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THE UNITED STATES FOREST SERVICE AND NATIONAL PARK SERVICE: PARADOXICAL MANDATES, POWERFUL FOUNDERS, AND THE RISE AND FALL OF AGENCY DISCRETION

FEDERICO CHEEVER*

There was no harm in getting a purpose down, even though the only purpose admissible raises more questions than it answers.¹

I. INTRODUCTION

On September 18, 1996, President Clinton announced the designation of the Grand Staircase-Escalante National Monument in southern Utah. Although a national monument in an area long targeted for protection by the National Park Service,² President Clinton's announcement made it clear that the monument's initial management plan would be prepared by another agency of the Department of the Interior, the Bureau of Land Management (BLM). President Clinton's action implied that the BLM might be more accommodating to local interests than the Park Service.³ Other sources suggest that the local interests in question include not only those concerned about the fate of the Andalex Resources Inc. mining enterprise within the monument, but also local

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1. ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS, 101 (1951) (discussing purpose language in National Park Service Organic Act of 1916).

2. Christopher Smith, *Feds Seek a Truce with Utah*, SALT LAKE TRIB., Nov. 9, 1996, at A5. George Frampton, Assistant Secretary of the Interior, referring to management of Grand Staircase-Escalante National Monument by the Bureau of Land Management, rather than the Park Services, stated:

I realize it may be controversial within the Park Service but I'm very comfortable with it . . . The Park Service is more preservationminded, [sic] but BLM has the skills and science available to uphold the mandate in the [monument's] proclamation. I would like to see this as a test for BLM and I would not like to see the monument go to the Park Service.

Id. Sen. Orrin Hatch, Utah, fumed "Indeed, this is the mother of all land grabs" when referring to the creation of the national monument. Laurie Sullivan Maddox, *Taking Swipes at Clinton, Utah-ans Vow to Fight Back*, SALT LAKE TRIB., Sept. 19, 1996, at A5.

3. *Details of the Monument*, SALT LAKE TRIB., Sept. 19, 1996, at A4 (quoting President Clinton's assurances that with BLM management, the public will be able to hunt, fish and graze livestock in the monument).

environmentalists concerned about the Park Service's management approach in some of the canyon parks in southern Utah.⁴

Although almost unnoticed in the fanfare surrounding the monument's designation, this exclusion from coveted terrain is a blow to the Park Service and suggests a level of controversy about the agency unparalleled in its eighty-year history. The Park Service remains one of a very few federal government icons in an anti-government age. The flat brimmed hats and brown uniforms of the park ranger evoke a sense of well being in most Americans.⁵ At the same time, with various interest groups, the Park Service is running into trouble, attacked both for its protectiveness of the lands it manages⁶ and for its traditional methods of facilitating human access to the national parks.⁷ Long standing contradictions in our national image of what national parks should be are generating new tension. Scholars have a role to play in describing these disputes and seeking out their sources. This symposium in the *Denver University Law Review* comes at a propitious time.⁸

This essay provides one cautionary observation: The Park Service may be following the road followed a few decades before by its sister agency, the United States Forest Service.⁹ Into the 1960s, the forest rangers and their mas-

4. Both federal land managers and nonprofit organizers expressed local environmental concerns:

"It's a good laboratory," said Eric Howard of the Grand Canyon Trust, which would like to see "local control with local dollars, *not falling prey to chain-store development patterns.*"

"We want to do a good job and show everybody we can," said Gregg Christiansen, one of six employees in the BLM Escalante office. "I think we can if we don't screw up, if they give us the money and don't give it to the National Park Service."

And the first issue will likely be paving the roads.

"Don't pave it," said Grant Johnson, a SUWA founder and outfitter who leads walks into Escalante. "The monument will never be better. Right now the trailhead is unmarked. *Next thing you know they'll put up a sign, and then you'll have a ranger patrolling with a gun.*"

Jim Carrier, *The Last Place*, DENV. POST (Empire Mag.), Nov. 17, 1996, at 18 (emphasis added).

5. In August 1996, developers outside Denver, Colorado, opened the Park Meadows Mall. The mall uses the traditional motifs of the National Park Service and National Park architecture to sell the usual mix of housewares, clothes and self-help literature:

At the main entrance, shoppers are greeted by nothing resembling a traditional mall entrance. Park Meadows' sandstone-and-rounded-timber-beam entrance, topped by a pediment, is certainly different and larger than life, but definitely not intimidating.

The unmistakable national parks-lodge lines are warmer and more friendly than the standard, chilly steel-and-glass mall entrances that have held sway for the past two decades.

J. Sebastian Sinisi, *Inviting Park Meadows Embraces Shoppers*, DENV. POST (EMPIRE MAG.), Nov. 10, 1996, at 18. The developer's choice is, if nothing else, a testament to the esteem in which most Americans still hold the National Parks and National Park Service.

6. In 1995, Congress appropriated a mere \$1 to fund the Mojave National Preserve. H.R. 1977, 104th Cong. (1995). President Clinton vetoed the appropriations bill, specifically targeting the lack of funding for the preserve. Veto of H.R. 1977, 104th Cong. (1995).

7. See *Sierra Club v. Lujan*, 716 F.Supp. 1289, 1293 (D. Ariz. 1989) (ordering preliminary injunction halting construction of a restaurant, hotel, and related structures on the north rim of the Grand Canyon).

8. Symposium, *The National Park System*, 74. DENV. U. L. REV. 567 (1997).

9. At a 1991 conference held in Yellowstone National Park for the Park Service managers

cot, Smokey Bear,¹⁰ enjoyed great popular esteem. Even Lassie spent some time in the Forest Service.¹¹ In thirty years, strong popular reaction to Forest Service logging practices and increased concern for the species, ecosystems, and scenery harmed by those practices wrought dramatic changes in a timber-oriented agency.¹² Changes in traditional Forest Service practices, in turn, provoked strong, if localized, popular reaction to change.¹³ Smokey Bear receives death threats.¹⁴ The Forest Service is attacked from both ends of the political spectrum and pleases almost no one. The fabric of Forest Service agency culture is in jeopardy.¹⁵

of the large western "backcountry parks," such as Yellowstone, Rocky Mountain, Glacier, and Olympic national parks, a manager admitted that although the public still views the Park Service as "America's favorite agency," he and other wilderness managers knew otherwise; that, in fact, the Park Service was losing the battle to maintain natural systems in the parks. Interview with Chad Henderson, former public policy manager of the National Outdoor Leadership School, in Denver, Colo. (Jan. 12, 1997).

10. References to "Smokey the Bear" are not only incorrect, but also contradict federal law. See 16 U.S.C. § 580p (1994) (establishing use and protection for the characters Smokey Bear and Woodsy Owl).

11. Evolution of attitudes toward the Forest Service:

The 1950s and '60s were kind to the Forest Service. The image of the ranger in the green uniform, there to protect the woods and rescue stray kids, dominated the national psyche. The Forest Service was trusted as the paternal land manager, its rangers as true as Smokey Bear; on TV, one of them was cast as fitting companion to no less a hero than Lassie.

But that image devolved with the social revolution that swept America in the late 1960s and early 1970s. The Forest Service drew a more critical stare from a public awakening to warnings of environmental catastrophe.

Then came the first Earth Day, the Endangered Species Act and the National Forest Management Act. Charges surfaced of illicit ties between the agency and the CIA; news accounts revealed below-cost timber sales and logging thefts.

By the late 1980s, the Forest Service was driving on its rims, battered and lack-luster. Trust in the agency's stewardship had all but dissolved.

Peter D. Sleeth, *Even in Washington, D.C., Thomas Keeps Forest Close*, PORTLAND OREGONIAN, July 14, 1996, at A1.

12. In 1971, the "Church committee" examined Forest Service timber management. See STAFF OF THE SUBCOMM. ON PUBLIC LANDS OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92d CONG., CLEARCUTTING ON FEDERAL TIMBERLANDS 1 (Comm. Print 1972) [hereinafter 1972 COMMITTEE REPORT]. The hearings and subsequent report contributed to congressional unease over Forest Service clearcutting practices, and contributed to passage of the National Forest Management Act in 1976. 16 U.S.C. 1600, 1611-1614, 472a, 521b (1994). Focus shifted from modifying silviculture practices to protection of values beyond timber production in the late 1980s with the northern spotted owl controversy. By 1991, the Forest Service faced dramatic reductions in timber harvests from Pacific Northwest national forests as a result of lawsuits seeking protection for the threatened spotted owl. See Alyson C. Flournoy, *Beyond the "Spotted Owl Problem": Learning from the Old-Growth Controversy*, 17 HARV. ENVTL. L. REV. 261 (1993) (discussing Pacific Northwest logging and its effects on native ecosystems contrasted with the costs of environmental protection and economic transitions of local communities).

