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John Leshy*

AMERICA'S PUBLIC LANDS: A SKETCH OF THEIR POLITICAL HISTORY AND FUTURE CHALLENGES¹

INTRODUCTION

I recently published a comprehensive political history of America's public lands, those owned by the national government and managed by four agencies—the National Park Service, the United States Forest Service, the U.S. Fish & Wildlife Service, and the Bureau of Land Management.

Most people know something about these lands, often through occasional, headline-making controversies, as when in 2017 President Trump drastically downsized two large protected areas in southern Utah—the Grand-Staircase Escalante and the Bear Ears National Monuments.

But what is not well-known is this: The United States owns almost one-third of the nation's land, more than 600 million acres of public forests, plains, mountains, wetlands, deserts, and shorelines, generally holds them open to all, and manages them primarily for conservation, recreation, and education. They are, I believe, one of America's great institutions.

Their reach surprises many, given that our culture has always celebrated private property and distrusted government, particularly the national government. Indeed, the typical response to hearing these facts is, "I had no idea—how did that happen?" I wrote the book to answer that question.

Of course, it didn't just happen. It came about because of a long series of decisions made by our representatives in the government—political decisions. What those decisions were, and how they came to be made, are the core of *Our Common Ground*.

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1. This essay is drawn from remarks I delivered at the University of New Mexico Law School on April 19, 2022. Portions appeared in my articles "America's Public Lands—A Look Back, A Look Ahead," 67 *Rocky Mt. Min. L. Inst.* 1-1 (2021); and "Public Land Policy After the Trump Administration: Is This a Turning Point?" 31 *Colo Nat. Resources, Energy & Env'tl. L. Rev.* 471 (2020). In keeping with the essay format, I have minimized footnoting. My book cites primary sources for much of the material discussed here, and other sources are readily available online.

The nub of the story begins around 1890. It was then that Congress began making a series of key decisions to hold onto and safeguard the public lands mostly for broad conservation purposes.

This was after, usually long after, the U.S. acquired title to these lands in the first place, from Indigenous Peoples and from foreign governments. Acquisition from Native Americans began as settlers invaded from Europe, more than two centuries before the United States was formed. In New Mexico, the Spanish invasion by Coronado in the sixteenth century triggered many decades of conflict, continuing through the Pueblo revolt of 1680 and the reconquest by the Spanish twelve years later. The eventual result was confirmation by the United States of Pueblo landholdings embodied in arrangements with predecessor governments.²

Elsewhere, Native Americans usually lost title usually through a sequence of events beginning when they were dispossessed through duress, chicanery, and sometimes violence by an evolving cast of characters—trappers, miners, speculators, squatters and other developers—often backed by the military force of European nations and their successor, the United States. Acquisition of formal title usually came through arrangements that, while providing Natives some compensation, would never fully make up for injustices perpetuated or the enormity of their loss.

My book does not address in any detail how the United States acquired title from Indigenous Peoples and foreign governments. That process was generally completed well before the U.S. began making the political decisions to hold onto significant amounts of land. It has also been the subject of many books.³ In the latter part of my book, I do discuss in some detail efforts by Native Nations in the modern era to gain greater influence over public lands to which they have ancestral ties, efforts that have had considerable success.⁴

THE MAJOR THEMES OF PUBLIC LAND POLITICAL HISTORY

This essay outlines the major themes that emerge from *Our Common Ground*, and offers some reflections about what may lay ahead for these lands. These themes demolish some common fictions that have grown up about these lands.

The first and perhaps most notorious myth is that the public lands have generally been a divisive force in American politics. In fact, the opposite is true; from the nation's very beginning, the public lands have tended to unite rather than divide.

My book opens with the story of a bitter dispute that for years thwarted the very formation of the first national government after the thirteen colonies had declared their independence from the British. It erupted between colonies like Virginia and New York that had extensive claims to so-called “western lands” (across the Appalachian crest), and colonies like Maryland and New Jersey that

2. See, e.g., *United States v. Sandoval*, 231 U.S. 28, 38-40 (1913).

3. See, e.g., RICHARD KLUGER, *SEIZING DESTINY: THE RELENTLESS EXPANSION OF AMERICAN TERRITORY* (New York: Vintage, 2007); STUART BANNER, *HOW THE INDIANS LOST THEIR LAND: LAW AND POWER ON THE FRONTIER* (Cambridge MA: Belknap, 2007).

