994, "[n]ext year, we will return on two tracks: We will again pursue legislation and we will also explore the full range of regulatory authority we now possess.").

³³⁵ See *Independence Mining Co. v. Babbitt*, 885 F. Supp. 1356, 1358-59 (D. Nev. 1995), *aff'd* 105 F.3d 502 (9th Cir. 1997) (describing the Secretary's steps to delay the issuance of patents). Although the district court in *Independence* refused to grant the mining company's request for mandamus and require Secretary Babbitt to issue the requested patents, the court called the Secretary's delaying actions "shameful" and "clearly contrary to Congress's intent, as expressed in the 1872 mining statute." *Id.* at 1364.

³³⁶ Solicitor's Opinion M-36988, *Limitations on Patenting Millsites Under the Mining Law of 1872* (Nov. 7, 1997), cited in Garver & Squillace, *supra* note 328, at 14-10 to 14-12. A millsite is the area used for processing facilities, tailings impoundments, the storage of waste rock, and other activities related to removing and processing a mineral.

³³⁷ See Garver & Squillace, *supra* note 328, at 14-11 to 14-14 (discussing the Interior Department's long practice of approving multiple millsite claims).

³³⁸ *Id.* at 14-17 to 14-24 (discussing this and other potential impacts of the millsite opinion).

³³⁹ *Id.* at 14-12 to 14-17 (detailing the arguments on both sides of this debate).

³⁴⁰ The Secretary's reforms were partially thwarted by Congress. In May 1999, Congress, in a supplemental appropriations measure, provided that the millsite opinion would not apply to any pending patent applications or plans of operation. 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, § 3006(c), 113 Stat. 57, 90-91 (1999). As this was part of an appropriations bill, it was not clear whether this limitation extended beyond the fiscal year. See Roger Flynn, *The 1872 Mining Law as an Impediment to Mineral Development on the Public Lands: A 19th Century Law Meets the Realities of Modern Mining*, 34 LAND & WATER L. REV. 301, 377 (1999) (discussing the impact of this rider and the millsite opinion more generally). Thus, later in 1999, in the 2000 Interior Department Appropriation Bill, Congress extended the limitation on the millsite opinion through 2001 only for patents pending at the time the Solicitor's Opinion was authored. Consolidated FY 2000 Appropriations; App., Pub. L. No. 106-113, § 337(a), 113 Stat. 1501, 1501A-199 (1999). Further congressional action seems likely. See *Emergency Money Bill May Provide Hard Rock Rider Opening*, PUB. LANDS NEWS, Mar. 17, 2000, at 3-4 (discussing possible congressional action).

Leshy claiming authority for BLM to reject plans of operations for hard rock mines that unduly impair cultural and environmental resources.³⁴¹ This claim also represents a new and aggressive interpretation of the Secretary's authority under FLPMA to "take any action necessary to prevent unnecessary or undue degradation" of the public lands.³⁴² Previously, this language had generally been understood as allowing the Secretary to regulate mining and impose environmental mitigation measures but only so long as mining would not be altogether prohibited.³⁴³ In another step to increase the Secretary's ability to restrict mining, the Secretary has hinted that the Department may have the authority to review the validity of mining claims under a different standard than that which has been employed for over 100 years. Whereas the Department has long judged claims by reference to whether the located mineral had sufficient value to justify mining it,³⁴⁴ in a recent decision the Secretary suggested that it may be more appropriate to apply a comparative value test under which the potential value of a mining operation is weighed against the other potential values of the land, namely recreation and preservation.³⁴⁵

³⁴¹ See Memorandum from John D. Leshy, Solicitor, Department of the Interior, to Secretary Babbitt, *Regulation of Hardrock Mining*, 6-10 (Dec. 27, 1999) (copy on file with author); *Leshy Holds BLM May Deny Mining Plan for 'Undue' Impacts*, PUB. LANDS NEWS, Jan. 21, 2000, at 1 (discussing the Solicitor's opinion and its subsequent approval by Secretary Babbitt).

³⁴² See 43 U.S.C. § 1732(b) (1994).

³⁴³ See *Sierra Club v. Hodel*, 848 F.2d 1068, 1090-91 (10th Cir. 1988) (holding that although the BLM could require a mining claimant to adopt less degrading access routes, it could not deny a proposed access improvement altogether); *Southwest Resource Council*, 96 I.B.L.A. 105, 120 (1987) ("BLM may require design changes in plant operation or in the route of access. The BLM may not, however, absolutely forbid mining or totally bar access to a valid mining claim."); *Cf. United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981) (suggesting that while the Secretary of Agriculture could regulate mining in the National Forests to protect the environment, mining could "not be prohibited nor so unreasonably circumscribed as to amount to a prohibition"); *United States v. Shumway*, 199 F.3d 1093, 1106-07 (9th Cir. 1999) (concurring with *Weiss* panel's view of the permissible scope of regulation). *But see Clouser v. Espy*, 42 F.3d 1522, 1529 (9th Cir. 1994) (suggesting that the Forest Service will not overstep its authority if its regulation of a mining operation only has the "collateral consequence" of rendering a claim invalid for purposes of discovery). See generally Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 *ECOLOGY L.Q.* 57 (1997) (discussing the appropriate scope of mining regulation and whether it may constitute a taking).

³⁴⁴ The Department of the Interior has traditionally employed two tests: the prudent miner test of *Castle v. Womble*, 19 L.D. 455 (1894), and the marketability test of *United States v. Coleman*, 390 U.S. 599 (1968). Under the former test, the question has been whether the mineral has sufficient value to justify the expenditure of labor and means by a miner of ordinary prudence. See *Womble*, 19 L.D. at 457. Under the latter test, the question has been whether the mineral is marketable at a profit. See *Coleman*, 390 U.S. at 601-02. The opportunity costs associated with devoting the land to a different purpose have not been part of the equation.

³⁴⁵ Exercising his authority to review the decisions of the Interior Board of Land Appeals, see 43 C.F.R. § 4.5 (1999), Secretary Babbitt reviewed an IBLA decision, *United States v. Opined Mining Corp.*, 142 I.B.L.A. 339 (1998), in which the Board majority, in a 6-4 split, had opined that the comparative value of the public lands for other purposes could be considered in determining whether a claim under the Building Stone Act was valid. *Id.* Secretary Babbitt determined that the language of the Building Stone Act, which requires land to be "chiefly valuable for building stone," see Act of Aug. 4, 1892, 27 Stat. 348, (as codified at 30 U.S.C. § 161 (1994)), allowed the Department to consider if another use of the land was more valuable. See

Yet another aggressive administrative alteration of the mining law has arisen from the Secretary's efforts to achieve his original legislative objective of more stringent environmental and reclamation standards. Following FLPMA's passage in 1976, the Department of the Interior promulgated regulations found at 43 C.F.R. subpart 3809 to implement its authority to take actions "necessary to prevent unnecessary or undue degradation" of the public lands.³⁴⁶ In 1997, Secretary Babbitt initiated an effort to change the regulations. The proposed regulations that resulted were "strikingly similar" to the legislation he had earlier endorsed; they imposed significant new requirements on miners and substantially expanded BLM's authority.³⁴⁷

Perhaps what is most striking about the 3809 regulations, however, is the highly combative and utterly self-assured way in which the Secretary pursued the changes in the face of congressional opposition. Even before the proposed regulations were issued, Congress, in a rider to its 1998 Interior Appropriations bill,³⁴⁸ required the Secretary, before proposing any changes in the regulations, to consult with the governors of the Western public lands states and prohibited the Secretary from publishing revised regulations until November 15, 1998.³⁴⁹ But three days after the bill was signed and without any further action by the agency, Pat Shea, the Director of BLM, announced that consultation had been completed.³⁵⁰ Then, prior to the expiration of the moratorium, Congress, in its Supplemental 1999 Interior Appropriations bill, required that the National Research Council (NRC) of the National Academy of Sciences conduct an independent

Decision Upon Review of *United States v. United Mining Corporation*, 142 I.B.L.A. 339, (May 15, 2000). Although the same "chiefly valuable" language does not appear in the mining law, the Secretary suggested that the term "valuable for minerals may imply the need to consider 'valuable' relative to other quantifiable and non-quantifiable values." *Id.* at 5. Although he left that determination for another day, *id.*, there seems to be little question about the direction in which he intends to go.

³⁴⁶ Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(b) (1994); Bureau of Land Mgmt., Dep't of the Interior - Pub. Lands: Regulations Relating to Pub. Lands, 43 C.F.R. § 3809.0-1 to 3809.6 (1998).

³⁴⁷ See Garver & Squillace, *supra* note 328, at 14-52 to 14-58 (discussing the significant scope of the proposed regulatory changes and how they mirror the Secretary's earlier legislative proposals).

³⁴⁸ Legislative riders have been criticized as undermining the democratic process in the same way as aggressive administrative action does. See Sandra B. Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 500-11 (1997). Although riders may be less desirable than legislation adopted through a more deliberate process of committee hearings and real floor debate, they do not undermine the democratic process. Passing substantive legislation is the constitutional mission of Congress, and representatives who vote for riders must still justify that vote to their constituents.

³⁴⁹ See Department of the Interior and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-183, § 339, 111 Stat. 1543, 1603 (1997). See generally Garver & Squillace, *supra* note 328, at 14-58 to 14-62 (discussing the development of the 3809 regulations and the battle between Congress and the Secretary).