13. See, e.g., Gail Kinsey Hill, *Shortfall in Timber Sales Doubles; The Forest Service Revises Previous Estimates of Timber That Won't Be Cut, and Mill Owners Say Thousands of Workers Will Lose Their Jobs*, PORTLAND OREGONIAN, Aug. 8, 1990, at B1. Timber workers in the communities where the Forest Service proposed large reductions in the timber harvest were upset, some of them feeling a "sense of doom." *Id.*

14. In the spring of 1989, court injunctions had effectively shut down Pacific Northwest timber sales on national forests. Angry members of the affected communities sent death threats to Forest Service mascots Smokey Bear and Woodsy Owl. STEVEN LEWIS YAFFEE, *THE WISDOM OF THE SPOTTED OWL* xv (1994) (providing an exhaustive analysis of the northern spotted owl controversy in the years 1989 to 1993).

15. Forest Service Chief Jack Ward Thomas commented on the deterioration of agency mo-

The Park Service and the Forest Service are different. The Forest Service authorizes logging, oil and gas development, mining and hunting in the national forests.¹⁶ The Park Service (with a few exceptions)¹⁷ permits none of these uses in National Parks. In other senses, however, the agencies share significant attributes. Both are agencies of long standing, progeny of the Progressive era. The Forest Service took on its current form in 1905 and 1906.¹⁸ The Park Service came into being in 1916.¹⁹ Congress created both to manage public land reserved considerably earlier. Grover Cleveland set aside the first "forest reserves" in 1891.²⁰ Congress set aside the first national park, Yellowstone, in 1872.²¹

More significantly for our purposes, both agencies were shaped by a type of person, rare then and almost non-existent now: wealthy, energetic visionaries who saw the reserves of public lands under their influence as a canvas for their ideas and who used the machinery of government to further their vision. Gifford Pinchot imagined the United States Forest Service and then created it.²² His vision still shapes that agency's view of itself and the land it manages eighty-seven years after his tenure as its chief. Steven Mather had an equally significant role in the creation of the National Park Service. Like Pinchot's, Mather's vision haunts the agency he helped create.²³

Finally, and not coincidentally, both agencies operate under "paradoxical"²⁴ legislative mandates. The National Park Service Organic Act of

rale. He stated, "This demonization [of the Forest Service] is on the verge of bringing down this agency." *Forest Service "No Demon,"* DENV. POST, Sept. 18, 1996, at B1.

16. 7 C.F.R. § 2.60 (1997). This regulation delegates authority to the Chief of the Forest Service to manage the National Forest System and defines the chief's responsibility for "forestry" to include:

renewable and nonrenewable resources of forests, including lands governed by the Alaska National Interest Lands Conservation Act, forest-related rangeland, grassland, brushland, woodland, and alpine areas including but not limited to recreation, range, timber, minerals, watershed, wildlife and fish; natural scenic, scientific, cultural, and historic values of forests and related lands; and derivative values such as economic strength and social well being.

Id.

17. Congress allowed hunting and certain off-road motorized access to national preserves in Alaska, managed by the Park Service. See Deborah Williams, *ANILCA: A Different Legal Framework for Managing the Extraordinary National Park Units of the Last Frontier*, 74 DENV. U. L. REV. 859, 860-64 (1997).

18. Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 23 OR. L. REV. 1, 15-19 (1985), Michael Frome, *THE FOREST SERVICE* 12-25 (1984).

19. National Park Service Organic Act, 16 U.S.C. §§ 1-4 (1994); see Robin W. Winks, *The National Park Service Act of 1916: "A Contradictory Mandate?"*, 74 DENV. U. L. REV. 575, 583-85 (1997).

20. Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1103 (repealed in 1976); see Wilkinson & Anderson, *supra* note 18, at 17-18.

21. Yellowstone National Park Act of 1872, 16 U.S.C. § 21 (1994).

22. MICHAEL WILLIAMS, *AMERICANS AND THEIR FORESTS* 417-421 (1989).

23. DYAN ZASLowsky & T.H. WATKINS, *THESE AMERICAN LANDS* 22-27 (1994).

24. I offer two definitions of "paradox" that may apply here: "a statement that is seemingly contradictory or opposed to common sense and yet is perhaps true" and "a self-contradictory statement that at first seems true." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 842 (10th ed. 1993).

1916²⁵ declares that the purpose of the national parks is to “conserve” scenery, “natural and historic objects” and “wild life” and provide for their enjoyment “by such means” as to leave them “unimpaired for the enjoyment of future generations.”²⁶ Congress did not specify by what means the Park Service was to “conserve” “unimpaired” the national parks while providing for their “enjoyment.” In the 1897 “Organic Act”²⁷ authorizing management of what were to become the national forests, Congress provided a mandate to “improve and protect the forest” while at the same time “securing favorable conditions of water flows” and furnishing “a continuous supply of timber for the use and necessities of citizens of the United States.”²⁸ Again, how to use the resources while protecting them remains unspecified.

At present, the paradoxical mandates of the two agencies facilitate the generation of perceptions of agency purpose at odds with actual agency conduct. They allow those of us who are interested in public land management to project our vision and values onto the language Congress used to instruct these agencies. This almost insures that some significant part of the interested public will believe that the agencies conduct is not only wrong but illegal.

Federal officials are fond of saying that when they anger both sides in a dispute, they are probably doing their jobs. In fact, operating in a manner that defies the expectations of interested outside groups has a corrosive quality. It corrodes working relationships between the agency and its potential partners in the community in which it operates, and it corrodes judicial deference to agency action. When a Winnebago tourist, who believes the national parks exist for his enjoyment, hears that the Park Service is planning to ban cars from Zion National Park,²⁹ he feels betrayed. When a wilderness enthusiast, who believes the national parks exist to preserve natural wonders, finds the equivalent of a shopping mall in Yosemite Valley, she feels betrayed.³⁰ When a timber

25. 16 U.S.C. §§ 1-4 (1994).

26. 16 U.S.C. § 1. The National Park Service Organic Act declares that:

The service thus established shall promote and regulate the of the Federal areas known as national parks, monuments, and reservations . . . by such means and measures as conform to the fundamental purpose . . . which purpose is to *conserve* the scenery and the natural and historic objects and the wild life 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.

Id. (emphasis added).

27. Forest Service Organic Administration Act of June 4, 1897, 16 U.S.C. § 473-482, 551 (1994). The Forest Service's pre-1976 authorizing legislation includes: Forest Transfer Act, 16 U.S.C. §§ 472, 615b, 554, 524 (1994); Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-531 (1994).

28. 16 U.S.C. § 475. The Forest Service Organic Administration Act states that “[n]o national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.” *Id.*

29. See Tom Kenworthy & Gary Younge, *Falling into a Hole at Grand Canyon; Nation's Parks Face Severe Budget Crunch*; WASH. POST, Aug. 21, 1996, at A23 (stating that Zion National Park officials are considering a ban on automobiles in the park to address visitation pressures and limited funds).

30. George Cameron Coggins & Robert L. Glicksman, *Concessions Law and Policy in the National Park System*, 74 DENV. U. L. REV. 729, 740 (1997) (discussing only one instance in which the National Park Service has been enjoined from allowing facility development to accom-

mill worker who believes that the purpose of the Forest Service is to furnish "a continuous supply of timber" learns the Forest Service will sell less timber in order to protect owl habitat, the timber mill worker feels betrayed.³¹ When a judge who believes that the purpose of the Forest Service is to protect national forest resources for future generations sees pictures of national forest land that look more like a clipped poodle than a landscape, the judge is inclined to believe the agency has broken the law.³²

So how did these agencies get stuck with such counter-productive mandates, and why did it take the better part of the twentieth century for the mandates to create such problems? I suggest that these paradoxical mandates once served to enhance agency prestige and esprit de corps by giving the powerful men who influenced the agencies' early years language onto which they could project *their* vision and that, in a world in which Congress and the Cabinet provided the only arenas for disputes about the public land, their opacity did little or no harm. Times have changed; ambiguity which once provided agencies necessary latitude before Congress and the Cabinet now inspire sophisticated western interest groups to challenge agency policy. Mandates which once contributed to the rise of agency discretion now contribute to its decline.

II. VISIONS, WEALTH AND CRAMPED GOVERNMENT OFFICES

Stephen Mather was 47 and a Borax tycoon when he made his tour of the western national parks in 1914.³³ A promoter, originator of the "twenty mule team" borax slogan,³⁴ and a business strategist who had bested Francis Marion "Borax" Smith in the business Smith had originated,³⁵ Mather was also an outdoorsman, member of John Muir's tiny Sierra Club and participant in the Club's 1905 Mount Rainier expedition.³⁶ Mather did not find the management of the western parks to his liking.³⁷ He wrote Franklin Lane, Secretary of the Interior and a friend from Mather's college days at Berkeley.³⁸ Lane wrote back telling Mather that if he didn't like the way the national

modate visitation within a national park).