4. JOHN LESHY, *OUR COMMON GROUND* 563-74 (Yale Univ. Press, 2022). As Solicitor of the Department of the Interior, I wrote a legal opinion that helped advance the Pueblo of Sandia's long and ultimately mostly successful effort to correct a surveying error in the 1800s that had deprived it of rights to land in the gap between the false and true crest of the Sandia Mountains. LESHY, *supra* note 2, at 570.

lacked such claims. The latter feared domination by the states that had western claims. To end the dispute, an agreement was struck—the new national government would take control of those western lands and use them to keep the nation together.⁵

These were nation's first public lands, and the national government proceeded to use them, and others it acquired from foreign governments and Native Nations, to do just that—to build and hold the nation together as Euro-American settlement extended across the continent, and new states were admitted to the union. Gifts of these lands were, for example, instrumental in creating a system of public education, including higher education, and in building infrastructure like canals and railroads.⁶

The second myth is that public lands tend to divide Americans along partisan lines. While today many tend to view all issues of public policy through a red/blue, Republican/Democratic lens, since the Civil War, politicians have time and time again joined hands regardless of political party to hold and protect more and more lands in U.S. ownership. Over this time, the vast majority of Americans of all persuasions have come to agree on the importance of protecting these lands so that all may have opportunities for life-changing encounters with nature and can learn from and be inspired by their rich cultural and scientific resources.

My book provides many examples of this. The stellar contributions of the two presidents Roosevelt—Theodore, a Republican, and Franklin, a Democrat—are well known. But my book brings deserved attention to many less-than-household names from both parties who played important roles. One was Fred Seaton, who had been a Republican Senator from Kansas before Dwight Eisenhower named him Interior Secretary in the late 1950s. Once there, he put more than 11 million acres of public lands in Alaska into national wildlife refuges, the most notable of which was the iconic Arctic National Wildlife Refuge.⁷

The third myth is that these decisions to hold and protect more and more lands have been mostly a land grab by the national government, carried out over local and state opposition. This claim was on full display in 2016 when armed extremists took over the Malheur National Wildlife Refuge in eastern Oregon for several days, claiming they were “taking the lands back.” The claim was sheer fantasy. The United States had purchased those particular lands in the 1930s, paying cash to a very willing seller, a company that was operating a failing agricultural enterprise.⁸

HOW THE NATIONAL FOREST SYSTEM CAME ABOUT

More generally, as my book shows, grass roots support played a key role in the establishment of much of the protected public lands we see today. This can be illustrated by a quick look at how most of the national forest system was put together between 1891 and 1909, a pivotal episode in public land history. Congress laid the basis for it in early 1891 by giving the president broad power to “set apart and reserve, in any State or Territory,” public lands as “public reservations”—putting them off limits to the many laws then on the books allowing their transfer out of

5. LESHY, *supra* note 4, at 3-13.

6. LESHY, *supra* note 4, at 31-40, 49-61.

7. LESHY, *supra* note 4, at 515.

8. LESHY, *supra* note 4, at 425.

federal ownership.⁹ At this point, it should be noted, New Mexico, like Arizona and Utah, was still a territory.

The 1891 law culminated a campaign that had begun fifteen years earlier, one that had several roots.¹⁰

One was increasing awareness that the traditional policy of fostering Euro-American settlement by granting public land to promote farming—embodied in various so-called homestead acts—would not work in the more rugged and arid parts of the West.

Most westerners supported the idea of keeping lands in the upper reaches of these arid watersheds in public ownership to safeguard water sources for growing populations. Even then the arid West was the nation's most urban region—Denver's population had grown from 5000 in 1860 to more than 100,000 in 1890.

Another root was the growing belief that the national government needed to rein in the well-known appetite of large industrial enterprises like railroad, mining and logging companies for taking control of vast amounts of land for private profit, pushing common folk aside. An influential promoter of this idea was a self-taught political economist named Henry George, who had spent years in the West, and whose masterpiece *Progress and Poverty* outsold every book in this era except the Bible. His warning that public lands not suitable for farming were likely to fall into a few hands reverberated with a populace increasingly dissatisfied with the garish corruption and high income and wealth inequality that marked what Mark Twain dubbed the “Gilded Age.”

Then there was the idea that Congress had already put in effect at Yosemite in 1864 and Yellowstone in 1872; namely, that government preservation of iconic American landscapes for public inspiration and enjoyment could, by nurturing national pride and unity shattered by the Civil War, help heal the nation.