³⁵⁰ See Garver & Squillace, *supra* note 328, at 14-59.

evaluation of the need for new 3809 regulations,³⁵¹ and extended the moratorium on the final 3809 regulations until September 30, 1999,³⁵² two months after the NRC was to issue its report. Rather than waiting to hear what the NRC had to say, however, Secretary Babbitt went ahead and published the proposed regulations on February 9, 1999 and set the comment deadline for May 10, 1999, some six weeks before the NRC was to issue its report.³⁵³ On May 21, 1999, Congress responded to the Secretary's refusal to consider the NRC report by requiring him to leave the comment period open for at least 120 days after issuance of the NRC report.³⁵⁴ In October 1999, however, the Secretary suggested that the recently-issued NRC report fully supported the need for all the proposed 3809 regulations.³⁵⁵ In response, Congress, in the 2000 Interior Appropriations bill, required that the regulations be revised consistent with the recommendations contained in the report.³⁵⁶ Solicitor Leshy, however, quickly countered with an opinion that the new 3809 regulations only needed to be consistent with the sixteen recommendations made in the NRC report and "not with the tenor of the report as a whole."³⁵⁷ Although the final regulations have not yet been issued, when they are there is likely to be litigation over the meaning of the congressional requirement that the regulations be consistent with the NRC report.³⁵⁸

³⁵¹ See Department of the Interior and Related Agencies Appropriations Act of 1999, Pub. L. No. 105-277, § 120(b), 112 Stat. 2681, 257-58 (1998).

³⁵² *Id.* § 120(d) ("The Secretary of the Interior shall not promulgate any final regulations to change the Bureau of Land Management regulations found at 43 CFR Part 3809 prior to September 30, 1999.").

³⁵³ Garver & Squillace, *supra* note 328, at 14-61.

³⁵⁴ Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, § 3002, 113 Stat. 57, 89 (1999).

³⁵⁵ See *3809 Study Chair Says Babbitt and Industry Both Have a Case*, PUB. LANDS NEWS, Oct. 15, 1999, at 8-9 (discussing Secretary Babbitt's contention that the National Research Council (NRC) report underscored the need for legislative reform and that he intended to proceed forthwith to propose the new 3809 regulations).

³⁵⁶ See Department of the Interior Fiscal 2000 Appropriations Bill, Pub. L. No. 106-113, § 357, 113 Stat. 1501, 1501A-201 (1999) (requiring that 3809 regulations be "not inconsistent with the recommendations contained in the [NRC] report"). The NRC report had concluded that existing rules were generally effective but that some regulatory changes were needed. *3809 Study Chair Says Babbitt and Industry Both Have a Case*, *supra* note 355, at 8-9.

³⁵⁷ See Solicitor's Memorandum of Dec. 8, 1999 (on file with author) (contending that the rider language "refers only to the numbered bold-face recommendations in the report, and not to any conclusions, discussions or other parts of the NRC report"). *Westerners Again Say 3809 Regs Not Needed; Leshy Attacked*, PUB. LANDS NEWS, Mar. 3, 2000, at 5 (on October 26, 1999, BLM had asked for public comment on how the Secretary's proposed 3809 regulations comported with the NRC report).

³⁵⁸ The draft of the final regulations proposed to add a tougher definition of "unnecessary and undue degradation" that would have forbidden any activity that caused "substantial irreparable harm." See *Draft Final BLM 3809 Regs Tighten 'Degradation' Definition*, PUB. LANDS NEWS, Aug. 4, 2000, at 1-1. In negotiations over another potential 3809 rider to the 2001 Interior Appropriations Bill, however, the Administration apparently agreed to drop the "substantial irreparable harm" language from the new regulations. See *Weakened 3809 Rider in Final Money Law; Lawsuit Likely?* PUB. LANDS NEWS, Oct. 13, 2000, at 1 (discussing this agreement). In return, the rider ultimately included in the 2001 appropriations bill, signed by

Why is it that the Secretary and the Solicitor have so tenaciously pursued revisions to the 3809 regulations that were promulgated by President Carter's Interior Department at a time much closer to the actual passage of the Federal Land Policy and Management Act?³⁵⁹ Presumably it is the same thing that has caused them to drag their feet on patent applications and to revise long-standing agency practice on millsites. It is certitude about a new vision for the public lands. When that vision could not be enacted legislatively or in collaboration with affected communities, it simply had to be enacted by whatever means were available.

2. *Administrative Changes to the Grazing Law*

The Secretary's approach to grazing reform has been less aggressive than his approach to mining reform, perhaps because the Secretary's vision of the public lands looks more favorably upon ranching,³⁶⁰ but unfortunate similarities persist.³⁶¹ Although the Secretary supported some legislative efforts at grazing reform,³⁶² from the beginning of the Administration he pursued administrative changes to the grazing laws, perhaps because the statutes governing grazing give the Secretary so much discretion in how to run the federal range.³⁶³ Although the Secretary conducted four town-hall

President Clinton on October 11, 2000, merely reiterates that the final 3809 rules may not be "inconsistent with the recommendations" contained in the NRC report. See Department of the Interior Fiscal 2001 Appropriations Bill, Pub. L. No. 106-291, § 156, 114 Stat. 922 (forthcoming 2001); see also *Weakened 3809 Rider in Final Money Law; Lawsuit Likely?*, *supra* at 2 (discussing this rider language). The conference committee's report accompanying the bill does, however, set up a possible lawsuit by asserting that the committee disagrees with the Secretary's interpretation of the consistency language in the 2000 Interior Appropriations Bill.

Id.

³⁵⁹ 43 U.S.C. §§ 1701 et seq. (1976).

³⁶⁰ See Babbitt, *supra* note 203, at 2 (arguing that good ranching is a key to maintaining range condition and that to the extent ranching is eliminated the environment will suffer).

³⁶¹ For more thorough overviews of the Secretary's grazing reform efforts, see Feller, *supra* note 319 (1995); Olinger, *supra* note 266; Arruda & Watson, *supra* note 232; Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513 (1997).

³⁶² Starting from Secretary Babbitt's earlier administrative proposals, Senator Reid (D-Nev.) proposed grazing reform legislation that tracked much of Secretary Babbitt's proposals. See H.R. 2520, 103d Cong., 1st Sess. (1993), 139 Cong. Rec. H9037-H9039 (1993). Secretary Babbitt ultimately decided to support the legislation. See Margaret Kriz, *Quick Draw*, 25 NAT'L J., Nov. 13, 1999, at 2711, available at LEXIS, News Library, National Journal File (discussing how Babbitt worked with the conference committee). When it failed, however, he vowed to return to his administrative agenda. As many predicted at the time, the Reid grazing proposal would ultimately have been more generous to ranchers than Babbitt's administrative changes proved to be. See, e.g., Editorial, *Misguided Filibuster; Grazing Practices Will Change*, ARIZ. REPUBLIC, Nov. 9, 1993, at B6, available at WL 11/9/93 ARIZREPUB B6:

Some Western senators are shooting themselves in the foot with their filibuster of the compromise amendment on grazing fees and practices. The compromise may not entirely please them or their ranching constituents, but it is significantly more pleasant from the ranchers' point of view than what Interior Secretary Bruce Babbitt has in mind.

³⁶³ See *Natural Res. Def. Council v. Hodel*, 624 F. Supp. 1045, 1058 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987) (holding that the language in FLPMA and PRIA "can hardly be

meetings in the West, he sought little additional public input before publishing his first notice of proposed rulemaking.³⁶⁴ Among other things, the proposal called for more than a doubling of the grazing fee over three years, created a new set of national standards for range management, and replaced Grazing Advisory Councils, which had traditionally been dominated by local ranchers with what would become Resource Advisory Councils made up of equal representation from resource and commodity users, preservation and recreation advocates, and public officials.³⁶⁵

The Secretary's proposal was met with strong opposition from ranching communities as well as an ultimately unsuccessful legislative effort to impose a moratorium on the regulations.³⁶⁶ Although he weathered the attempted moratorium, Secretary Babbitt wisely decided to engage in a more inclusive process.³⁶⁷ Every week for two months, the Secretary met with the Colorado Rangeland Reform Working Group, a collection of ranchers, environmentalists, and local elected officials who had originally been convened by Colorado governor Roy Romer.³⁶⁸ During this same period, the Secretary was also traveling the West and listening to concerns from other groups.³⁶⁹ When the final regulations were issued in February of 1995,³⁷⁰ this more participatory process had resulted in a number of changes, including elimination of the grazing fee increase and the one-size-fits-all national ecological standards.³⁷¹

Certainly, the Secretary deserves praise for his efforts to include

considered concrete limits upon agency discretion. Rather, it is language which breathes discretion at every pore.") (citations and internal quotation omitted); Pendery, *supra* note 358, at 543 (discussing impact of *Hodel* decision on politics of range reform).

³⁶⁴ See Olinger, *supra* note 266, at 657 (discussing this first attempt at grazing reform); Advanced Notice of Proposed Rulemaking, 58 Fed. Reg. 43,208 (Aug. 13, 1993).

³⁶⁵ See Olinger, *supra* note 266, at 657 (discussing Rangeland Reform '94); *id.* at 667 (discussing composition of the resource advisory councils); 43 C.F.R. § 1784.6-1(a)(1) (1996) (describing membership of resource advisory councils).

³⁶⁶ See Olinger, *supra* note 266, at 657-58.

³⁶⁷ See Catalia Camla, *The Fillbuster Ends; Bill Clears; Babbitt Can Still Raise Fees*, 51 CONG. Q. WKLY. 3112, 3113 (1993) (quoting Secretary Babbitt as saying that he was "now committed to an even more inclusive process—one involving elected officials, ranchers, environmentalists, and others").

³⁶⁸ See Olinger, *supra* note 266, at 660-63 (discussing the development of the Colorado Working Group and its consensus building approach to range problems).