31. President Clinton addressed the timber-spotted owl conflict in the Pacific Northwest by forming the "Forest Ecosystem Management Assessment Team." The team presented a plan, and the plan's "Option 9" was selected as the approach to limit timber harvest in order to protect the owls. Local opposition was fierce. Sue Kupillas, an Oregon county commissioner, testified before a House subcommittee, stating "Our worst fears were realized when the FEMAT [Forest Ecosystem Management Assessment Team] group emerged from its secret deliberations and handed down plans that included an 80-percent reduction in timber harvests, with corresponding losses of revenues upon which we depend." *Hearing on President Clinton's Forest Plan for Spotted Owl Before the Subcommittee on National Parks, Forest, and Lands, House Committee on Resources*, 104 Cong. (1996) (statement of Sue Kupillas, Commissioner, Jackson County, Oregon).

32. *See, e.g., Seattle Audubon Soc'y v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (affirming injunction of Forest Service from awarding timber contracts in Pacific Northwest national forests that would log habitat suitable for the spotted owl until the agency complies with the National Environmental Policy Act and the National Forest Management Act).

33. SHANKLAND, *supra* note 1, at v.

34. *Id.* at 27-28.

35. *Id.* at 33-39.

36. *Id.* at 9.

37. *Id.* at 7.

38. *Id.*

parks were run, he could come down to Washington and run them himself.³⁹ Mather did.⁴⁰

Mather left a life of comfort in Chicago, moved into a small office in the Department of the Interior, and through a decade and one-half of almost incessant labor left an indelible impression on the national parks and the people who run them. Mather supplemented his employees' salaries out of his own pocket⁴¹ and purchased significant assets for the parks with his own money, including the Tioga Road, the only eastern, and most spectacular, entrance into Yosemite National Park.⁴² He used his personal connections in business and government to further the interests of the national parks as he saw them, and he had much to do with the passage of the National Park Service Organic Act of 1916.⁴³ Mather knew what he wanted the national parks to be, and he used every asset at his disposal to remake them in that image.⁴⁴

Mather's mixture of vision and philanthropy in government service strikes us as alien and even slightly disturbing. He was of another time, not so much in his willingness to spend almost unlimited quantities of his money and time to further his version of the public good,⁴⁵ but rather in his choice of the federal government as the instrument of his will.

Mathers are rare in any age, but Stephen Mather was not unique in his time. He operated in the wake of a better known and similar man. Gifford Pinchot was not a businessman. He was rich. Few would deny that Pinchot's gifts for promotion and organization would have made him an excellent businessman had his vision not taken him in another direction. As a very young man he travelled to Europe to study forestry and encountered there the perpetually harvested and perpetually maintained forests of France, Germany and Switzerland.⁴⁶ As Pinchot wrote in his autobiography:

The Forests of Haye and Vandoeuvres are . . . hardwood forests, managed on a system of coppice (sprouts cut once every thirty years) under standards (seedling trees cut once in 150 years). They gave me my first concrete understanding of the forest as a crop, and I became deeply interested not only in how the crop was grown, but also in how it was harvested and reproduced.

39. *Id.*

40. *Id.*

41. Winks, *supra* note 19, at 58.

42. Mather's generosity described:

Congress would get around to voting the parks an ample appropriation only when it heard a loud enough public demand, but it would hear a loud enough public demand only after an ample appropriation had been spent on publicity and improvements. A cash primer was called for to set the process off. Mather thought about this and had a familiar reaction. He hauled out his checkbook. For a curtain-raiser to his park administration he wanted to make some noise . . . Casting about for an idea, he remembered the Tioga Road, a broken-down east-west thoroughfare, fifty-six miles long that bisected [Yosemite National] [P]ark.

Id. at 57-58.

43. SHANKLAND, *supra* note 1, at 100-06.

44. *Id.* at 243.

45. Witness Ross Perot.

46. GIFFORD PINCHOT, *BREAKING NEW GROUND* 10-22 (1947).

Work in these woods was assured for every year, and would be, barring accidents, world without end. The forest supported a permanent population of trained men . . . and not only a permanent population but also permanent forest industries, supported and guaranteed by a fixed annual supply of trees ready for the ax.⁴⁷

Pinchot brought the vision of sustained yield forestry back to the United States in the early 1890s and spent most of the next twenty years lobbying for the creation of the national forests and creating the organization that would manage them, the United States Forest Service.⁴⁸ Like Mather, he moved into cramped government offices and created an agency which eventually grew to include tens of thousands of employees controlling millions of acres of land.⁴⁹

Pinchot's philanthropy was not as ostentatious as Mather's. However, the Yale Forestry School, established to train his successors in the Forest Service, owes much to his largess.⁵⁰

Like Mather, Pinchot used the government to further his vision. As Mather saw the national parks on his 1914 trip, so Pinchot saw the Department of the Interior "forest reserves" when he inspected them on his visit to the west as a "confidential forest agent" in 1897.⁵¹ Like Mather, he used all the assets at his disposal to remake the reserve system in the image of the perpetual forestry he brought from Europe, personally reformulated for his native country.⁵²

III. GETTING "CARTE BLANCHE" FROM CONGRESS

A. *Personal Vision and Washington Politics*

In the age of Mather and Pinchot, there were two significant obstacles to using the machinery of the federal government to realize a personal vision: Congress and cabinet-level officials. Both Mather and Pinchot became masters at manipulating Congress and the various secretaries of Interior and Agriculture.

Generating benign popular interest has always been a key to congressional support. Michael Frome, a journalist himself, observes that Gifford Pinchot "may have been the best press agent of his time"⁵³ As Theodore Roosevelt, an intimate friend of Pinchot's, notes in his autobiography:

It is doubtful whether there has ever been elsewhere in the Gov-

47. *Id.* at 13.

48. *Id.* at 188-262.

49. In 1898 Pinchot Succeeded Bernhard Fernow as chief of the division of Forestry in the Department of Agriculture. He began with eleven employees "the nucleus of the Forest Service today." FROME, *supra* note 18, at 19.

50. FROME, *supra* note 18, at 298-299.

51. PINCHOT, *supra* note 46, at 122-132.

52. Pinchot had considerable disdain for those who wished to apply European forestry principles unaltered in the United States. *Id.* at 147. However, it is far from clear how his personal vision differed from theirs.

53. FROME, *supra* note 18, at 45 (Frome quickly notes that Mather ran a close second).

ernment such effective publicity [as that of the Forest Service]—purely in the interest of the people—at so low a cost. Before the educational work of the Forest Service was stopped by the Taft Administration, it was securing the publication of facts about forestry in fifty million copies of newspapers a month.⁵⁴

Pinchot lobbied for the 1897 “Forest Service Organic Act”⁵⁵ which gave authority to sell timber to whomever managed the national forests.⁵⁶ Pinchot termed it a “door wide open to the forester.”⁵⁷ Pinchot mounted a lengthy political campaign which finally resulted in the 1905 Transfer Act⁵⁸ which transferred authority over the forest reserves from the Department of the Interior, where Pinchot had made some enemies,⁵⁹ to the Department of Agriculture, where he had good friends.⁶⁰ The hallmark of his victory over Congress was his establishment of a significant federal agency authorized by only a few paragraphs of congressional mandate. Pinchot did not want Congress interfering which his Forest Service or his vision of the national forests, and he significantly advanced that end by preventing Congress from imposing any significant legal standards on himself or his agency.

Similarly, Mather worked for enthusiastic congressional support of the national parks without congressional participation in their management. Between his arrival in Washington in early 1915 and passage of the National Park Service Organic Act on August 25, 1916, he marshalled his friends in the press to cover the parks,⁶¹ and, in the summer of 1915 he took a select group of influential people on a tour of the western parks.⁶² The party contained a number of well positioned members of Congress, including Gilbert Grosvenor of the National Geographic Society and the United States Geological Survey’s most prized trail cook, Ty Sing.⁶³ Mather was a Republican who “took the Bull Moose turn-off” in 1912.⁶⁴ He worked happily and effectively in Democratic administrations. When Republicans of a very different sort recaptured the White House in 1920, and Albert Fall, of Teapot Dome fame, became Secretary of the Interior, Mather had established a sufficient network of influential friends to prevent Fall from doing much damage to the national parks.⁶⁵

Professor Fischman points out that scholars have focused considerable attention on a single prescriptive phrase in the National Park Service Organic

54. *Id.* at 45-46.

55. 16 U.S.C. §§ 473-482, 551.

56. 16 U.S.C. § 475.

57. PINCHOT, *supra* note 46, at 117.

58. 16 U.S.C. §§ 472, 615b, 524, 554.