What happened next showed how deeply public land reservations reflected mainstream opinion in the West as well as nationally. Within four weeks of enactment, President Harrison had used it to reserve one million acres of public land in the state of Wyoming. The very next day, he appointed Montana congressman Thomas Carter, to head the Interior Department's General Land Office—the executive branch agency then in charge of all the public lands. The politically ambitious Carter, who would later represent Montana in the U.S. Senate for two terms, was the first westerner to hold the post. Carter promptly directed his staff to launch a systematic inventory looking to “reserve all public lands in mountainous and other regions” that produced water flows for the use of “communities and settlements” downstream—yes, he said “reserve all” such public lands.¹¹

Before Harrison left office less than two years later, he had responded to westerners' requests by establishing fifteen reserves covering more than thirteen million acres in five western states and three territories, including what was then called the Pecos River reserve in New Mexico.

9. General Revision Act, 26 Stat. 1095, 1103 (1891) (codified as amended at 16 U.S.C. § 471 et seq.).

10. LESHY, *supra* note 4, at 98-99, 153-59.

11. LESHY, *supra* note 4, at 178-79.

The next several presidents, Republican and Democrat, continued that practice, setting aside most of today's national forest system. With a couple of relatively minor exceptions, Congress went along without complaint. In New Mexico, President McKinley established what was called the Gila River forest reserve, more than two million acres, in 1899. His successor Theodore Roosevelt, also a Republican, is responsible for reserving the remainder of what are the national forests in New Mexico today. They total well over nine million acres.

THE ANTIQUITIES ACT AND NEW MEXICO

Theodore Roosevelt's presidency also saw the enactment of one of the most important public lands protection statutes—the Antiquities Act of 1906. It came about because of the tireless efforts of New Mexicans dedicated to preserving important cultural, scientific, and related resources on public lands, many of which were then being plundered.

Its author was a remarkable educator, anthropologist and avid archaeologist named Edgar Lee Hewett, then president of what is now known as New Mexico Highlands University. He worked closely with one of the unsung heroes of public land protection, an Iowa Republican Congressman and Civil War veteran named John Lacey, to get it through Congress.¹²

Hewett's skillful drafting is worth noting. The core of the Act authorized the president to protect "objects of historic or scientific interest" on lands "owned or controlled by the U.S.," as "national monuments" – the term "monument" being an implicit recognition that, by custom, only Congress could label an area of public land a "national park."

The Antiquities Act is one of the earliest examples of Congress legislating a uniform approach to public lands regardless of which government agency was responsible for managing them. This approach would, as I explain below, become much more common in the latter half of the twentieth century. The Act also broke new ground by authorizing the U.S. to accept donations of land, opening the door for state and local governments and public-spirited private individuals to protect worthy areas by acquisition and gift. It was also the first time Congress unequivocally declared, in legislation of general application, that scientific inquiry was a sufficient reason by itself to hold and protect lands in public ownership.

Finally, while the Act cautions that protected areas "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected," Hewett's adroit language ultimately left the size of the area up to the chief executive, by determining how to characterize the "objects" to be protected, and what kind of "care and management" was "proper" for them. If, for example, an entire ecological, geological, or similar network was deemed such an object, its proper care and management could encompass a very large area indeed. And that is just how Theodore Roosevelt interpreted the Act soon after signing it into law, for among his national monuments were the 808,000 acre Grand Canyon National Monument and 639,000 acre Mount Olympus National Monument in the state of Washington.

12. LESHY, *supra* note 4, at 253-262. The Act is found at 34 Stat. 225 (1906).

Roosevelt established three national monuments in New Mexico, including Chaco Canyon. Democratic President Woodrow Wilson protected Bandelier. Today, New Mexico has some eleven national monuments, including four—Rio Grande Del Norte, Kasha-Katuwe, Organ Mountains-Desert Peaks, Desert Trackways—that are managed by the Bureau of Land Management.

Altogether, the Antiquities Act has led to the protection of more than one hundred million acres of public land onshore, and—thanks to George W. Bush and Barack Obama—several hundred million acres of submerged public lands in marine areas under U.S. jurisdiction.

ALBERT FALL AND THE PUBLIC LANDS

My book also recounts how New Mexico served up one of the more infamous players in public land policy, Albert Fall. The scandal he perpetrated—called “Teapot Dome,” after a rock formation near one of the public land areas he leased after being bribed by an oil company—long cast a shadow over public land administration.