³⁶⁹ See Department Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration—Exclusive of Alaska, 60 Fed. Reg. 9894, 9894 (Feb. 22, 1995) (to be codified at 40 C.F.R. pt. 4) (noting that during this period the Secretary "met on 20 occasions around the West with groups that included Western governors, State and local officials, ranchers, environmentalists and other public land users"); Bruce Babbitt, Federal Document Clearing House, Inc., *Statement Before the Senate Comm. on Energy and Natural Resources*, 103d Cong. 16-69 (1994) (testimony of Secretary Babbitt). See also Olinger, *supra* note 263, at 675-76 (discussing public participation in the administrative reform process).

³⁷⁰ See 60 Fed. Reg. 9894 (Feb. 22, 1995) (Final Rule).

³⁷¹ See Feller, *supra* note 319, at 711-12 (describing changes in the final rule from the original 1993 advanced notice of proposed rulemaking). In place of national ecological standards, the rule allows BLM officials within each Western state to develop their own standards in consultation with the Resource Advisory Councils. See 60 Fed. Reg. 9894, 9898-99 (Feb. 22, 1995).

ranchers and local officials in the development of new grazing rules. This praise is a function not so much of the changes that resulted, but of the fact that local participation, albeit diluted by the participation of national interest groups, actually made some difference. On the other hand, the praise should be tempered by the fact that the entire exercise was precipitated by the Secretary's decision to depart from an administrative scheme developed by agencies with a much closer connection to the statutes governing grazing. The new public lands goal was set by the Secretary and compromise was at the Secretary's discretion. There was never any real doubt that the regulations would move in favor of preservation and recreation.³⁷²

The limited nature of the Secretary's collaborative and compromising intentions is evidenced by the opposition to the final reforms by the majority of the ranching community,³⁷³ and by the fact that the new rules were grounded in such an aggressive re-interpretation of agency authority under the Taylor Grazing Act, FLPMA, and the PRIA. That aggressive interpretation was challenged by ranchers even before the new regulations went into effect³⁷⁴ and resulted in the primary public lands decision of the Supreme Court's most recent term.³⁷⁵ In their complaint, the ranchers raised a number of objections, but four changes finally became the focus of the controversy: a new rule providing that title to new range improvements would be vested in the United States rather than the rancher;³⁷⁶ the elimination of the requirement that grazing permits be issued only to those involved in the livestock business,³⁷⁷ a new rule allowing grazing permits to be issued for conservation use instead of grazing; and a redefinition of the regulatory term "grazing preference," which ranchers claimed improperly eliminated from

³⁷² See *supra* notes 326–29 and accompanying text (noting Secretary Babbitt's long commitment to reforming grazing and other public land use policies in an effort to promote preservation and recreation).

³⁷³ See, e.g., Frederick W. Obermiller, Federal Document Clearing House, Inc., House of Representatives, Agriculture: Livestock, Dairy, and Poultry, Testimony, Sept. 17, 1997, available at 1997 WL 577455 (observing that the "Western federal land dependent livestock industry viewed these new regulations as excessive, in violation of existing statutes, arbitrary and capricious, and otherwise threatening to their economic welfare and way of life"); Steve Hinchman & Donica Mensing, *The West's Grazing War Grinds On*, HIGH COUNTRY NEWS, June 27, 1994, at 5 (discussing vehement opposition of ranching community to the second draft proposal).

³⁷⁴ The case was filed in July of 1995. Brief for the Petitioners, at 14, *Pub. Lands Council v. Babbitt*, 529 U.S. 728 (2000) (No. 98-1991). The final regulations went into effect on August 21, 1995. See 929 F. Supp. 1436, 1439 (D. Wyo. 1996), *aff'd in part and reversed in part*, 167 F.3d 1287 (10th Cir. 1999), *aff'd*, 529 U.S. 728 (2000).

³⁷⁵ 529 U.S. 728 (2000).

³⁷⁶ Prior to 1995, the regulations provided that title to structural or removable range improvements, such as fences and stockwater tanks, would be "shared by the United States and cooperator(s) in proportion to the actual amount of respective contribution to the initial construction." 43 C.F.R. § 4120.3-2 (1994). The new regulations vest title to all new improvements in the United States. 43 C.F.R. § 4120.3-2(b) (2000).

³⁷⁷ The prior regulations provided that "to qualify for grazing use on the public lands an applicant must be engaged in the livestock business." Bureau of Land Mgmt., Dept. of Interior, Regulations Relating to Public Lands, 43 C.F.R. § 4110.1 (1994). The new regulations eliminated the qualification. 43 C.F.R. § 4110.1 (2000).

their grazing allotments the fixed baseline of potentially available forage.³⁷⁸

In part because it touched upon their longstanding belief that they should have a property right in their grazing allotments, it was this last issue which most concerned the ranchers. The Taylor Grazing Act provided that in allocating grazing permits among the various ranchers that graze the public commons, "preference" would be given to persons who owned land or water rights (commonly called "base property") within or near a grazing district.³⁷⁹ The amount of forage attached to a particular permit was based on the historical use and forage capacity of the base property owned by the applicant and of the public lands the applicant sought to graze. Once the permit was issued, Congress provided that the grazing privilege should "be adequately safeguarded."³⁸⁰ The quantity of forage originally determined to be attached to a permit was not defined by the Act but eventually came to be known as the "grazing preference."³⁸¹ The quantity of forage actually authorized for a permit holder's use sometimes was less than the "grazing preference" because the Secretary, in renewing permits, may have determined that range conditions could not justify grazing the entire original amount of forage.³⁸² Accordingly, the practice of the Secretary was to divide the "grazing preference" into "active use" (the quantity of forage that could actually be grazed under the permit) and "suspended use" (the difference between the "active use" and the original quantity of forage known as the "grazing preference").³⁸³ Under the Secretary's new regulations, instead of a "grazing preference" consisting of active use and suspended use, the Secretary essentially substituted the term "permitted use." Permitted use is "the amount of forage available for livestock grazing" as established in the applicable land use plan.³⁸⁴ Members of the livestock industry argued that eliminating recognition of the original forage determination (the "grazing preference") would impair their credit because their bank loans were based in part on the amount of the grazing preference, which denoted the upper limit to which grazing would be allowed under ideal conditions, and not just

³⁷⁸ See *Public Lands Council v. Babbitt*, 167 F.3d 1287, 1291-93 (10th Cir. 1999) (summarizing these four regulatory changes and the ranchers' arguments against them).

³⁷⁹ Taylor Grazing Act of 1935, 43 U.S.C. § 315b (1994):

Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them.

³⁸⁰ *Id.*

³⁸¹ 43 C.F.R. § 4100.0-5 (1994) (defining grazing preference as the amount of forage "apportioned and attached to base property owned or controlled by the permittee").

³⁸² The determination to reduce the actual amount of grazing on any particular allotment was done pursuant to both the Taylor Grazing Act and FLPMA. See 43 U.S.C. § 315(b) (1994) (providing that a permit does "not create any right, title, interest, or estate in or to the lands" and that the Secretary is to "specify from time to time numbers of stock and seasons of use"); 43 U.S.C. § 1752(a) (1994) (providing that the Secretary may "cancel, suspend, or modify a grazing permit . . . in whole or in part").

³⁸³ 43 C.F.R. § 4110.3-2 (1994).

³⁸⁴ 43 C.F.R. § 4110.2-2 (2000).

on the active or permitted use.³⁸⁵

The federal district court in *Public Lands Council v. Babbitt*³⁸⁶ invalidated each of the four new rules, holding that the Secretary had exceeded his statutory authority in their adoption. The court found that the language in the Taylor Act and FLPMA providing for compensation when ranchers' improvements are taken³⁸⁷ evidenced Congress's intent that grazers would have title to the range improvements they erected.³⁸⁸ It also found that eliminating the requirement that permittees be involved in the livestock business was contrary to the language of the Taylor Act giving preference to "landowners engaged in the livestock business, bona fide settlers, or owners of water or water rights."³⁸⁹ With respect to the new conservation use rule, the court made the straightforward observation that the Taylor *Grazing* Act only authorized the Secretary to issue "permits to graze livestock."³⁹⁰ Finally, the court held that eliminating the grazing preference (the maximum potential forage allocation for each allotment determined following passage of the Taylor Act), violated the Act's promise that grazing privileges would be "adequately safeguarded."³⁹¹

The Tenth Circuit, however, was largely unpersuaded by the rancher's arguments, affirming only the district court's invalidation of the conservation use rule.³⁹² Nor was the Supreme Court convinced. It unanimously affirmed the Tenth Circuit's decision.³⁹³ With respect to the qualifications rule, the Court reasoned that the only qualification requirement of the Taylor Grazing Act was that permittees be "bona fide settlers, residents, and other stock owners."³⁹⁴ The Act only gave *preference* to "landowners engaged in the livestock business."³⁹⁵ On the improvements

³⁸⁵ Brief for the Petitioners at 23, *Pub. Lands Council v. Babbitt*, 120 S. Ct. 1815 (2000); Brief of *Amici Curiae* Farm Credit Institutions in Support of Petitioners, *Pub. Lands Council v. Babbitt*, 120 S. Ct. 1815 (2000) (making argument in greater detail).

³⁸⁶ 929 F. Supp. 1436 (D. Wyo. 1996), *aff'd in part and rev'd in part*, 167 F.3d 1287 (10th Cir. 1999), *aff'd*, 120 S. Ct. 1815 (2000).

³⁸⁷ See 43 U.S.C. § 315(c) (1994) ("No permit shall be issued which shall entitle the permittee to the use of such improvements constructed *and owned* by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements . . .") (emphasis added); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1752(g) (1994 & Supp. III. 1997) (providing that when a permit is canceled the permittee "shall receive from the United States a reasonable compensation for the adjusted value, to be determined by the Secretary concerned, of his interest in authorized permanent improvements").

³⁸⁸ 929 F. Supp. at 1442-43.