59. WILLIAMS, *supra* note 22, 105, at 418 (describing Pinchot’s attack on the Department of the Interior’s General Land Office for its incompetence in managing the forest reserves).

60. Notably “Tama” Jim Wilson, Secretary of Agriculture, who Pinchot described:

He was a grand man to work for. He knew enough, as plenty of executives do not, to give a man his head—let him alone, so long as he stayed on the right track.

PINCHOT, *supra* note 46, at 137.

61. SHANKLAND, *supra* note 1, at 83-99.

62. *Id.* at 68.

63. *Id.*

64. *Id.* at 42.

65. *Id.* at 217-18.

Act of 1916:⁶⁶

[T]o conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations.⁶⁷

They have done so, in part, because it is the *only* prescriptive provision in the 1916 law. In that act, Mather gained the authority to hire employees, the authority to make and publish rules and regulations "necessary or proper for the use and management of the parks," the authority to sell and dispose of timber "in order to control the attacks of insects or diseases or otherwise conserve the scenery," the authority to destroy "detrimental" animals and plants, the authority to grant "privileges, leases, and permits for the use of land for the accommodation of visitors," and the authority to permit cattle grazing "when [in the judgment of the Secretary of the Interior] such use is not detrimental to the primary purpose for which such park . . . was created."⁶⁸ The law granted this authority subject to the limitations imposed in specific acts establishing parks⁶⁹ and the paradoxical provision quoted above.

B. *The Promise of Balance*

The success Pinchot and Mather enjoyed in their dealings with Congress and the Cabinet had something to do with their promises, explicit and implicit, to do the difficult job of striking a balance between preservation and use. The texts of the laws Congress enacted clearly indicated congressional awareness of the need for such a balance.⁷⁰ While the legislators of the first decades of the century could not imagine the effect of chainsaws, snowmobiles and interstate highways, they understood that managing the public lands required trade-offs.

The creation of the original forest reserves in 1891 was intended to stop unregulated timber harvest on sensitive public lands and provided no authority for the sale of federal timber.⁷¹ This set off a backlash among those who benefitted from logging on public land and led to the 1897 Organic Act which authorized regulated timber cutting.⁷² Pinchot obtained control of the national forests in 1905 by telling Congress that he and the agency he created could regulate the timber harvest to the benefit of all the people without damaging the national forest resources or draining the treasury.⁷³

66. Robert L. Fischman, *The Problem of Statutory Detail in National Park Establishment Legislation and its Relationship to Pollution Control Law*, 74 DENV. U. L. REV. 779, 779-80 (1997).

67. 16 U.S.C. § 1.

68. 16 U.S.C. § 3.

69. Fischman, *supra* note 66, at 779-80; see also Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 16-31 (1992).

70. See *supra* notes 16-28, and accompanying text.

71. Act of March 3, 1891, ch. 561, 26 Stat. 1095, 1103, (repealed 1976).

72. FROME, *supra* note 18, at 18-19.

73. See Robert E. Wolf, *National Forest Timber Sales and the Legacy of Gifford Pinchot*:

The seminal policy document for Pinchot's Forest Service, the document that acted "to crystallize the purpose and spirit of the new enterprise in terms that are as valid today [1946] as they were forty years ago [1905]"⁷⁴ was a letter transmitted to Pinchot by his friend, Secretary of Agriculture James "Tama Jim" Wilson, dated the day of the transfer of authority over the forest reserves into Pinchot's hands.⁷⁵ In his autobiography, Pinchot coyly noted "[t]hat letter, it goes without saying, I had brought to the Secretary for his signature."⁷⁶ The letter states:

In the administration of the forest reserves it must be clearly borne in mind that all land is to be devoted to its most productive use for the permanent good of the whole people All the resources of the forest reserves are for *use*, and this use must be brought about in a thoroughly prompt and businesslike manner, under such restrictions only as will insure the permanence of these resources. . . . The permanence of the resources of the reserves is . . . indispensable to continued prosperity, and the policy of this department for their protection and use will invariably be guided by this fact, always bearing in mind that the *conservative use* of these resources in no way conflicts with their permanent value.

You will see to it that the water, wood, and forage of the reserves are conserved and wisely used for the benefit of the homebuilder first of all⁷⁷

Reading through the text of Pinchot's letter, one senses the oscillation between declarations in favor of use and of preservation. In the first two sentences, use is paramount, modified by the need for permanence. However, by the end of the paragraph, "permanence" and even "protection" dominate, modified by allegedly consistent "conservative use."

The tension between use and preservation framed the debate surrounding enactment of the National Park Service Organic Act of 1916 (1916 Act). The debate took place in the shadow of the 1913 Hetch-Hetchy dam controversy, in which federal agencies, supported by Pinchot and opposed by his former friend John Muir, allowed the City of San Francisco to build a dam in Yosemite National Park and flood one of its most beautiful valleys.⁷⁸ Mather was still in the Borax trade when the Hetch-Hetchy controversy took place, but the fight spurred the movement to establish a separate agency to manage the national parks,⁷⁹ a movement that Pinchot opposed.⁸⁰ The promise in the

Managing A Forest and Making It Pay, 60 U. COLO. L. REV. 1037, 1045-51 (1989) (discussing Pinchot's promises to Congress regarding the Forest Service's profitability and budget).

74. PINCHOT, *supra* note 46, at 261.

75. *See id.* at 260-61.

76. *Id.* at 260.

77. *Id.* at 261.

78. FROME, *supra* note 18, at 276.

79. *Id.*

80. When the idea of a separate national park service was first introduced, Pinchot scoffed that it "was no more needed than two tails to a cat." FRANK E. SMITH, *THE POLITICS OF CONSERVATION* 155 (1966). Pinchot believed the Forest Service should run the National Parks. Hetch-Hetchy among other things made that impossible. *Id.*

1916 Act to preserve the parks while facilitating their enjoyment suggested that there would be no more need to resolve Hetch-Hetchy-like controversies in Congress. Two prominent sponsors of the 1916 Act, Congressmen John E. Raker and William Kent, had been in the thick of the debate and strong proponents of the Hetch-Hetchy dam. Kent, an outdoorsman, suffered the loss of his friendship with John Muir as a result of the Hetch-Hetchy dispute.⁸¹ Franklin Lane, the Secretary of the Interior who hired Mather, had also supported the Hetch-Hetchy dam.⁸² The single prescriptive provision of the 1916 Act, quoted above, requires both use and preservation.⁸³ From now on, balancing would be done at the agency level.

Many of the current balancing acts regarding both national parks and national forests center around one extremely useful and destructive technology, internal combustion vehicles and the roads on which they travel. Some of the damage and pressure associated with roads, cars, campers, snowmobiles and all-terrain vehicles can be traced to Stephen Mather's enthusiastic acceptance of automobiles as a means of access to the national parks. While much of the current problems may have been inevitable in light of America's romance with the automobile, some can be traced to Mather's personal romance with the automobile:

As (in the jargon of the early motor age) an "auto crank," Mather belonged to the American Automobile Association and the Chicago Automobile Association and operated a car of his own in Washington. He knew what agonies the motorist suffered. Once, in the spring of 1916, he invited Grace and Horace Albright on a spin to Richmond, but they stopped spinning in a sea of mud in Fairfax Court House on the outskirts of the national capital.⁸⁴

Mather's biographer observes that "[f]rom the start [Mather] touted the automobile as a source of abundant strength to the national parks," an assertion, he adds, "inescapable [as] it seems now, that most of his colleagues fiercely resisted."⁸⁵

In 1916, Congress delegated Mather the authority to set the balance between use and preservation in the national parks.⁸⁶ In setting that balance, he decided automobiles were a good thing for use and not a bad thing for preservation.⁸⁷ In 1915, he had opened Yellowstone National Park to automobiles,⁸⁸ and was present at the dedication of Rocky Mountain National Park and "the greatest automobile demonstration ever seen in Colorado [300 cars]."⁸⁹ Additionally, Mather is credited with inspiring the National Park-to-Park Highway Association dedicated to connecting the national parks by high-

81. RODERICK NASH, *WILDERNESS AND THE AMERICAN MIND* at 173-175 (3d ed. 1982).

82. *Id.* at 170.

83. *See supra* note 16.

84. SHANKLAND, *supra* note 1, at 148.

85. *Id.* at 147.

86. 16 U.S.C. §§ 1-4.

87. SHANKLAND, *supra* note 1, at 154.

88. *Id.* at 151.