Fall became one of New Mexico’s first Senators upon its admission to the Union in 1912. Not long after President Harding named him Interior Secretary in 1921, he persuaded the president to transfer to his Interior Department control of naval petroleum reserves in California and Wyoming that had been established by Presidents Taft and Wilson. He then secretly leased them to oil companies headed by friends of his. Later it was revealed that the oil company CEOs had both “loaned” Fall several hundred thousand dollars. As the details emerged, Fall resigned and was eventually found guilty of bribery. The first cabinet officer in American history to be convicted of a felony committed while in office, he served nearly ten months in prison. The oil leases were cancelled.¹³

Other than the scandal, Fall had little impact on public land policy. During his brief tenure as Interior Secretary, he helped protect Yellowstone from dam-building proposals, but also promoted what is generally regarded as perhaps the least meritorious idea for a national park in public land history. His proposed Mescalero National Park consisted of a handful of small, relatively isolated tracts in and around the Mescalero Indian Reservation in his home state, one of which, as it happened, adjoined his own ranch. The park would have remained open to power and irrigation development, mining, and grazing, and would have included land within the Indian reservation without compensating the Tribe.¹⁴ The proposal passed the Senate while he was Secretary but never advanced in the House. The juicy Teapot Dome scandal did help make public lands administration a favorite subject for press scrutiny, and occasionally led Interior officials to express frustration with review layers installed to prevent a recurrence, and so in that way, Albert Fall’s ghost was said to stalk the halls of the Department for many years thereafter.

13. LESHY, *supra* note 4, at 366-68.

14. LESHY, *supra* note 4, at 339.

LAND ACQUISITION PROGRAMS ESTABLISHED BY CONGRESS

A little-known fact about the public lands is that most of those that are now protected in the national parks, wildlife refuges and forests in the East, South and Midwest were acquired from willing-seller private owners, with the support of the relevant states. Congress established the basis for many of these by enacting the so-called Weeks Act in 1911. It launched a program that eventually resulted in the purchase of more than twenty million acres and the establishment of fifty-two reserves in more than two dozen states in the East, South, and Midwest. The purchases were made only in states that consented to them and were almost all from willing-seller private owners.¹⁵

Congress also enacted numerous pieces of legislation to establish new national parks where the lands were not owned by the national government. Some of these were acquired by purchase, but some, including most of the once-private lands that form large national parks like the Everglades in Florida and Big Bend in Texas, were acquired by the states themselves, paid for by the state's taxpayers, and then donated to the U.S. so they could become national parks!¹⁶

My book also describes how, after President Theodore Roosevelt established the first national wildlife refuges on public lands early in the twentieth century, Congress was quick to jump into that space as well. Then, in the depths of the Great Depression, the government began a major program, concentrated in the middle of the country, to acquire prime wildlife habitat into national ownership to reverse a sharp decline in the population of migratory birds. A key mechanism for funding the purchases, one supported by sport hunters, was the sale of so-called Duck Stamps. The purchases were from willing sellers and done with the approval of state governments. The resulting acquisition of more public lands worked to reverse the bird decline.¹⁷ In New Mexico today, there are seven national wildlife refuges, including the Bosque del Apache, a favorite spot for observing the sandhill crane migration, established in 1939.

Congress launched another major acquisition program in the New Deal era, to buy homesteads that had failed because of Dust Bowl conditions back into U.S. ownership for grassland rehabilitation.¹⁸ One of these so-called national grasslands, the Kiowa, is located in northeastern New Mexico.

RESERVING THE REMAINING PUBLIC LANDS IN THE 1930S

My book also sets the facts straight on another commonly misunderstood public lands story; namely, how, in the early 1930s, the United States decided to keep some 150 million acres of remaining *unreserved* public lands in the western states in national ownership. Livestock operators had grazed most of these lands for many decades with the government's passive acquiescence, but Dust Bowl conditions had plunged the industry in deep depression.

15. LESHY, *supra* note 4, at 277, 311-14, 342-43, 428-29.

16. LESHY, *supra* note 4, at 342-43, 411-14, 428-29.

17. LESHY, *supra* note 4, at 245-52, 382-88.

18. LESHY, *supra* note 4, at 429.

President Hoover proposed giving all these lands to the states on certain conditions. Congress responded by calling for a committee, known as the Garfield Committee after its chair, to consider Hoover's idea. Most of its 20 members were Republicans from the West, including two New Mexicans, one of whom, Holm O. Bursum, had represented the state in the U.S. Senate for four years. The committee recommended, with no dissents, that this vast acreage be put under what it called "responsible administration or regulation for the conservation" as well as the "beneficial use of its resources," and that the states be given the option to accept that responsibility.¹⁹

But the committee specified that, before the U.S. extended that offer to the states, it should reserve in national ownership all unreserved public lands deemed "important for," among other things, "national forests, national parks, national monuments, and migratory-bird refuges." The committee emphasized the importance of protecting "wilderness," "wildlife," "archaeological and ethnological remains" and "unusual wonders of nature." Only after that would the remaining lands be offered to the states, and then only with significant strings attached; for example, states would have a trust responsibility to rehabilitate those lands.