³⁸⁹ 43 U.S.C. § 315b (1994). See also 929 F. Supp. at 1444-45 (district court discussion of qualifications issue).

³⁹⁰ 929 F. Supp. at 1443-44; 43 U.S.C. § 315b (1994) ("The Secretary of the Interior is authorized to issue or cause to be issued permits to graze livestock . . .").

³⁹¹ 929 F. Supp. at 1440-41; 43 U.S.C. § 315b.

³⁹² 167 F.3d 1287, 1309 (10th Cir. 1999) (Judge Seymour authored the majority opinion and Judge Tacha dissented on the improvements and preference issues).

³⁹³ 120 S. Ct. 1815 (2000). The Secretary did not seek certiorari on the conservation use rule. *Id.*

³⁹⁴ 120 S. Ct. at 1825; 43 U.S.C. § 315b.

³⁹⁵ 120 S. Ct. at 1825; 43 U.S.C. § 315b ("Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business,

issue, the Court concluded that nothing in the Taylor Act required that ranchers have ownership of improvements, only that they be compensated in those cases where the Secretary decided to grant title to those improvements.³⁹⁶ Although the Secretary had regularly recognized title prior to 1995, nothing in the statute prevented him from changing that longstanding practice.³⁹⁷

With regard to the elimination of the grazing preference, the Court essentially concluded it was much ado about nothing. It emphasized that under the Taylor Grazing Act and FLPMA, and even under the prior regulations, the Secretary has always had authority to reduce the amount of forage attached to a particular permit.³⁹⁸ This was not, of course, the issue that the ranchers had contested. They had conceded that the Secretary had authority to diminish their active use; what they argued could not be diminished was the historical determination of the amount of forage available for grazing under ideal conditions (the active use plus the suspended use, or the "grazing preference"). Although the ranchers never explained very clearly why retaining this historical preference figure was critical (specifically, why credit institutions would consider this historic figure in their lending decision rather than just rely on active use and on an analysis of range condition),³⁹⁹ the Court accepted the Solicitor General's curious assurance that the new regulations actually "preserve all elements of preference," including the concept of suspended use.⁴⁰⁰ Although there is

bona fide occupants or settlers, or owners of water or water rights . . .").

³⁹⁶ 120 S. Ct. at 1827-28.

³⁹⁷ *Id.*

³⁹⁸ *Id.* at 1823-24. See also Taylor Grazing Act of 1935, 43 U.S.C. § 315(b) (providing that the Secretary is to "specify from time to time numbers of stock and seasons of use"); Federal Land Policy and Management Act (FLPMA) of 1976, § 1752(a) (1994 & Supp III 1997) (providing that the Secretary may "cancel, suspend, or modify a grazing permit . . . in whole or in part").

³⁹⁹ Brief for the Petitioners, at 23; Reply Brief for the Petitioners, at 13-14. The difficult question the ranchers needed to address was why including the historical forage figure (grazing preference) in their grazing permits enhanced a permit's value if the Secretary already had complete discretion to depart from that historical figure and reduce or eliminate grazing on an allotment. Although the ranchers suggested that retaining the preference was important because it indicated to the rancher what he could expect in the way of forage if range conditions were ideal, this was not accurate because the Secretary was not obligated to allow the full preference to be grazed even under ideal range conditions. See 43 U.S.C. § 1752(a), (g) (1986) (allowing the Secretary to cancel or suspend a permit to fulfill a different public purpose, although the Secretary must give two years notice in the absence of an emergency). Plainly, the ranchers understood this, so why did they fight so hard to retain the preference? Perhaps it is because the preference figure serves as a permanent marker against which Secretarial reductions can be judged. Leaving the marker in place thus may have some deterrent effect on grazing reductions. The ranchers may also have wanted to retain the preference because the very idea of *suspended* use tends to connote that there is a right to additional forage some time in the future.

⁴⁰⁰ 120 S. Ct. at 1824. The Solicitor General's argument that the new regulations preserved "all elements of preference" had something of a bizarre quality to it. If that were the case, why had the Secretary worked so assiduously to defend the change? Put another way, if the Secretary had the authority to cancel or modify any grazing permit, why was he so eager to eliminate suspended use? This, of course, is the mirror question of why the ranchers worked so hard to retain the grazing preference when it had so little apparent value. See *supra* note 399

some reason to suspect the assurance that suspended use still exists,⁴⁰¹ the Court was plainly correct that if the new regulations did nothing to disturb suspended use, they did nothing to impair ranchers' credit, and therefore "adequately safeguarded" their grazing privilege as required by the Taylor Grazing Act.

Despite the district court's contrary conclusion and despite the fact that the Secretary's regulations swept away grazing practices that had been in place since the passage of the Taylor Grazing Act in 1934, it was not particularly surprising that the Secretary prevailed given the generous standard of review applicable to challenges to administrative regulations. Under the *Chevron* standard governing judicial review of administrative rule-making, whenever a statute "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."⁴⁰² Thus, as a matter of

(discussing this question). The most plausible explanation for the Secretary's tenacity is that the Secretary did indeed see the change as a way to destabilize the livestock industry. Certainly preservation advocates believed the change served that purpose. See Steve Stuebner, *Supreme Court Upholds Babbitt's Grazing Reforms*, HIGH COUNTRY NEWS, June 5, 2000, at 6 (quoting the spokesman for Forest Guardians that the changed preference regulation "will completely undermine ranchers' use of grazing permits as collateral for bank loans"). See also 139 Cong. Rec. S14,083, 14,087 (daily ed. Oct. 1, 1993) (statement of Sen. Reid (D-Nev.) proposing amendment to Secretary Babbitt's proposed 1993 grazing reform legislation explaining that his amendment did not include changes to the grazing preference because "eliminating [the] preference . . . would devalu[e] the permit in the eyes of lending institutions"). Even if the Secretary did not believe the change diminished the value of grazing permits, he surely understood that it eliminated one more impediment to reducing or eliminating grazing on parts of the public lands.

⁴⁰¹ In response to comments on his proposed rule, the Secretary did state that he had decided not to eliminate suspended non-use because he viewed "the matter as merely an administrative record-keeping issue." Department Hearings & Appeals Procedures; Cooperative Relation; Grazing Administration - Executive of Alaska, 59 Fed. Reg. 14,314, 14,323 (1994) (proposed Mar. 25, 1994). The new regulations are, however, more ambiguous. They redefine "suspension" as the "temporary withholding from active use . . . of part or all of permitted use," and "permitted use" is defined as "the forage allocated by . . . an applicable land use plan." Grazing Administration, 43 C.F.R. § 4100.0-5 (2000). By contrast, the prior regulations defined "suspension" as "temporarily withholding, in whole or in part, a grazing preference from active grazing use." Grazing Administration, 43 C.F.R. § 4100.0-5 (1994). The regulations, however, elsewhere provide that "[p]ermitted use shall encompass all authorized use including . . . any suspended use . . ." Grazing Administration, 43 C.F.R. § 4110.2-2 (2000). The question is whether suspended use is now the difference between active use and permitted use, as suggested by the definitional section, or whether suspended use is the difference between active use and the original grazing preference, as it has previously been calculated. If it is the latter, the ranchers had little reason to contest the new regulation. Perhaps that is why they contended that the Court's emphasis on the Secretary's suspended use clarification had been a victory for them despite the 9-0 ruling. See, e.g., Edward Walsh, *Court Backs U.S. on Land Use*, WASH. POST, May 16, 2000, at A19 (reporting this contention).

⁴⁰² *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 843 (1984). See also *Regions Hosp. v. Shalala*, 522 U.S. 448, 457 (1998) ("If the agency's reading fills a gap or defines a term in a reasonable way in light of the Legislature's design, we give that reading controlling weight, even if it is not the answer the court would have reached if the question initially had arisen in a judicial proceeding.") (internal quotation and citation omitted); *Babbitt v. Sweet Home Chapter of Cmty. for a Greater Oregon*, 515 U.S. 687, 708 (1995) ("When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our

administrative law, it mattered little that the prior regulations had for many years been a permissible construction of the Taylor Grazing Act and FLPMA.⁴⁰³ The question before the Court was whether Secretary Babbitt's interpretation of the broad language in those two statutes was also "permissible."

Ultimately, it is this favorable standard of review that forms the foundation for Secretary Babbitt's administrative reform project. Whether the change is to the millsite patent rule, the 3809 regulations, or to the grazing preference, the Secretary knows that the change is unlikely to be overturned by the courts as long as he stays, even just barely, within the interpretive boundaries of statutory language. Given the rather general mandates that often animate the public lands statutes, particularly those of more recent vintage like FLPMA, this is not extraordinarily difficult to do. However, bare legality should not be the touchstone of public lands policy. If nineteenth century Indian policy teaches any lesson, it is that judicial approval does not a virtuous policy make.⁴⁰⁴

views of wise policy for his."). In *Public Lands Council v. Babbitt*, the Secretary's standard of review hurdle was even lower because the plaintiffs had brought a facial challenge to the regulations. 120 S.Ct. 1815, 1828 (2000) (O'Connor, J., concurring) (noting this lower standard of review). As the Court explained in *Anderson v. Edwards*, a facial challenge is "the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the rule would be valid." 514 U.S. 143 at 155 n.6 (1995) (internal quotation and citation omitted).