89. *Id.* at 79.

way so that "the people can tour all the national parks by machine."⁹⁰

Robert Sterling Yard recalled Mather's statements inducing one reluctant developer to build a hotel in Yosemite Valley: "Why, look at those cars!" he snorted. "There must be close to two hundred of them. Where's your imagination, man? Some day there'll be a thousand!"⁹¹

In the long run, the significance of Stephen Mather's enthusiastic acceptance of the automobile as a method of enjoying national parks, dwarfs the significance of the Hetch-Hetchy dispute. Some modern visitors to Yosemite find the valley saved—the Yosemite valley, with its grand hotels, stores, crowds and armed rangers—far less evocative of any spirit of natural grandeur than its flooded sister, Hetch-Hetchy.⁹² Stephen Mather may not have imagined the "industrial tourists" of Edward Abbey's famous polemic on tourism in the national parks, but he certainly had a hand in creating them.⁹³

C. *Carte Blanche*

The better part of a century of public land management controversies demonstrate that there is at best a tension and at worst a direct contradiction in a mandate that directs an agency to exploit a public land resource and preserve it at the same time. The American people are "loving their parks to death",⁹⁴ using them to a degree that will ultimately degrade their value for future use. Forest Service logging and road building, even when subject to political scrutiny, continues to silt-up salmon runs, cause landslides,⁹⁵ reduce the habitat for

90. *Id.* at 150 (quoting Gus Holms of Cody, Wyoming, one of the organization's founders).

91. *Id.* at 147.

92. Summertime in Yosemite:

Yosemite Valley feels enclosed and civilized, tamed and overrun by humans, swarmed upon in the 1850s by Gold Rush zealots and subsequently by entrepreneurs eager to take advantage of a new concept in leisure: tourism.

...

Last summer, visitors without camp or lodge reservations had to be turned away for six straight weekends. As autumn approached, park officials were experimenting with weekend changes in the traffic patterns, making some roads one-way and closing a few others.

Robert Cross, *The Weeping Face: Indian Legend or Glacier?* SUN-SENTINEL (Ft. Lauderdale), July 14, 1996 at 1J.

93. EDWARD ABBEY, *Polemic: Industrial Tourist and the National Parks*, in *THE SERPENTS OF PARADISE* 110 (John Macrae ed. 1995). The modern version of Mather's credo emerges in the statement of the road crew surveying boss Abbey encounters in Arches National Park half a century later:

"Look," the [surveying] party chief explained, "[Y]ou need this road." He was a pleasant-mannered, soft-spoken civil engineer with an unquestioning dedication to his work. A very dangerous man. . . . "When this road is built you'll get ten, twenty, thirty times as many tourists in here as you get now." His men nodded in solemn agreement, and he stared at me intently, waiting to see what possible answer I could have to that.

"Have some more water," I said. I had an answer all right but I was saving it for later. I knew I was dealing with a madman.

Id. at 114.

94. See Jan G. Laitos, *National Parks and the Recreation Resource*, 74 DENV. U. L. REV. 847 (1997), Robert B. Keiter, *Preserving Nature in the National Parks: Law, Policy, and Science in a Dynamic Environment*, 74 DENV. U. L. REV. 649 (1997).

95. A cause of landslides:

"It was no act of God that caused these landslides," said Andy Stahl of the Association

forest species and ultimately reduce the ability of the forests to produce timber.⁹⁶

The conflict between use and preservation leads many scholars to ponder the language of the various laws and quasi-legal documents that outline the institutional missions of the Park Service and Forest Service. Scholars endeavor to discover, through close reading of the texts, what Congress might have told Stephen Mather or Gifford Pinchot to do in a world with chainsaws, snowmobiles, and Cinemax theaters.⁹⁷

But consideration of these mandates in the context of the history of their times suggests a disturbing alternative: These mandates have no content. Men like Mather and Pinchot sought support from Congress, but not direction. The legislative mandates they lobbied for and, in large part, achieved, were so broad they were almost meaningless. They received the authority to operate with the blessing of Congress, but without congressional supervision. Mather and Pinchot received *carte blanche*. Neither man was a lawyer and therefore both lacked a lawyer's customary veneration of legislative text and history. Both men were instrumentalists when it came to Congress, using the assets at their disposal to extract from Congress the authority they needed to further their visions for the public land. Paradoxical mandates were a particularly useful form of legislative *carte blanche*. They appear to have substance be-

of Forest Service Employees for Environmental Ethics. "With few exceptions, the slides resulted from [sic] clearcutting and logging roads on steep hillsides." Many of the assessments were made by aerial surveys, Stahl said, adding the damage to the region's threatened salmon runs must await more detailed ground inspections.

Forest employees: Logging worsened landslides, GANNETT NEWS SERV., Feb. 15, 1996, available in 1996 WL 4374215.

96. The ability of forest soils to remain productive through repeated timber harvests has been debated for decades. In, 1971, Dr. Robert R. Curry, Professor of Environmental Geology at the University of Montana, testified before the Church committee. Curry discussed the "long range adverse effects of clear-cutting on soil nutrients." STAFF OF SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS, 92D CONG., "CLEAR-CUTTING" PRACTICES ON NATIONAL TIMBERLANDS: HEARINGS BEFORE THE SUBCOMM. ON PUBLIC LANDS OF THE SENATE COMM. ON INTERIOR AND INSULAR AFFAIRS 158 (Comm. Print 1971) [hereinafter 1971 COMMITTEE REPORT]. Curry's issue was one of the few issues discussed during the hearings specifically referenced in the subcommittee's subsequent report. 1972 COMMITTEE REPORT, *supra* note 12, at 1. During the hearings, Chairman Church called the "question of loss of nutrient and adequate management of the soil" a "most critical question that has been uncovered in the course of these hearings." 1971 COMMITTEE REPORT, *supra* at 829.

97. Consider:

While in Springdale [Utah], treat yourself to a visit to the new large-screen Zion Canyon Cinemax Theatre, opened in May 1994. The theater has been showing a spectacular film on Zion and nearby scenic areas called "Zion Canyon—Treasure of the Gods." Early this month, the theater began showing a second film entitled "The Great American West." The films are each about 40 minutes in length and shown on alternating hours. The \$7 ticket may seem a bit pricey until you have viewed either of the films.

The two films are presented in an indoor auditorium on a six-story-high screen. The sound system is terrific. The projected images are splendid and hard to describe. Either film will give you an eagle-eyed view of scenery only a handful of photographers will ever see firsthand. It is no substitute for visiting Zion and other scenic treasures of the West yourself, but you will get an introduction to scenery so difficult to access that you may never see it on your own.

Margo Bartlett Pesek, *Autumn Helps Make Zion National Park a Must See Destination*, LAS VEGAS REV.-J., Nov. 17, 1996, at 8K.

cause they speak of general values in mandatory terms. However, they do not significantly constrain agency action. Almost anything can be justified between the two poles of "use" and "preservation", extensive clearcuts⁹⁸ and swank hotels⁹⁹ as well as limitations on rafting access¹⁰⁰ and livestock trains.¹⁰¹ The resolution of the paradox required balancing, and balancing traditionally fell within the expert agencies' discretion.

IV. A CHANGED WESTERN LANDSCAPE

The political landscape of the American west has changed dramatically since Mather and Pinchot's time. The level of use on the public lands has multiplied many times. Use pressures come from both within and without national park boundaries. Visitation has increased over 800% in the last forty years.¹⁰² The constituency for preservation has grown almost as fast. Mather's small social Sierra Club now contains more than half a million people.¹⁰³ Development near park borders increasingly causes conflict.¹⁰⁴ New parks and monuments are subject to intense political debates that lead to compromises in establishment legislation, often at the expense of traditional park purposes and prohibitions.¹⁰⁵

As significantly, battles over western public land policy, which once took place almost exclusively in the halls of Congress, now take place in federal court,¹⁰⁶ state court, before county commissioners¹⁰⁷ and governors' com-

98. FROME, *supra* note 18, at 108-12.

99. Consider.

The Ahwahnee Hotel at Yosemite National Park is hosting its midwinter Chef's Holiday program Feb. 2-5. Chefs from restaurants throughout California will hold morning and afternoon cooking demonstrations in the main ballroom. A reception on the first evening will allow tour participants to meet the chefs. A final banquet Feb. 5 will be prepared by the chef-instructors. Guests stay three nights at the Ahwahnee or at the nearby Yosemite Lodge, take three cooking classes and tour the historic Ahwahnee and its kitchen. Cost: \$499 per person, double occupancy at the Ahwahnee; \$379 per person, double occupancy at Yosemite Lodge. Both prices include transportation via Amtrak, cooking demonstrations and two meals.

Tours, ARIZ. REPUBLIC, Jan. 5, 1997, at T4.

100. Wilderness Public Rights Fund v. Kleppe, 608 F.2d 1250, 1251 (9th Cir. 1979).

101. High Sierra Hikers Ass'n v. Kennedy, 1995 WL 382369, at *17 (N.D. Cal. June 14, 1995).

102. See Laitos, *supra* note 94, at 851.

103. As of May, 1996, the Sierra Club had 587,000 members. Alex Barnum, *A Fresh Look for Sierra Club*, S.F. CHRON., May 25, 1996, at A1.