Neither the states nor the major interest groups could agree on how to respond, and legislation to carry out the committee's recommendations went nowhere. At that point veteran Congressman Edward Taylor of Colorado, a Democrat, stepped in. Building on a proposal crafted in the preceding Congress by Congressman Don Colton of Utah, a Republican, he introduced legislation requiring the United States to control livestock grazing on these lands to rehabilitate them and stabilize the floundering livestock industry that depended on them.

Taylor had represented Colorado in the House since 1909, and his evolution on this issue is instructive. While in his first term, he called the Weeks Act, which launched the program to buy land and established national forests in the East, an "outrage," and he condemned as "un-American" the idea that the U.S. should hold large amounts of public lands in the West. But he gradually changed his mind in the 1920s as the farm and ranching industries fell into deep depression with the Dust Bowl. In his words, the "overuse" and "abuse" of the public lands threatened the "basic economy of entire communities," and so he pursued reform with, as historian Louise Peffer put it, the "zeal of a convert." Enacted with strong bipartisan support, the Taylor Grazing Act of 1934 assigned this task to the Interior Department, which eventually, in 1946, established the Bureau of Land Management to carry forward its implementation.²⁰

The events of this era brought much attention to the fact that these previously unreserved public lands contained many places worthy of special protection. Popular interest in safeguarding natural scenery, recreational opportunities, wildlife habitat, and historic, archaeological, and other cultural resources found in abundance on public lands had not slackened in the Great Depression. Herbert Hoover himself had used his authority under the Antiquities Act to protect large amounts of formerly unreserved public lands at places like White

19. LESHY, *supra* note 4, at 373-81, 429, 588.

20. LESHY, *supra* note 4, at 298, 400-01, 438.

Sands in New Mexico, Great Sand Dunes in Colorado, and Death Valley in California. Over succeeding decades, as appreciation of their values steadily grew, many millions more of these acres would be protected with names like, in New Mexico, Rio Grande del Norte and Organ Mountains-Desert Peaks, and elsewhere, names like Arches, Bears Ears, Chiricahua, Grand Canyon-Parashant, Grand Staircase-Escalante, Great Basin, Joshua Tree, King Range, Missouri Breaks, Organ Pipe Cactus, and Red Rock Canyon.²¹

CONGRESS RECLAIMS AUTHORITY FROM THE EXECUTIVE

There is a fourth myth about public land history; namely, that most decisions to conserve lands in U.S. ownership have been made by executive fiat, by people like Theodore Roosevelt, over the opposition of many in Congress. The facts are mostly otherwise, for as my book shows, Congress not only gave the executive that power, but almost always subsequently approved how the executive exercised it. A good example here is how often Congress eventually made presidentially-established monuments into national parks.²²

Indeed, in the 1960s, Congress began a systematic effort to reclaim from the executive primary authority to decide what kinds of uses ought to be allowed on particular tracts of public land. It was led by a conservative Democrat from Colorado's Western Slope, Wayne Aspinall.

His first big success was in the Wilderness Act of 1964. There Congress created a new very protective category of public lands, providing detailed instructions regarding what was permitted and what was not. Lands given "wilderness" designation must generally to remain free not only from extractive activities like logging and mining, but also from roads and motorized vehicles. In the Senate, a major promoter of the Act was Clinton Anderson of New Mexico, who as a young journalist in Albuquerque wrote some early stories about the emerging Teapot Dome scandal that brought down his fellow New Mexican, Albert Fall.²³

Aspinall was not a big fan of limiting intensive industrial uses of public lands, but more important to him was that Congress should make those basic decisions. To that end he insisted that Congress make itself the gatekeeper of the wilderness system. This has had a significant, if not very well appreciated, effect on public land policy; namely, it has enhanced the influence of the individual Senators and House members who represent particular areas of public lands. This is because of a powerful, long-standing custom in the Congress that gives members an effective veto over legislation that applies particularly to their states or districts. Regardless of party or ideology, members are very uncomfortable dictating how public lands in other members' districts are to be managed, for fear the tables could be turned on them.

Aspinall seriously underestimated the support that would develop at the grassroots for limiting such industrial uses. Since 1964 Congress has enacted many

21. LESHY, *supra* note 4, at 380-81.

22. See, e.g., THE ANTIQUITIES ACT: A CENTURY OF AMERICAN ARCHAEOLOGY, HISTORIC PRESERVATION, AND NATURE CONSERVATION (David Harmon, Francis P. McManamon & Dwight T. Pitcaithley, eds., Univ. of Arizona Press, 2006).