⁴⁰³ To say that it mattered little is not to say that prior administrative constructions of statutory language are entirely irrelevant to the analysis. On other occasions, the Court has stated that longstanding regulations, particularly those promulgated contemporaneously with the passage of a statute, are entitled to greater weight. See, e.g., *Davis v. United States*, 495 U.S. 472, 484 (1990) ("[W]e give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use."); *Watt v. Alaska*, 451 U.S. 259, 272-73 (1981) (agency's interpretation of an amendment that was contemporaneous with the amendment's passage was entitled to greater deference than an agency's current, inconsistent interpretation); *Atchison, T. & S.F.R. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973) (stating "presumption" that Congress's "policies will be carried out best if the settled rule is adhered to"). When agencies depart from previous rules, they will be found to have acted arbitrarily and capriciously unless they "supply a reasoned analysis for the change." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). In what amounted to a tactical error, the Public Lands Council did not raise such a *State Farm* argument before the Supreme Court. See *Public Lands Council v. Babbitt*, 120 S. Ct. 1815, 1828 - 29 (2000) (O'Connor, J., concurring) (noting this omission). Had it done so, the Solicitor General may have been more reluctant to argue that the new regulations "preserve[d] all elements of preference," 120 S. Ct. at 1824, and thus served little practical purpose.

⁴⁰⁴ De Tocqueville's articulation of this point is one of the most memorable. After noting that Americans treatment of Native Americans was characterized "by a singular attachment to the formalities of law," he observes:

The Spaniards were unable to exterminate the Indian race by those unparalleled atrocities which brand them with indelible shame, nor did they succeed even in wholly depriving it of its rights; but the Americans of the United States have accomplished this twofold purpose with singular felicity, tranquilly, legally, philanthropically, without shedding blood, and without violating a single great principle of morality in the eyes of the world. It is impossible to destroy men with more respect for the laws of humanity.

1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 355 (Henry Reeve trans., Phillips Bradley ed., Alfred A. Knopf 1980) (1835).

Even if *Chevron's* permissibility analysis is the lodestar for the judiciary,⁴⁰⁵ it should not be the guiding light for an administrative agency. A principled approach to promulgating new regulations should focus on whether the regulations would comport with the vision of the Congress that passed the legislation, not on whether the new regulation would be a "permissible" interpretation of a particular provision of the relevant public lands statute.⁴⁰⁶ Unfortunately, the grazing and mining reforms of Secretary Babbitt and Solicitor Leshy appear to be driven more by *Chevron* than by a sincere conviction about the intent of the legislatures that passed the Mining Law, the Taylor Grazing Act, or even FLPMA. In fact, the Secretary and Solicitor have both basically conceded as much.⁴⁰⁷ Such aggressive administrative reform is dubious even in the abstract,⁴⁰⁸ but it is particularly

⁴⁰⁵ See *supra* text accompanying note 402 (quoting *Chevron* standard for judicial review of an administrative regulation).

⁴⁰⁶ Perhaps running the judicial gauntlet would be a better proxy for a correct interpretation of a statute if courts employed a more rigorous standard of review or if the non-delegation doctrine were not a constitutional dead letter. See generally Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Back to the New Deal?*, ARIZ. ST. L.J. (forthcoming 2000) (reviewing the history of the non-delegation doctrine and recent efforts to breathe life into it). But given the breadth of administrative power under broad federal delegations and given the fact that *Chevron's* permissibility analysis almost never results in overturning agency action, (see Mark Seidenfeld, *A Syncopated Chevron: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretation of Statutes*, 73 TEX. L. REV. 83, 96 (1994)) (noting that for an agency's interpretation to be rejected, it must "flunk the laugh test"), the primary check on an administrative agency's reform agenda will have to be internal and come from a skepticism about the reform role of an administrative agency and a scrupulous adherence to legislative intent.

⁴⁰⁷ See John D. Leshy, *Reforming the Mining Law: Problems and Prospects*, 9 PUB. LANDS L. REV. 1, 11 (1988) (suggesting that the mining law could be changed through "[b]old administrative actions like major new withdrawals, creative rulemakings, and aggressive environmental enforcement"); Babbitt: *BLM May Accept a New Building Stone Validity Test*, PUB. LANDS NEWS, June 9, 2000, at 2 (reporting Secretary Babbitt's suggestion that a comparative value test for discovery of a valuable mineral deposit may be in the offing because the mining law's phrase "valuable for minerals" may "imply the need to consider the term 'valuable' relative to other quantifiable and non-quantifiable values" and because "such an interpretation would be consistent with contemporary land use needs"). See also *infra* note 418 and accompanying text (discussing Secretary Babbitt's view of a modernized Antiquities Act).

⁴⁰⁸ The very notion of administrative "reform" is dubious, absent perhaps a desire to correct an egregious prior administrative departure from statutory intent, because administrative agencies are not charged with reforming the law. They are charged with implementing it. If legislation needs to be reformed, it should be the legislators that perform the task. The proper role of administrative agencies is the subject of a vast body of legal literature. See Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1467-84 (2000) (discussing this literature). Professor Noah analyzes three "competing metaphors" for appropriate administrative interpretation of enabling statutes. First, he examines "the classic analogy" that an agency enabling statute should be read like a corporate charter, and thus "a court reviewing a regulatory action not explicitly authorized by the statute would invalidate it as ultra vires." *Id.* at 1467. Next he investigates "the constitutional metaphor" under which "organic acts are just that, living instruments that can adapt to new circumstances." *Id.* Finally, he looks at the "common law metaphor," which views "enabling legislation as expressing little more than broad goals to pursue." *Id.* at 1467, 1480. The approach advocated in this article is grounded in the "classic analogy," whereas the approach of Secretary Babbitt and Solicitor Leshy has hewed more closely to the latter two metaphors.

so when its purpose is to facilitate the removal of rural public lands users from the public lands in favor of a preservation and recreation preference that mostly did not exist when the General Mining Law and the Taylor Grazing Act were passed and was just taking hold at the passage of the FLPMA. It is inappropriate to work toward severing rural communities' ties to the land through administrative reform of statutes that helped to encourage the development of such ties to the land.⁴⁰⁹ If the preservation preference is to be enshrined, Congress is a better forum for such a change because it is more conducive to rural communities' participation and thus to compromise.⁴¹⁰

Again, this conclusion is not necessarily at odds with the assessment that some of Secretary Babbitt's grazing reforms may indeed be the wisest course for the public lands. Moreover, one can take the Secretary at his word when he states his desire to preserve ranching communities in the West.⁴¹¹ But neither conclusion justifies the Secretary's approach. It is more important to adhere to the participation norm, including waiting for congressional action, than it is to adopt a good idea. And, as the allotment experience teaches, noble federal motives do not always produce results beneficial to the intended recipients,⁴¹² particularly when those motives are mixed with another competing goal (now, obtaining preservation and recreation benefits; then, opening additional land for settlement).

3. National Landscape Monuments

A third, and perhaps most publicly prominent, area in which self-assured unilateralism has supplanted skeptical and conscientious promotion of preservation is in the Administration's use of the Antiquities Act⁴¹³ to

⁴⁰⁹ See *supra* notes 284-87 and accompanying text (discussing how both the long federal acquiescence in grazing prior to the Taylor Grazing Act and the Act's promise to safeguard ranchers' grazing privileges encouraged ranchers to rely upon a continued ability to graze the public lands, despite the absence of any property interest in their grazing permits).

⁴¹⁰ See *supra* notes 300-01 and accompanying text (discussing why the legislative branch is more conducive to rural participation).

⁴¹¹ Secretary Babbitt, who comes from a long-time ranch family in Arizona, Timothy Egan, *The (Bruised) Emperor of the Outdoors*, N.Y. TIMES, Aug. 1, 1993, at 21 (discussing the Secretary's background), has stated his desire to preserve the ranching way of life. See, e.g., Steve Yozwiak, *Endangered Species*, ARIZ. REPUBLIC, Aug. 29, 1993, at F1 (quoting the Secretary's statement that his proposed grazing fee increase had been set at a level that would "ensure that ranching families continue to make a living off the public's lands, thus preserving an important part of the Western economy and Western culture"). See also *supra* note 203 (discussing Secretary Babbitt's suggestion that ranching helps preserve open space).

⁴¹² See *supra* notes 73-84 and accompanying text (discussing the allotment policy).

⁴¹³ 16 U.S.C. § 431 (1994). Section 2 of the Act delegates broad authority to the President to create national monuments:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

declare national monuments. Beginning with his pre-election declaration of the Grand Staircase-Escalante National Monument,⁴¹⁴ the President, at Secretary Babbitt's urging, has now declared ten national monuments and expanded one other.⁴¹⁵ The approximately 3,661,000 acres of lands in the lower forty-eight states is the most ever withdrawn by a president.⁴¹⁶ Even though the Act's original purpose was to allow the President to make small withdrawals of public lands in order to protect prehistoric ruins and Indian artifacts⁴¹⁷ and even though the Secretary's plan to put BLM in charge of a system of "national landscape monuments" blatantly departs from the Act's original purpose,⁴¹⁸ the proclamations creating the monuments are likely to

Id.

⁴¹⁴ For a thorough review of the politics and history behind the designation of the Grand Staircase-Escalante National Monument, see Rasband, *supra* note 299, at 492-514.