104. See, e.g., Al Knight, *The Real Story of Mine Swap at Yellowstone*, DENV. POST, Aug. 14, 1996, at B9 (discussing President Clinton's agreement with a Canadian company to swap land to stop a proposed gold mine development near Yellowstone National Park). For a discussion of park boundaries and their relationship to wildlife management and ecological processes, see Keiter, *supra* note 94.

105. For example, traditional prohibitions against hunting and off-road vehicle access were expressly eliminated from the Alaska National Interest Lands Conservation Act, the 1980 legislation that created or expanded 13 of Alaska's 15 national park units. See Williams, *supra* note 17 (discussing greater statutory detail in national park establishment legislation that results from the increasingly complex land use system that exists under new parks and creeps closer to established parks).

106. California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 577 (1987).

107. City of Colorado Springs v. Board of County Comm'rs of County of Eagle, 895 P.2d 1105, 1109 (Colo. Ct. App. 1994).

missions.¹⁰⁸ The once hierarchical public land management regime—with Congress and the Cabinet at the top, the agencies below and the users below them—has given way to a much more pluralistic, sometimes anarchic political process. Expertise and resources once concentrated in federal agencies are now spread among local governments, industry groups and public interest groups, to name only the most obvious.¹⁰⁹

In 1985, the United States Supreme Court held that state agencies could regulate mining operations on national forest land.¹¹⁰ This holding represents and accelerates a trend toward more local and state participation in federal land use decisions.¹¹¹ More recently, western counties have been declaring themselves masters of federal land within their borders in an apparent attempt to usurp the Forest Service's functions completely.¹¹²

This new political pluralism has transformed the effect of paradoxical agency mandates. Interest groups are willing to exploit congressionally-created ambiguity to further their goals. "Carte blanche" mandates, rather than providing a vehicle for pursuing personal or agency vision, allow interest groups to project *their* visions onto the congressional mandates. This provides the interest groups with something far more significant than legal arguments; it provides the conviction that they are right.

In his book-length attack on federal land management in the west, *War on the West*,¹¹³ William Perry Pendley, a lawyer who, in his own words, "represents hundreds of westerners in the battle against environmental oppression,"¹¹⁴ takes the Park Service to task for ignoring its legislative mandate:

Congress saw parks as performing two missions: "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 a manner and by such means as to leave them unimpaired for the *enjoyment* of future generations" (emphasis added). Note that Congress chose the word "conserve," not "preserve," In other words, the National Park Service was to utilize those natural resources wisely, not place them off limits to the people.

The National Park Service is currently busy putting a creative spin on the statutes under which it is supposed to operate. . . . The

108. See, e.g., D. Craig Bell et al., *Retooling Western Water Management: The Park City Principles*, 31 LAND & WATER L. REV. 303 (1996). The Western Governor's Association and Western States Water Council sponsored workshops in 1993 and 1994 to develop western states capacity to deal with complex water issues. *Id.* The workshops led to the adoption of the "Park City Principles" which attempt to define the relationships and roles of different levels of government and private users with respect to water rights. *Id.*

109. See WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 4-6 (Charles Davis ed. 1997)

110. *California Coastal Comm'n*, 480 U.S. at 613-14.

111. See *City of Colorado Springs*, 895 P.2d at 1120.

112. See *United States v. Nye County, Nev.*, 920 F.Supp. 1108, 1109, 1120 (D. Nev. 1996) (granting summary judgement to the federal government against the claim that Nye County owns disputed federal lands in the county).

113. WILLIAM PERRY PENDLEY, *WAR ON THE WEST: GOVERNMENT TYRANNY ON AMERICA'S GREAT FRONTIER* xvii-xx (1995).

114. *Id.* at 231.

NPS's views coincide with those of environmental extremists, the self-proclaimed protectors of the nation's parks.¹¹⁵

Environmentalists, concerned about the future of the national parks, see the mandate of the 1916 Act in quite a different way:

The Organic Act of 1916 stipulated that the parks were to be preserved "unimpaired, for the enjoyment of future generations." By the year 2010, visitation to the parks is expected to reach an astonishing half-billion people a year, and if we do not take action, those "future generations" may have little to enjoy that has not been significantly, perhaps permanently, impaired.¹¹⁶

Paradoxical agency mandates can be used to challenge agency action in court. Most notably, in 1978, in *United States v. New Mexico*,¹¹⁷ five justices of the United States Supreme Court affirmed the State of New Mexico's use of the language of the Forest Service Organic Act to reduce the water rights the Forest Service could claim in the Rio Mimbres by finding narrow limits to the preservation component in the 1897 Forest Service Organic Act:

The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for only two purposes—"[t]o conserve the water flows, and to furnish a continuous supply of timber for the people." . . . National forests were not to be reserved for aesthetic, environmental, recreational, or wildlife-preservation purposes.¹¹⁸

Justice Powell, joined by three other justices in dissent, championed a more preservation-oriented view of the Organic Act:

I do not agree . . . that the forests which Congress intended to "improve and protect" are the still, silent, lifeless places envisioned by

115. *Id.* at 101-02 (citations omitted).

116. Zaslowsky & Watkins, *supra* note 23, at 51. Another writes:

Preservation has been a guiding mandate for the National Park System from the moment Yosemite and Yellowstone were set aside for the enjoyment of future generations of park visitors. The mission of the parks is to provide visitors with a natural experience in a natural setting, to challenge people to meet nature on its own terms and come away with an appreciation of the importance of the natural world. In carrying out this mission, the National Park Service must refuse the whims and desires of popular demand and instead exert a strong hand in shaping both the type and scale of development to create an experience worthy of this mandate.

Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 66 (1992).

117. 438 U.S. 696, 697 (1978).

118. *New Mexico*, 438 U.S. at 707-09. Interestingly, the majority bolstered their narrow view of the language of the Forest Service Organic Act by citing the purportedly broader language of the Park Service mandate:

Any doubt as to the relatively narrow purposes for which national forests were to be reserved is removed by comparing the broader language Congress used to authorize the establishment of national parks. In 1916, Congress created the National Park Service and provided that the "fundamental purpose of the said parks, monuments, and reservations . . . is to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same . . . unimpaired for the enjoyment of future generations."

Id. at 709 (footnotes omitted).

the Court. In my view, the forests consist of the birds, animals, and fish—the wildlife—that inhabit them, as well as the trees, flowers, shrubs, and grasses. . . .

My analysis begins with the language of the [Organic Administration Act of 1897] Although the language of the statute is not artful, a natural reading would attribute to Congress an intent to authorize the establishment of national forests for three purposes . . . “1) improving and protecting the forest, 2) securing favorable conditions of water flows, and 3) furnishing a continuous supply of timber.”¹¹⁹

The effect of paradoxical mandates reaches beyond cases in which the language of the statutes are at issue and color a range of legal disputes about the balance between preservation and use. In 1973, Congress passed the Endangered Species Act.¹²⁰ The first show-downs between this national mandate to protect biological diversity and agency agendas involved the Little Tennessee River and the Tennessee Valley Authority,¹²¹ and the slopes of Moana Kai and the Hawaii Department of Lands and Natural Resources.¹²² However, since the middle 1980s, the United States Forest Service has borne the brunt of the Endangered Species Act's effect. Efforts to enforce the act—mostly in the form of federal court cases brought by environmental groups—have severely curtailed agency discretion in the Forest Service's two most valuable timber producing regions: the forests of the southeast—home of the Red-Cockaded Woodpecker¹²³—and the forests of the Northwest, home of the Northern Spotted Owl¹²⁴ and various runs of protected salmon.¹²⁵ Forest Service timber production has dropped precipitously in recent years¹²⁶

119. *Id.* at 719-20 (Powell, J., dissenting) (citing Mimbres Valley Irrigation Co. v. Salopek, 564 P.2d 615, 617 (N.M. 1977)).

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

121. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 172 (1978) (holding that Endangered Species Act prohibited Tennessee Valley Authority from completing dam where construction of the damn threatened to eradicate the snail darter, an endangered species).

122. Palila v. Hawaii Dept. of Land and Natural Resources, 852 F.2d 1106, 1110-11 (9th Cir. 1988) (holding that the state agency's permitting of sheep on the slopes of Moana Kai constituted a “taking” under the Endangered Species Act because the sheep ate the mamane trees essential for the habitat of the palila, an endangered bird); Palila v. Hawaii Dept. of Land and Natural Resources, 639 F.2d 495, 495-96 (9th Cir. 1981) (affirming summary judgment against the state agency and order to remove feral sheep and goats from palila's critical habitat).