23. LESHY, *supra* note 4, at 441-43, 463-70.

dozens of individual pieces of legislation that have together put more than 100 million acres of public land in the National Wilderness Preservation System.

This has been a decidedly bipartisan enterprise. More than half of the 54 million acres of public land in the wilderness system outside of Alaska were the result of acts of Congress signed into law by Republican presidents. More than a quarter moved through congresses where Republicans were in control of at least one chamber.

Beginning around the same time, the mid-1960s, Congress enacted numerous other statutes that zoned or delineated permitted uses on particular areas of public land. Besides national parks, many such areas carry labels like national recreation area, conservation area, or preserve. Congress wrote management specifications into law for each that resemble the Wilderness Act, if somewhat less strict and more variable. They all make conservation and recreation the primary objectives of management, and they limit agency discretion by ruling out or strongly discouraging roadbuilding, mining, timber harvesting and the like. Besides adding protections, they bring more visibility to natural and cultural qualities of particular areas.²⁴

Congress established the first national recreation area in 1964. There are now more than three dozen, including the Jemez in New Mexico. Congress established the first national conservation area in 1970; there are now seventeen, including El Malpais in New Mexico. Congress established the first two national preserves in 1974 in Texas and South Florida; there are now nearly two dozen. One is the Valles Caldera National Preserve, the legacy of a Mexican land grant that Congress in 2000 directed be acquired by the United States. Initially put in the care of the U.S. Forest Service, Congress transferred it to the National Park Service in 2015. New Mexico also has two national parks, at Carlsbad Caverns (originally a national monument established by President Coolidge in 1923, and made a park by Congress in 1930) and White Sands (originally a national monument established by President Hoover in 1933, and made a park by Congress in 2019).

Beginning in the 1960s Congress established nearly a dozen national seashores and lakeshores. It has also established national scenic areas, and a National Wild and Scenic Rivers System on the Wilderness Act model. New Mexico has five river segments in this national system.

In doing all this, Congress did not discriminate among the four land management agencies; today, for example, each looks after millions of acres in the wilderness system.

Congress also asserted its authority in a more generic way, by enacting new or reforming existing management charters, or “organic acts,” as they are known, for all four agencies. The Bureau of Land Management and the Forest Service got theirs in 1976, the Fish & Wildlife Service in 1997, and the National Park Service in 1998. In each, Congress provided more specificity in management objectives, a more detailed process for making decisions, and clear marching orders to pay close attention to science and the environment.²⁵

24. LESHY, *supra* note 4, at 471-72, 478-82, 493-94, 500-02.

25. LESHY, *supra* note 4, at 588-89.

In doing all this, Congress has substantially blurred distinctions among the four agencies. This, in turn, has elevated in public consciousness the idea that, regardless of which agency is in charge, public lands are generally managed for open space conservation and recreation more than anything else. In this context, “[o]ne of the most important developments in public land policy in the last half century,” as my book puts it, is how the BLM, which was long derided as the “bureau of livestock and mining,” has—with the strong, bipartisan encouragement of the U.S. Congress—made conservation, protection of cultural resources and recreation a major focus of its management.²⁶

Congress’s reclaiming of authority over public lands has also operated to enhance the durability of these protections. Indeed, the fact is that, for more than a century, once protections for public lands are installed, Congress almost never weakens, much less rescinds them.

It is also important to note that, while the Democrats controlled Congress in the 1960s and 1970s, Republicans like John Saylor of Pennsylvania played key roles in crafting key pieces of public lands legislation like the Wilderness Act. Almost all of this legislation had strong bipartisan support; indeed, the final votes were usually nearly unanimous. Moreover, Republican Presidents Nixon and Ford were generally as supportive as their Democratic counterparts. In 1976, for example, Ford signed into law the landmark Federal Land Policy and Management Act, crafted largely by western members of Congress, which played an important role in “greening” the BLM.²⁷

PUBLIC LAND POLICY FROM REAGAN TO TRUMP

Ronald Reagan’s rise in the late 1970s marked a growing polarization of the body politic on many important issues. But it did not, my book makes clear, significantly affect the overall direction of public land policy. This can be shown in a quick tour of presidential administrations beginning with Jimmy Carter’s.