⁴¹⁵ See Grand Staircase-Escalante National Monument, Proc. No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996) (withdrawing approximately 1.7 million acres); Grand Canyon-Parashant National Monument, Proc. No. 7265, 65 Fed. Reg. 2825 (Jan. 11, 2000) (withdrawing approximately 1,014,000 acres in northern Arizona adjacent to Grand Canyon National Park); California Coastal National Monument, Proc. No. 7264, 65 Fed. Reg. 2821 (Jan. 11, 2000) (withdrawing thousands of small islands, rocks, and reefs off the coast of California); Agua Fria National Monument, Proc. No. 7263, 65 Fed. Reg. 2817 (Jan. 11, 2000) (withdrawing approximately 71,000 acres of mesas and canyons near Flagstaff, Arizona); Giant Sequoia National Monument, Proc. No. 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000) (withdrawing approximately 328,000 acres of the Sequoia National Forest in California); Canyons of the Ancients National Monument, Proc. No. 7317, 65 Fed. Reg. 37,243 (June 9, 2000) (withdrawing approximately 164,000 acres in the Four Corners region of southwest Colorado); Cascade Sikiyou National Monument, Proc. No. 7318, 65 Fed. Reg. 37,249 (June 9, 2000) (withdrawing approximately 52,000 acres of the Cascade Range along the Oregon-California border); Hanford Reach National Monument, Proc. No. 7319, 65 Fed. Reg. 37,253 (June 9, 2000) (withdrawing approximately 195,000 acres in southeast Washington along the Columbia River); Ironwood Forest National Monument, Proc. No. 7320, 65 Fed. Reg. 37,259 (June 9, 2000) (withdrawing approximately 129,000 acres in the Sonoran Desert northwest of Tucson). President Clinton also created the President Lincoln and Soldiers' Home National Monument (Armed Forces Retirement Home), Proc. No. 7329, 65 Fed. Reg. 43,673 (July 7, 2000) (classic 2.3 acre designation), and enlarged the boundaries of the Pinnacles National Monument in California. See Proc. No. 7266, 65 Fed. Reg. 2831 (June 9, 2000) (withdrawing approximately 800 additional acres).

⁴¹⁶ See *supra* note 415 (listing acreage). See also Mike Soraghan & Electa Draper, *Canyons of the Ancients: A Modern Monument*, DENV. POST, Jun. 10, 2000, at B1 (noting that President Clinton has set aside more land in National Monuments in the lower forty-eight states than any other president). In 1978, President Carter used the Antiquities Act to declare seventeen National Monuments in Alaska, totaling approximately 56,000,000 acres. See generally Richard M. Johannsen, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 453-56 (1981) (discussing the Alaska withdrawals). President Carter took this action to ensure the status quo would prevail during negotiation of the Alaska National Interest Lands Conservation Act. When the Act was passed in 1980, Congress terminated the monuments. See John F. Shepherd, *Up the Grand Staircase: Executive Withdrawals and the Future of the Antiquities Act*, 43 ROCKY MTN. MIN. L. INST. 4-1, 4-33 (1997) (discussing the Alaska withdrawals and their termination).

⁴¹⁷ For an examination of the legislative history of the Antiquities Act, see David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES. J. 279, 301-02 (1982); Johannsen, *supra* note 414, at 449-50; Ronald F. Lee, *The Antiquities Act of 1906* (National Park Service 1970).

⁴¹⁸ See Secretary Bruce Babbitt, *From Grand Staircase to Grand Canyon Parashant: Is*

survive legal challenge.⁴¹⁹ A number of other presidents have relied on the “*other objects* of historic or scientific interest” language of the Antiquities Act⁴²⁰ to declare monuments that fall well outside of the Act’s original purpose.⁴²¹ And no court has invalidated a monument,⁴²² in part because a generous arbitrary and capricious standard of review applies to the question of whether the President exceeded his authority in designating a monument.⁴²³ Although the bare legality of the various monuments is not much of a question—as it was not with most of the Secretary’s regulatory changes discussed above—bare legality again should not be the measuring rod by which the proclamations are judged.

If the Administration’s proclamations are appropriately judged by the skepticism standard and its accompanying participation norm, they unfortunately fall short. Certainly, that is true of the Grand Staircase, which was imposed on the rural communities without any notice at all, let alone genuine collaboration.⁴²⁴ And despite Secretary Babbitt’s vow to be more inclusive,⁴²⁵ the collaboration he has offered has been largely illusory,⁴²⁶ with

There a Monumental Future for the BLM? Remarks at the University of Denver Law School (Feb. 17, 2000). The landscape monuments idea is a clear departure from the Antiquities Act, which explicitly separates the power to designate “structures and other objects” from the power to “reserve” the land necessary to protect the objects. 16 U.S.C. § 431 (1994). With landscape monuments, the object and acreage determinations are explicitly conflated. When he announced his landscape monument project, the Secretary himself was quite clear that it was a departure from the purposes of the Antiquities Act:

Doesn’t it make sense in light of a subsequent 100 years of understanding to say that we have room in the West to protect the landscape, an anthropological ecosystem. The real science of these landscapes doesn’t come out of digging out a room and extracting a few pots. That was the 19th Century—and it was important.

Id.

⁴¹⁹ See generally Rasband, *supra* note 299, at 499–504 (discussing why the legal challenge to the Grand Staircase-Escalante National Monument seems likely to fail).

⁴²⁰ 16 U.S.C. § 431(2) (1994) (emphasis added). See also *supra* note 413 (setting forth entire statutory provision).

⁴²¹ Since its enactment in 1906, and prior to the Grand Staircase designation, presidents had withdrawn land under the Antiquities Act 102 times. See Rasband, *supra* note 295, at 501 & n.85.

⁴²² See Rasband, *supra* note 299, at 501–04 (discussing the unsuccessful legal challenges to National Monument designations under the Antiquities Act).

⁴²³ See *Wyoming v. Franke*, 58 F. Supp. 890, 895 (D. Wyo. 1945) (“If there be evidence . . . of a substantial character upon which the President may have acted in declaring that there were objects of historic or scientific interest included within the area, it is sufficient upon which he may have based a discretion.”); *Id.* at 896 (“What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected.”); *Alaska v. Carter*, 462 F. Supp. 1155, 1159 (D. Alaska 1978) (noting that the Antiquities Act specifically authorizes the President “in his discretion” to declare monuments).

⁴²⁴ See Rasband, *supra* note 299, at 504–07, 509–14 (describing the process by which the Grand Staircase-Escalante National Monument was designated).

⁴²⁵ See Steve DiMeglio, *Clinton Looks West in Search of a Legacy*, GANNETT NEWS SERV., May 29, 2000, available at 2000 WL 4400274 (quoting Secretary Babbitt: “What I’ve said to everybody in the West after Escalante is that won’t happen again on my watch”).

⁴²⁶ The approach, which has been about as collaborative as the typical treaty council, has generally consisted of an announcement of a planned designation followed by a period of time during which the affected communities may encourage their representatives to pass legislation

limited exceptions.⁴²⁷ The Secretary's suggestion that he is seeking genuine input is belied by the fact that the Department of Interior has opposed all efforts to amend the Antiquities Act, even one that contained only the barest requirement of participation and consultation.⁴²⁸ At bottom, the Secretary is

withdrawing essentially the same acreage with essentially the same protections; *See, e.g., Hearing on Shivwits Plateau and Utah Wilderness Before the Subcomm. on National Parks and Public Lands of the House Comm. on Res.*, 106th Cong. (Oct. 19, 1999) (testimony of Secretary Babbitt) (forthcoming), available at 1999 WL 992693 (vowing no more surprises but emphasizing that he will only support legislation "that I think is reasonable, and that meets up with the objectives of this administration"); *Hearings on Energy Costs and Foreign Dependency Before the Subcomm. on Nat'l Parks of the Senate Energy and Natural Res. Comm.*, 106th Cong. (Jun. 15, 2000) (statement of Senator Ben Nighthorse Campbell) (forthcoming), available at 1999 WL 992693, (observing that the "public process" prior to the designation of the Canyons of the Ancients National Monument consisted only of his opportunity to first introduce a bill proposing to withdraw the land the Secretary promised to designate); *Hearing on Shivwits Plateau and Utah Wilderness Before the Subcomm. on Nat'l Parks and Pub. Lands of the House Comm. on Res.*, 106th Cong. (Oct. 19, 1999) (statement of Arizona Representative Bob Stump) (forthcoming), available at 1999 WL 992693 (expressing efforts to craft a plan with local input and the testimony of Secretary Babbitt rejecting the proposal as inadequate). Bills at variance with the Secretary's plan have been criticized by the Secretary as "sham piece[s] of legislation." *See* Babbitt, *supra* note 418. Authentic participation generally occurs when both parties to a negotiation feel like they have participated—not when one party deems itself to have allowed enough input.

⁴²⁷ The Secretary did turn over to Representative Mary Bono and local officials the development of a proposal for a new national monument in the Santa Rosa and San Jacinto mountains of Southern California. *See* Jacqueline Newmyer, *House Oks Palm Springs-area National Preserve Environment: Developers and Outdoors Activists Both Worked to Set Aside 272,000 Mountain Acres, Senate and Administration Approval Is Also Expected*, L.A. TIMES, July 26, 2000, at A4 (reporting on this agreement). The House has now passed the bill and Senate approval awaits. *See id.* The President, however, has promised to designate a monument if the bill is not passed this session. *See* Jennifer Bowles, *Inland Environmentalists Not All Gore Enthusiasts: He May Face Protests from Erstwhile Allies when the Democrats Meet Next Week*, PRESS-ENTERPRISE, Aug. 9, 2000, at A9 (reporting the President's vow). Another bill with a similar genesis is the Colorado Canyons National Conservation Area proposed by Colorado Representative McClinnis to protect some 200,000 acres along the Colorado-Utah line near Grand Junction. The bill, which reflected compromises with the Interior Department, has also passed the House and needs Senate approval. *See House OK's Preservation Measure*, SALT LAKE TRIB., July 26, 2000, at A7 (discussing this legislation). Similar legislation has been developed for Steens Mountain in Oregon. *See Steens Mountain Cooperative Management and Protection Area: Hearing on H.R. 4828 Before the House Subcomm. on Nat'l Parks and Pub. Lands*, 106th Cong. (July 18, 2000), (statement of Molly McUsic, Counselor to the Secretary) (forthcoming), available at 2000 WL 23831475 (promising Administration support if "important modifications are made").