123. The red-cockaded woodpecker has been the subject of numerous federal court decisions. See Sierra Club v. Glickman, 67 F.3d 90, 91 (5th Cir. 1995); Sierra Club v. Espy, 38 F.3d 792 (5th Cir. 1994); Region 8 Forest Serv. Timber Purchasers Council v. Alcock, 993 F.2d 800, 802 (11th Cir. 1993); Sierra Club v. Lyng, 694 F. Supp. 1260, 1262 (E.D. Tex. 1988), *aff'd in part, vacated in part sub nom.* Sierra Club v. Yeutter, 926 F. 2d 429 (5th Cir. 1991).

124. See, e.g., Portland Audubon Soc'y v. Babbitt, 998 F.2d 705, 707-09 (9th Cir. 1993) (affirming standing, possibility of injunction and order of supplementary environmental impact statements for environmental groups suing to protect northern spotted owl habitat).

125. See, e.g., Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1056 (9th Cir. 1994) (affirming injunction against Forest Service that prevents agency from proceeding with forest projects authorized under management plans that violated the Endangered Species Act consultation requirement).

126. Timber production declined to 4.8 billion board feet in fiscal year 1994, down from annual harvests regularly exceeding 10 billion board feet in the previous three decades. U.S. Forest Service, *Timber Sale Program Annual Report FY1994*, fig. 3 <<http://www.->

and not as a result of agency decisions.

In these situations, one can perceive a gap between what the Forest Service is doing and what a powerful interest group believes they should be doing. In each case that gap leads to conflict and, in many cases, an erosion of Forest Service prestige and discretion. Generally, Congress and the Cabinet, the primary concerns of Pinchot and Mather, are not involved. When they do take a hand it is usually in support of the agency and is often indecisive.¹²⁷

Court decisions reveal evidence of a similar gap between interest groups' expectations of the Park Service and Park Service actions. Groups are bringing "Organic Act" claims against the Park Service. The Park Service still usually wins these cases.¹²⁸ In *Wilkins v. Lujan*,¹²⁹ a United States District Court used the language of the National Park Service Organic Act to support its argument that the Park Service had made a "clear error of judgment" in its decision to remove wild horses from the Ozark National Scenic Riverways.¹³⁰ The United States Court of Appeals for the Eighth Circuit subsequently reversed.¹³¹ The circuit decision used the National Park Service Organic Act language concerning removal of "detrimental" animals and plants to support Park Service discretion:

Our conclusion is supported by the 1916 Organic Act . . . "The obvious purpose of [organic act] language is to require the Secretary to determine when it is necessary to destroy animals which, for any reason, may be detrimental to the use of the [national] park."¹³²

However, Judge Loken dissented:

To suit the Park managers' convenience and preconceived notions of culture and history, we will now incur significant expense and short-term environmental damage to remove a small band of wild horses

fs.fed.us/land/fm/tspirs/tspirs.html>.

127. In 1995, Congress passed a "salvage rider" to allow logging of insect and fire-damaged old-growth timber in the Pacific Northwest, bypassing environmental regulations. Emergency Salvage Timber Sale Program, Pub. L. 104-19 § 2001, 109 Stat. 240 (1995). In 1993, President Clinton held a "Timber Summit" to address timber management issues in the Pacific Northwest. Kathie Durbin, *Forest Conference Reaches Harvest Point*, PORTLAND OREGONIAN, Apr. 2, 1993, at A1.

128. See *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996); *Greater Yellowstone Coalition v. Babbitt*, 952 F.Supp. 1435 (D. Mont. 1996). The court in *Greater Yellowstone Coalition* stated:

Title 16 of the United States Code, section one, requires NPS to conform its actions to its purpose, which "purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for their enjoyment and leave them unimpaired for future generations." 16 U.S.C. § 1. Plaintiffs argue that by this statutory language Congress has clearly required NPS to leave the Yellowstone bison absolutely untouched. But the statutory purpose language obviously gives park managers broad discretion in determining how best to conserve wildlife and to leave them unimpaired for future generations.

Greater Yellowstone Coalition, 952 F.Supp. at 1441.

129. 798 F.Supp. 557 (E.D. Mo. 1992), *rev'd sub nom. Wilkins v. Secretary of Interior*, 995 F.2d 850 (8th Cir. 1993) [hereinafter *Wilkins II*].

130. *Wilkins*, 798 F.Supp. at 562-63.

131. *Wilkins II*, 995 F.2d at 853.

132. *Id.* at 853. (quoting *New Mexico State Game Comm'n v. Udall*, 410 F.2d 1197, 1199 (10th Cir.1969)).

from the 65,000-acre Ozark National Scenic Riverways. Most users of the Park believe (and the record establishes it is a reasonable belief) that these animals reflect the cultural heritage of the region and contribute toward what Congress intended to foster, with only negligible impact on the Park's other resources and attractions. I am hard-pressed to find a clearer example of arbitrary and capricious agency action.¹³³

While a victory for the Park Service, the decision demonstrates the willingness of judges at both the district and circuit level to question Park Service decisions about what "preservation" means.

The Park Service has begun losing a few cases to park user groups unhappy with the balance it has struck between use and preservation. In *Mausolf v. Babbitt*,¹³⁴ the United States district court in Minnesota granted summary judgment to snowmobilers challenging the Park Service's determination to prohibit snowmobiling on frozen lake shores in Voyageur National Park.¹³⁵ While the Park Service provided some "anecdotal" evidence that the snowmobiling disrupted the feeding patterns of protected eagles and wolves, the court did not find the evidence convincing.¹³⁶

In another access case, a federal court in California enjoined the Park Service from expanding the number of pack animals allowed for each party in the wilderness area in Sequoia-Kings Canyon National Park. According to the court in *High Sierra Hikers Association v. Kennedy*,¹³⁷ the Park Service had failed to justify its decision not to prepare an environmental impact statement analyzing its decision to alter its stock animal limits in the wilderness.¹³⁸

The finding that the proposed increase in the stock limit would result in little or no change in actual stock use is inconsistent with the premise on which the proposal is itself based. The EA [justifying not preparing an EIS] explicitly states that the proposal is premised in

133. *Id.* at 853-54 (Loken, J., dissenting).

134. 913 F.Supp. 1334 (D. Minn. 1996).

135. *Mausolf*, 913 F.Supp. at 1344.

136. The court wrote:

A generous review of defendants' evidence reveals: Snowmobilers and other winter recreationists have apparently displaced some wolves feeding on kills along shorelines, but scientific evidence shows the likelihood of permanent displacement is less than minimal. Of the four validated reports of wolf takings, two were aerial gunnings, bearing no relation to snowmobile trail closures. One poacher drove a wolf off a kill and scavenged the remains, with neither evidence nor suggestion that a snowmobile was present. Finally, one snowmobiler apparently permanently displaced a wolf feeding on a kill. The only formal, scientifically prepared reports indicate that snowmobilers have no significant impact on wolf or eagle populations, although "generally accepted" principles indicate that increased Park access, by whatever means, will likely result in increased mortality among individual animals.

Mausolf, 913 F.Supp. at 1343. The court continued:

This "generally accepted" principle applies equally to any mode of transportation—snowmobiles, motor vehicles, skis, snowshoes, hiking, or aircraft. The value, if any, of a snowmobile bar on the basis of such evidence is purely speculative.

Id. at 1344.

137. No. C-94-3570 CW, 1995 WL 382369 (N.D. Cal. 1995).

138. *High Sierra*, 1995 WL 382369, at *16.

part on the existence of stock parties exceeding 20 animals who have been "blocked" from entering the park by the pre-existing policy. Since an express purpose of the proposal is to permit such previously blocked parties to enter, it is arbitrary and capricious to assume that they will not in fact enter.¹³⁹

The Court cited the high level of controversy concerning alteration in the stock animal limits as one of the factors supporting its decision.¹⁴⁰

While specifically about Park Service failures to justify important decisions, these two opinions speak directly to the balance between use and preservation and the discretion of the Park Service to strike that balance. Snowmobilers and hikers, like the environmental groups and local and state governments that batter the Forest Service, have the power to use the Park Service's ambiguous mandate against it, projecting their values—preservation (in the case of the hikers) or motorized use (in the case of the snowmobilers)—on Congress' ambiguous language.

V. CONCLUSIONS

It would be alarmist and intellectually myopic to say that federal land management agencies are being torn apart by their inadequate legislative mandates. It is fair to say, that in an age fraught with contradictory forces, amounting, perhaps, to a complete reformulation of the American perception of public land, the paradoxical mandates of the Forest Service and Park Service are not helping any and may be hurting some. The differing interpretations of these mandates express a deeper cultural disconformity which may indeed be tearing the agencies apart.

It also seems fair to observe that these mandates once made more practical sense than they do now. That congressional mandates to "go forth and do good" had a place in a world of people like Pinchot and Mather, masters of Washington politics, who were innocent of the organized, powerful indigenous western interest groups so evident in today's public land disputes.