It was then that the so-called “sagebrush rebellion” erupted. It was promoted primarily by holders of public land grazing permits unhappy with the direction of federal policy, and took the form of legislation, adopted by a handful of western states including New Mexico, that formally claimed state ownership of BLM lands. This so-called “rebellion” was not, as I put it in the book, a “serious political movement aimed at divesting the U.S. of ownership of public lands.”²⁸

It quickly faded. The states enacting the legislation never tried to litigate their claim in court or take any other concrete step to enforce it. Congress never took it seriously. Neither did the executive branch. And neither did the American people, including the people in the states that were ostensibly “rebellious.” Underneath this blast of hot air, the long tradition of bipartisan consensus supporting more protection for more public lands endured.

That bipartisan consensus easily survived a hiccup when, early in Ronald Reagan’s first term as president, libertarian economists talked him into proposing the

26. LESHY, *supra* note 4, at 501-02.

27. LESHY, *supra* note 4, at 492-98.

28. LESHY, *supra* note 4, at 499. See also John Leshy, *Unraveling the Sagebrush Rebellion: Law, Politics and Federal Lands*, 14 U. Calif. Davis L. Rev. 317 (1980).

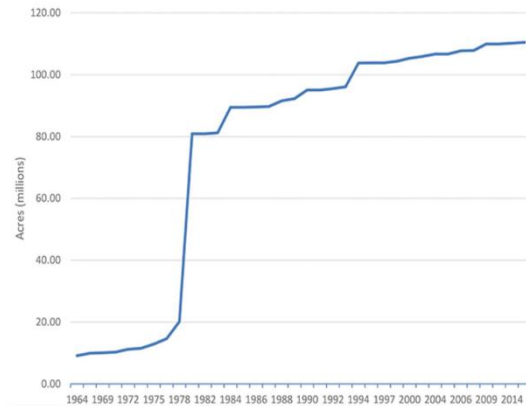
sale of some 35 million acres of so-called “surplus” public land to help balance the federal budget. The idea triggered much grassroots opposition and found no support among Republicans or Democrats in Congress.²⁹

Around the same time, Reagan’s first Interior Secretary, James Watt, sought to issue oil and gas leases on submerged public lands off every coast and in wilderness areas onshore. (The Wilderness Act had contained a 20-year window for leasing in wilderness areas and it was about to close.) Watt’s proposals were quickly beaten back by a strong bipartisan coalition in the affected states and in Congress.³⁰

After Watt became a serious political liability and left office, Reagan, a skillful politician, moved swiftly to the middle on public lands issues, working with Congress to follow the well-worn path to protect more public lands. In 1984, with the Senate in Republican control, Reagan signed legislation adding more than eight million acres to the national wilderness system, the largest addition in any single year since the Wilderness Act was enacted in 1964 (except for the special case of Alaska, where legislation signed by Jimmy Carter in 1980 put more than sixty million acres in the wilderness system). Indeed, before he left office, Reagan signed legislation putting more acreage in the lower 48 states in the wilderness system than any president before or since.

This is captured in the following chart.

Growth in Acreage in the National Wilderness Preservation System from its Establishment in 1964



In 1985, the then-governor of Arizona, Bruce Babbitt, nicely captured what was happening in a speech. The last few years, he said, would be remembered as a time when public land protection advocates broadened their base, sharpened their message, and mounted a strong grassroots campaign to replace the idea of “multiple use”—a well-worn catch-phrase used to suggest that public lands managed by the Forest Service and the BLM were fully open to logging and mining and other forms of intensive development—with the idea of “public use.” The latter, Babbitt said,

29. LESHY, *supra* note 4, at 499-500.

30. LESHY, *supra* note 4, at 470-71.

recognizes “the new reality that the highest, best, and most productive use of western public land will usually be for public purposes—[protecting] watersheds, wildlife and recreation.”³¹

Babbitt had it right and Republicans as well as Democrats got the message. Today, in fact, industrial uses like mining, drilling, and large-scale commercial logging take place on a relatively small proportion of Forest Service and BLM lands.³²

The pattern held through subsequent administrations. For example, although the “Contract with America” that Newt Gingrich used in leading a Republican takeover of the House of Representatives in 1994 bristled with anti-government rhetoric, it was utterly silent on public lands. This was not really a surprise. The contract had been extensively poll-tested, and its principal drafter, Republican messaging guru Frank Luntz, put the matter bluntly in a later memo, advising the GOP to resist making a head-on challenge to what he called “[t]he most popular federal programs today”—specifically, “conservation of public lands and waters through parks and open spaces.”³³

In 1996, less than two months after President Clinton stirred up some opposition by establishing the Grand Staircase-Escalante National Monument in southern Utah, he signed into law an omnibus public lands protection bill that had been guided through the Republican-controlled Congress by Alaska Republican Don Young. Before he left office, he signed into law bipartisan bills strengthening the statutory management charters of the park and wildlife refuge systems, and one approving a very large land swap the State of Utah negotiated with the U.S. to clear state-owned inholdings from protected areas of public lands in Utah in exchange for public lands mostly of industrial value elsewhere.³⁴