⁴²⁸ *Compare* H.R. 1487, 106th Cong. (1999) (passed by the House 408-2 on Sept. 24, 1999) (requiring public participation and comment as well as consultation with the appropriate Governor and congressional delegation prior to designation but not requiring an act of Congress and allowing the President to forego consultation in an emergency) *with Senate Energy Committee Approves Weaker Version of Monument Bill*, INSIDE ENERGY/WITH FEDERAL LANDS, Oct. 25, 1999, at 14, available at 1999 WL 12810767 ("An Interior Dept. spokesman has said his department would recommend Clinton veto even the House bill as a restriction on presidential powers."), and *with Hearing on H.R. 1487 Before the Subcomm. on Nat'l Parks and Pub. Lands of the House Comm. on Res.*, 106th Cong. 18-66 (Jun. 17, 1999), (Statement of John D. Leshy), available at 1999 WL 20009065 (opposing earlier version of H.R. 1487 which included requirement that an environmental impact statement be prepared). *Compare also* H.R. 1127, 105th Cong. (1997) (requiring congressional approval and comments from the appropriate

so certain that monuments are the best use of the public lands (a conviction made even stronger by broad popular support within the urban and suburban areas of the East and West) that he feels confident opposing most measures that bespeak delay or compromise.⁴²⁹

Governor before designation of a national monument in excess of 5,000 acres), S. 477, 105th Cong. (1997) (similar to house version, but requiring congressional approval before presidential action), S. 62, 105th Cong. (1997) (requiring an Act of Congress and public participation before extending or establishing a national monument in Idaho), and S. 691, 105th Cong. (1997) (requiring an Act of Congress and public participation before designation of any national monument), with *Hearing on H.R. 1127, S. 477, S. 691, and H.R. 901 Before the Subcomm. on Nat'l Parks, Historic Preservation, and Recreation of the Senate Comm. on Energy and Natural Res.*, 105th Cong. 22-43 (Feb. 12, 1998) (statement of John D. Leshy), available at 1998 WL 61440 (F.D.C.H.) (testifying against all three bills and opposing "new formal procedural requirements for notice, consultation and Congressional action" on the grounds that it would "increase the opportunity and the incentive to rush to establish rights or exploit resources that could irreparably harm the features and values to be preserved"). This concern about a rush to exploitation is more rhetoric than reality given the Secretary's emergency withdrawal authority under FLPMA. See Rasband, *supra* note 299, at 539 & n.257 (discussing this emergency power). Among other recent attempts to amend the Antiquities Act that have not received the support of the Administration are S. 729, 106th Cong. (1999) (requiring public participation, survey of resource values, and approval by act of Congress) and H.R. 4121, 106th Cong. (2000) (prohibiting any President from designating more than one national monument and requiring congressional approval within two years for the designation to become effective).

⁴²⁹ The Secretary would surely contend that he has been willing to compromise in the course of his national monument program and that he has protected the valid existing rights of those who are using the public lands proclaimed as monuments. In part, it is true. The Secretary has not always gone as far as pressed to go by the preservation community. See, e.g., *BLM Okays Conoco Oil Well in Utah Monument; Appeal Filed*, PUB. LAND NEWS, Sept. 18, 1997, at 2 (reporting BLM's decision to allow Conoco to conduct exploratory drilling in the Grand Staircase Escalante National Monument despite opposition from environmental groups); cf. Lee Davidson, *'Wilds Neutral' Bill Has Environmentalists Howling*, DESERET NEWS, Mar. 8, 2000, at A9 (discussing environmental groups objection to the Interior Department's negotiation of a compromise proposal for the San Rafael Western Legacy and National Conservation Bill); but cf. Jim Woolf, *Cannon Gives Up On San Rafael Bill*, SALT LAKE TRIB., July 7, 2000, at B4 (noting Secretary Babbitt did not deliver a single member of his party in support). He also has made some changes to his proposals based on the objections of local residents and representatives. See *Shivwits Plateau and Utah Wilderness: Hearing on H.R. 2795 and H.R. 3035 Before the Subcomm. on Nat'l Parks and Pub. Lands of the House Comm. on Res.*, 106th Cong. (1999) (statements of Rep. James Hansen (R-UT) (forthcoming), available at 1999 WL 992693 (F.D.C.H.) (describing both H.R. 2795 and H.R. 3035 as compromises between Secretary Babbitt and congressional and local representatives). The suggestion that the recognition of valid existing rights constitutes some sort of compromise or recognition of rural communities reliance interests is largely unsustainable. Recognizing valid existing rights is more about avoiding taking claims than it is about preserving commodity interests. The right to regulate such uses remains in place, and the compatibility-type standards by which such uses are judged only become more rigorous when the adjacent public lands have a more protective designation. See Rasband, *supra* note 299, at 518-21 (discussing the impact of valid existing rights).

4. *Nothing New Under the Sun*⁴³⁰

Supporters of the administrative reform agenda will point out that there are instances in which the Secretary has worked cooperatively with local communities. There is no denying that is the case.⁴³¹ It is also true, however, that the Secretary's confident and aggressive use of the administrative tools at his disposal has ranged beyond the areas of grazing, mining, and national monuments.⁴³²

Supporters may object to another aspect in which the portrait of Secretary Babbitt appears too one-sided. They will almost surely argue that the Secretary is only doing what previous secretaries and presidents have done. In a recent speech, Interior Solicitor John Lesly referred to a

⁴³⁰ See *Ecclesiastes* 1:9-10:

The thing that hath been, it is that which shall be; and that which is done is that which shall be done: and there is no new thing under the sun. Is there any thing whereof it may be said, See, this is new? It hath already been of old time, which was before us.

⁴³¹ See, e.g., *supra* note 422 (discussing the Secretary's compromises with local communities on some of his National Monument proposals); *supra* notes 363-72 and accompanying text (discussing the Secretary's effort to obtain public input on grazing regulation reform). The Secretary's diligent efforts to promote land exchanges with private parties and state and local governments in the face of significant opposition from many quarters are another example. See, e.g., Jim Carlton, *Congressman Seeks U.S. Moratorium on Land Exchange*, WALL ST. J., July 13, 2000, at A16 (Representative George Miller's (D-Cal.) opposition to the Administration's land exchanges and his proposed moratorium on all exchanges). See also BUREAU OF LAND MGMT. AND THE FOREST SERV., U.S. GENERAL ACC. OFF.: LAND EXCHANGES NEED TO REFLECT APPROPRIATE VALUE AND SERVE THE PUBLIC INTEREST (GAO/RCED-00-73) (June 2000) (critical report requested by Representative Miller). *But see* Elizabeth Kitchens, *Federal Land Exchanges: Securing the Keys to the Castle*, 46 ROCKY MTN. MIN. L. INST. 23 (forthcoming) (noting that the preservation benefits which accrue to the federal government through these exchanges are not always well-reflected by the valuations).

⁴³² Another instance is the administrative effort to narrow R.S. 2477 rights-of-way. See *supra* note 274 (discussing R.S. 2477 rights-of-way). The existence and scope of an R.S. 2477 right-of-way has long been considered a matter of state law. *Sierra Club v. Hodel*, 848 F.2d 1068, 1080 (10th Cir. 1988). However, in 1994, the Interior Department proposed regulations that would have established uniform standards and a process to determine the existence and location of R.S. 2477 claims. See Proposed Rules, Dept. of the Interior, 59 Fed. Reg. 39216 (Aug. 1, 1994). Congress, in turn, imposed a moratorium on the regulations and then passed legislation forbidding new regulations unless approved by Congress. See Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). See generally Mitchell R. Olson, Comment, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 ENVTL. L. 289, 291 & n.13 (1997) (discussing the moratorium and providing citations). The Secretary also conducted a reinventory of BLM lands in Utah in order to help establish additional wilderness. See Rasband, *supra* note 299, at 507-09 (discussing the reinventory). He has also worked diligently to make changes to the implementation of the Endangered Species Act. See generally J.B. Ruhl, *Who Needs Congress? An Agenda for Administrative Reform of the Endangered Species Act*, 6 N.Y.U. ENVTL. L.J. 367, 372-400 (1998) (reviewing these administrative reforms to the ESA). Although Secretary Babbitt is not in charge of the National Forests, the Forest Service's Roadless Policy initiative is another example of such an aggressive administrative initiative. See generally Jennifer L. Sullivan, *The Spirit of 76: Does President Clinton's Roadless Lands Directive Violate the Spirit of the National Forest Management Act of 1976?*, 17 ALASKA L. REV. 127, 138-57 (2000) (discussing the Roadless Policy and potential legal challenges to it).

"bipartisan" tradition of using presidential power under the Antiquities Act to designate national monuments.⁴³³ Although the Solicitor's use of the term "bipartisanship" is rather novel—generally the term is used to describe measures on which the opposing parties agree⁴³⁴—he is correct that there is a history of presidential stretching of the Antiquities Act.⁴³⁵ More broadly, there is an unfortunately long history of presidents using their administrative power to circumvent the legislative branch.⁴³⁶ The most recent and probably best example of an Interior Secretary whom Secretary Babbitt could be said to have emulated, in approach if not in acrimonious tone, is James Watt, President Reagan's first Secretary of the Interior. Like Secretary Babbitt, Secretary Watt aggressively employed his administrative powers, but in an effort to increase commodity uses of the public lands.⁴³⁷

Watt's administrative efforts, along with similar efforts by other members of the administration's environmental team,⁴³⁸ were roundly

⁴³³ See Gary Bryner, *John Lesly on Shaping the Modern West: The Role of the Executive Branch*, 49 RESOURCE LAW NOTES 2 (Mar. 2000).

⁴³⁴ THE AMERICAN HERITAGE DICTIONARY (2d College ed. 1976) (defining "bipartisan" as "[c]onsisting of or supported by members of two parties, esp[ecially] two major political parties.").

⁴³⁵ See *supra* notes 413–16 and accompanying text (discussing prior presidential use of the Antiquities Act).