Congress could pass organic legislation telling the Forest Service and the Park Service exactly what to do. Those who supported Jennings Randolph's prescriptive Forest Service reform legislation in 1976,¹⁴¹ subscribed to something approaching this idea. Randolph's bill was defeated, and Hubert

139. *High Sierra*, 1995 WL 382369, at *9.

140. The court wrote:

The Administrative Record demonstrates that the increased stock limit was highly controversial from the moment it was proposed. The Wilderness Managers Group's proposal of a standardized 25 stock animal limit, [The Park Service's] draft wilderness management plan incorporating the stock limit increase and SEKI's 1993 EA supporting the increase all generated substantial opposition. While much of the public comment merely expressed opposition to the proposed increase itself, some of the objecting comments explicitly addressed the "size, nature or effect" of the increase and called into question [the Park Service's] representations regarding those issues.

Id. at *15.

141. See DENNIS C. LE MASTER, *DECADE OF CHANGE: THE REMAKING OF FOREST SERVICE STATUTORY AUTHORITY DURING THE 1970S* 58-59 (1984).

Humphrey's National Forest Management Act endeavored to preserve much of the discretion traditionally granted to the Forest Service.¹⁴² The battering the Forest Service has taken over the last twenty years suggests the curse embodied in retention of that discretion. Professor Fischman's analysis of the increased prescriptiveness of national park legislation suggests that some limitation of discretion is already happening piecemeal.¹⁴³

Yet there is much more going on here than law. To take management discretion away from an agency like the Forest Service or the Park Service also have a negative effect on agency culture. The effectiveness of law, any law, on the public lands depends completely on a healthy agency culture. Neither industry representatives nor environmental activists will ever manage the public lands, staff the regional offices, collect the data, inspect the range, control the run-off, welcome and manage the visitors. Legislation which furthers ideological goals at the cost of destroying the agencies which might effectuate them is a victory for no one.

At the same time, it would be useful to have agency mission statements that were more than mirrors, reflecting back the values of each interest group on itself. A clearer mission statement, conveying the same message to all interested parties, would not guarantee enhanced agency stature and discretion, but would at least make it possible. While we cannot all agree on what should be done on the public lands, we all have at least grudging respect for a job well done.

Effective "new law"—legislative, administrative or judicial—must be grounded in an historical understanding of the original purposes of the agencies and the evolution of those purposes over time. To a considerable degree, it must be a rearticulation (and perhaps redirection) of established agency values and not the imposition of alien congressional mandates.

So what should the new law/old law be? Professor Winks argues that the framers and supporters of the 1916 Organic Act knew exactly what they meant by "to conserve the scenery . . . and to provide for the enjoyment of the same."¹⁴⁴ Professor Winks informs us that, in 1916, preservation did come first.¹⁴⁵ Through judicial and administrative action, and perhaps legislation, we can make it clear that there is a traditional hierarchy of values in national park management with preservation at the top.

In recent years, the Park Service itself has begun reasserting its mandate for preservation. First, in the 1960s, a Department of Interior committee of

142. *Id.* at 58-79.

143. Fischman, *supra* note 66, at 782. Fischman notes that while the purpose clause of the National Park Service Organic Act has received generous attention over the years, over 120 national parks and monuments were created by establishment legislation containing, in many cases, specific mandates that direct agency management of the unit. *Id.* at 775-76.

144. Winks, *supra* note 19, at 623.

145. *Id.* Winks' thorough analysis of the legislative and social history of the Organic Act supports his conclusion. For example, Congressman Kent, one of the principal authors of the act, believed that national parks should be maintained "in a state of nature", "forever free from molestation." *Id.* at 601. Mather himself believed that national parks "must be maintained in absolutely unimpaired form," though this comment came in 1918, and he apparently did not comment on the purpose clause during the act's deliberations by Congress. *Id.* at 607.

scientists produced the influential "Leopold Report" pronouncing a "primary goal" of national park management to be preservation of biotic systems "in the condition that prevailed when the area was first visited by white men."¹⁴⁶ Second, the Park Service produced a report, the Vail Agenda, during its 75th anniversary in 1991.¹⁴⁷ The agenda stated the Park Service's central objective as "protection of park resources from internal and external impairment."¹⁴⁸

The new emphasis on preservation has roots not only in the creation of the Park Service but also in the birth of the concept of national parks. In 1865, fifty years before Congress created the Park Service, Frederick Law Olmstead¹⁴⁹ wrote a report on "The Yosemite Valley and the Mariposa Big Trees." In this report, Olmstead articulated an early preservatoinist vision:

The first point to be kept in mind then is the preservation and maintenance as exactly as possible of the natural scenery; the restriction, that is to say, within the narrowest limits consistent with the necessary accommodations of visitors of all artificial constructions and the preventions of all constructions markedly inharmonious with the scenery or which would unnecessarily obscure, distort or detract from the dignity of the scenery.

Second: it is important that it should be remembered that in permitting the sacrifice of *anything* that would be of the slightest value to future visitors to the convenience, bad taste, playfulness, carelessness, or wanton destructiveness of present visitors, we probably yield in each case the interest of uncounted millions to the selfishness of a few individuals.¹⁵⁰

While this report did not persuade California's legislators to establish a park in 1865, John Muir sought Olmstead's assistance to establish Yosemite National park in 1890.¹⁵¹

One could hear an echo of Olmstead's prescription in January, 1996, when the Park Service proposed to ban at least four-fifths of all automobiles from Grand Canyon National Park.¹⁵² By proposing such a ban, the Park Service appeared to turn away from Stephen Mathers' inspired but outdated

146. Leopold et al., *Wildlife Management in the National Parks*, in 28 Transactions of the N. Am. Wildlife & Nat. Resources Conf. 29, 29-44 (1963). For a discussion of the report and its influence, see Keiter, *supra* note 94, at 656-57.

147. NATIONAL PARKS FOR THE 21ST CENTURY—THE VAIL AGENDA (National Park Foundation 1992).

148. *Id.* at 17.

149. Olmstead influenced both Pinchot and Mather. He encountered Pinchot when Pinchot, just back from Europe, arrived in the Biltmore Estate near Ashville, North Carolina:

Mr. Olmstead was to me one of the men of the century. He was a quiet-spoken little lame man with a most magnificent head and one of the best minds I have ever had the good luck to encounter. His knowledge was far wider than his profession.

PINCHOT, *supra* note 46, at 48.

150. Frederick Law Olmstead, *The Value and Care of Parks*, in THE AMERICAN ENVIRONMENT: READINGS IN THE HISTORY OF CONSERVATION 23-24 (Roderick Nash ed. 2d ed. 1976) (emphasis added). For a provocative analysis of Olmstead's statement, see JOSEPH L. SAX, MOUNTAINS WITHOUT HANDRAILS 19-24 (1980).

151. *Id.* at 18-19.

152. *U.S. Seeks to Cut Grand Canyon Park's Traffic*, L.A. TIMES, Feb. 1, 1997, at A4.

solution to the use/preservation quandary and implementing—in a modest way—Edward Abbey's prescription for preserving the national parks.¹⁵³

Reemphasizing preservation will require hard, unpopular choices. William Lowry, in *Capacity for Wonder: Preserving National Parks*, his comparison of the American and Canadian Park systems related a story about a grizzly bear in a Canadian park:

[Superintendent Church] described an incident at Lake O'Hara, the most acclaimed destination in Yoho National Park. Visitors need reservations months in advance to camp or stay at the lodge there. The Canadian Park Service (CPS) already imposes limits on visitation and use, but on the preceding weekend, with beautiful weather and a full load of visitors anxious to go hiking, Church had shut the area down. A grizzly bear, a threatened species, had wandered into a campsite looking for food. To protect the bear, the CPS required people to stay inside the lodge from which they were bussed out to designated hiking areas Being smart means allowing only use of parks that does not compromise the preservation of natural features such as grizzly bears.¹⁵⁴

Examples of positive approaches to preservation abound. The fundamental question remains: As a nation, are we wise enough to support a public land management agency that "conserves" or "preserves" natural wonders *for* our children by preserving them *from* us.

153. Abbey wrote:

No more cars in the national parks. Let the people walk. Or ride horses, bicycles, mules, wild pigs—anything—but keep the automobiles and the motorcycles and all their motorized relatives out. We have agreed not to drive our automobiles in cathedrals, concert halls, art museums, legislative assemblies, private bedrooms and other sanctums of our culture; we should treat our national parks with the same deference, for they, too, are holy places.

ABBEY, *supra* note 93, at 121-22.

154. WILLIAM R. LOWRY, *THE CAPACITY FOR WONDER: PRESERVING NATIONAL PARKS* 153 (1994).