⁴³⁶ See generally William J. Olson & Alan Woll, *Executive Orders and National Emergencies: How Presidents Have Come to "Run the Country" By Usurping Legislative Power*, POL. ANALYSIS No. 358, at 13 (Oct. 28, 1999) (listing number of executive orders issued by each president since Abraham Lincoln and showing that Ronald Reagan issued 381, Bill Clinton issued 304, and Franklin Roosevelt issued 3723).

⁴³⁷ See George C. Coggins & Doris K. Nagel, "Nothing Beside Remains": *The Legal Legacy of James G. Watt's Tenure As Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473 (1990) (describing Secretary Watt's various efforts at administrative change). Among a multitude of efforts, Secretary Watt proposed "without a hearing or any rulemaking procedures" to sell 4.4 million acres of BLM lands. *Id.* at 495. He departed from long bipartisan practice and attempted to lease minerals in wilderness and wilderness study areas. *Id.* at 532–34. See also *Sierra Club v. Peterson*, 705 F.2d 1475 (9th Cir. 1983) (finding Interior Department in violation of the National Environmental Policy Act for allowing oil and gas leasing in wilderness area); *Nat'l Wildlife Fed. v. Watt*, 19 ERC 1959 (1983) (enjoining coal lease sales). He refused to spend monies appropriated for national parkland acquisition. Coggins & Nagel, *supra*, at 500–01. He reclassified with less protective designations nearly 161 million acres of public lands. *Id.* at 507. He imposed a moratorium on grazing reductions and created so-called Cooperative Management Agreements designed to give ranchers who demonstrated exemplary rangeland management practices a more secure tenure in their grazing permits. *Id.* at 540–44. See also *Natural Res. Def. Council v. Hodel*, 618 F.Supp. 848 (E.D. Cal. 1985) (striking down the Cooperative Management Agreements). Acting in an almost identical manner to Secretary Babbitt's approach to mineral examinations and patent issuance, (see *supra* note 330 and accompanying text), Secretary Watt also reorganized the Office of Surface Mining, reducing the number of field offices from thirty-seven to twenty and replacing five regional offices with two technical service centers in an effort to weaken enforcement of the strip mining laws. Michael E. Kraft & Norman J. Vig, *Environmental Policy in the Reagan Presidency*, 99 POL. SCI. Q. 415, 429 (1984).

⁴³⁸ Similarly aggressive uses of administrative power were also employed by other members of Reagan's environmental team. Soon after the Reagan Administration began in 1981, Anne Gorsuch Burford, in another move reminiscent of Secretary Babbitt's foot-dragging on mineral examinations and patent issuance, abolished the EPA's Office of Enforcement and then reestablished it with a significantly smaller staff. *Id.* at 429. These and other changes led to an

criticized by the environmental community.⁴³⁹ What is most interesting is that they were also criticized by Bruce Babbitt, who was then governor of Arizona. Before he held the reigns of federal power, Secretary Babbitt argued that the absence of local participation constituted an abuse of that power:

If President Reagan and Secretary Watt are serious about efforts to establish a "good neighbor policy" between Washington and the West, they should work to strengthen, not weaken, mechanisms for joint decisionmaking on public lands. In particular, the states must be given a more meaningful role in planning development on federal lands within their borders . . . What angers most Westerners is not the fact of federal ownership, but the federal government's insistence that it is entitled to exercise power "without limitation." When this sovereign power is wielded by a continually changing parade of federal administrators, each with a different agenda, the situation becomes intolerable.⁴⁴⁰

Secretary Babbitt also argued that if there were a public lands issue of truly national interest, then Congress "ought to identify that interest explicitly through legislation, rather than leaving identification to agency administrators."⁴⁴¹ Unfortunately, during his time in Washington, Secretary Babbitt seems to have unlearned some of these basic principles. Just last year, Secretary Babbitt articulated his changed view: "When I got to town, what I didn't know was that we didn't need more legislation We've switched the rules of the game. We're not trying to do anything legislatively."⁴⁴² The truth is that Secretary Babbitt had it right when he came to town. Whatever one thinks of the Secretary's vision for the public lands, and parts of that vision certainly are commendable, circumventing public comment and dubious parsing of legislative language to upset settled expectations is not the way to accomplish it.

C. *The Authors of the New Reservation and Removal Policy*

The Secretary's departure from the participation principle he once espoused is unfortunate and should be a cautionary message for those who find no analogy between nineteenth century removal and reservation policies and public lands policy today. If we are ready to countenance abuses, albeit smaller ones, to achieve our preservation and recreation aspirations, how would we have acted if our objective had been promoting settlement and development? Would skepticism, participation, and respect

"eighty-four percent decline in the number of cases EPA referred to the Justice Department between June 1981 and July 1982." Howard Kurtz, *Since Reagan Took Office, EPA Enforcement Actions Have Fallen*, WASH. POST, March 1, 1983.

⁴³⁹ See, e.g., *supra* note 437 (criticizing Secretary Watt's administrative agenda); NAT'L WILDLIFE FED'N, MARCHING BACKWARDS: THE DEPARTMENT OF INTERIOR UNDER JAMES G. WATT 365 (Apr. 29, 1982); WILDERNESS SOC'Y, THE WATT RECORD 26-34 (1983).

⁴⁴⁰ See Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 857-58 (1982).

⁴⁴¹ *Id.* at 858.

⁴⁴² Carl M. Cannon, *The Old-Timers*, 1999 NAT'L J. 1386, 1391.

for culture and long ties to the land have been our guiding lights?

Although I have criticized Secretary Babbitt for his deviation from the skepticism and participation norms, it would be unfair to characterize the Secretary as the author of the new removal and reservation policy. Ultimately, the focus should not be solely on Secretary Babbitt; it must also be on those of us in the West's urban archipelagoes and elsewhere who are eager to see our public lands aspirations fulfilled. As Solicitor Leshy said in a recent speech: the hallmark of the Administration's public lands policy has been to "figure out what the people want, and give it to them."⁴⁴³ The new reservation policy is not about Secretary Babbitt any more than nineteenth century Indian policy is about one President, Interior Secretary, or Commissioner of Indian Affairs. Some were more active than others in conceiving and implementing federal policy, some had a more detrimental impact, but most were only responding to a century-long public inclination.⁴⁴⁴ Certainly, Secretary Babbitt should have deferred more often to the legislative process where rural interests could have tempered the general preference of the majority for preservation and recreation, and surely he could have done more to allow genuine participation by rural communities, but the Secretary's approach has been carried along by the strong underlying current of public preference. In the end, it is those of us who dwell in the West's urban archipelagoes who must recognize the importance of rural communities' ties to the public lands and the value of the skepticism and participation norms.

VII. CONCLUSION: "THEY THINK THEY ARE VICTIMS, BUT THEY ARE CONQUERORS"⁴⁴⁵

One of the dominant public lands metaphors of the last decade has been Charles Wilkinson's description of the law governing the public lands as "the lords of yesterday,"⁴⁴⁶ which he suggested must be "abolished" if the West is to be preserved.⁴⁴⁷ The metaphor captures a truth about the West.

⁴⁴³ John D. Leshy, Remarks at 48th Annual Rocky Mountain Mineral Law Institute (July 20, 2000). Furthermore, Leshy stated that the Administration's public land policy has comported with "the will of the people." *Id.*

⁴⁴⁴ The fact that the first removal policy occurred over a century is also a response to a potential argument that Secretary Babbitt has not engaged in a removal policy because his administrative initiatives have not resulted in wholesale changes in the use of the public lands. Most miners continue to mine and ranchers continue to graze. In fact, local BLM and Forest Service officers are probably more solicitous of rancher needs than the Secretary would like. Although the new removal and reservation policy has not yet been wholly accomplished, it is indeed underway, and the Secretary cannot be counted as anyone other than an eager participant in the process.

⁴⁴⁵ Bodio, *supra* note 236, at 20 (describing New Westerners).

⁴⁴⁶ WILKINSON, CROSSING THE NEXT MERIDIAN, *supra* note 3, at xii-xiii (offering this metaphor for the Nineteenth century law, policies, and ideas that inform public land use in the West); CHARLES F. WILKINSON, THE LORDS OF YESTERDAY (1996).

⁴⁴⁷ WILKINSON, CROSSING THE NEXT MERIDIAN, *supra* note 3, at 305. See also Egan, *supra* note 411, at 21 (reporting on Secretary Babbitt's "campaign against what he calls the 'Lords of Yesterday,' the old forces of government-subsidized industry that have shaped development of

The laws and policies of the nineteenth century were indeed the banners under which the West was conquered, settled, and developed, and some of those banners still fly, albeit less confidently. But the metaphor has also taken hold for another reason: it suggests that those who now seek to plant the flag of preservation and recreation are somehow victims of these rapacious lords of yesterday. It is time to understand that we too are conquerors.

As the new banners of preservation and recreation gain the ascendancy, we must recognize that their predominant motif is still self-interest. The fact that rural communities were established under a prior regime should not obscure the fact that it is they, and not the increasingly powerful political majorities in the West's urban archipelagoes, who stand to be the new victims.⁴⁴⁸ The test for those of us who favor the new paradigm of preservation and recreation is whether this time we will follow a more principled path to achieving our public lands aspirations that is less certain, and more willing to recognize the interests of the communities who are a part of the fabric of those lands.

the West, the main realm of Interior").

⁴⁴⁸ Professor Wilkinson emphasizes that the "people" of the West are not to be included in the lords of yesterday. See *CROSSING THE NEXT MERIDIAN*, *supra* note 3, at xlii. However, the almost inevitable result of the metaphor is that those communities established by the lords of yesterday will be seen as extensions of the lords of yesterday and their removal as part of achieving a greater good.