Much the same thing happened when the so-called “Tea Party” insurgency led to a Republican recapture of control of the House in 2010. Although Republican Party platforms in the last couple of decades have sometimes included, as a dog-whistle to the far-right fringe of the Party, planks calling for divesting some public lands, no serious effort was ever made to put any of those planks in practice.³⁵

Instead, Congress has continued to enact bipartisan legislation adding protections to more and more public lands. At the same time, it has often adjusted land ownership patterns to better meet modern protection objectives, including providing the public better access to public recreational lands that are surrounded by private lands, and better protecting biodiversity while promoting more efficient or productive use of non-public lands. In early 2009, for example, President Obama signed the Omnibus Public Land Management Act into law. Among other things, it put millions more acres in the Wilderness system, established four new national conservation areas, and added three new units to the national park system. Most of

31. LESHY, *supra* note 4, at 577-58.

32. LESHY, *supra* note 4, at 598-99.

33. LESHY, *supra* note 4, at 578-79.

34. LESHY, *supra* note 4, at 578-79.

35. LESHY, *supra* note 4, at 578-79.

its parts had been assembled earlier, when Republicans controlled the White House and one house of Congress.³⁶

THE TRUMP ADMINISTRATION

But what about the Trump Administration, one might ask? Certainly it made a big splash by severely shrinking (though not abolishing altogether) the size of two large national monuments, the Grand Staircase-Escalante and the Bears Ears, that presidents Clinton and Obama had established on more than three million acres of public land in southern Utah. It also made numerous efforts to bend public land policy away from conservation and toward industrial exploitation, especially by the fossil fuel industry.

But I would argue that Donald Trump correctly grasped that most voters who identify as Republicans, in the West as elsewhere, do not support transferring public lands to states or the private sector, nor stripping protections away from most of them. Consider these facts:

In the campaign leading up to the Nevada Republican caucuses in February 2016, while his rival Ted Cruz was calling it “ridiculous” not to give “full control” of Nevada’s public lands to their “rightful owners, its citizens,” Trump gave a well-publicized interview with *Field and Stream*, a publication focusing on hunting, fishing and other outdoor activities, in which he opposed selling off public lands or giving them to the states, arguing instead that the U.S. should, in his words, continue to be “great stewards” of these “magnificent” lands. In the caucuses, Trump won more than twice as many delegates as any other candidate; Cruz finished third.³⁷

When the Republican platform committee that year promoted a plank calling for considering possible divestiture of public lands, Montana Republican Congressman Ryan Zinke resigned in public protest. This apparently so endeared him to the Trump campaign that, once elected, Trump nominated him Interior Secretary. He was quickly confirmed by the Republican-controlled Senate.³⁸

Most important, before he left office, President Trump himself signed two major pieces of bipartisan public land protection legislation into law.

The first, in 2019, was another omnibus public lands protection bill. It added more than a million acres in several states to the National Wilderness System and expanded several National Park System units. Its most noteworthy piece added protections to nearly a million acres of public land in southern Utah. This piece was crafted by the all-Republican Utah congressional delegation not long after Trump reduced the nearby Bears Ears.³⁹

Another component of the 2019 bill ended Congress’s fifty-five-year-old practice of putting an expiration date on the Land and Water Conservation Fund that

36. LESHY, *supra* note 4, at 580-81, 591-95.

37. Patrick Svitek, *In Uncertain Nevada Contest, Cruz Tests Message for West*, TEX. TRIBUNE (Feb. 21, 2016), <https://www.texastribune.org/2016/02/21/after-southern-start-cruzs-campaign-turns-west/>. Q&A: *Donald Trump on Guns, Hunting, and Conservation*, FIELD & STREAM, (Jan. 21, 2016), <https://www.fieldandstream.com/articles/hunting/2016/01/qa-donald-trump-on-guns-hunting-and-conservation/>.

38. LESHY, *supra* note 4, at 581-82.

39. LESHY, *supra* note 4, at 477, 581-84.

Congress had established in 1964. The Fund is intended to provide a stream of money (derived primarily from oil and gas leases on public lands offshore and onshore) for federal, state, and local government agencies to buy more land for conservation and recreation. As a result, Congress no longer has to renew the Fund periodically.

The next year, Trump signed into law the Great American Outdoors Act. It has been called the biggest public lands conservation legislation in a generation, because of the even more fundamental change it made in the Land and Water Conservation Fund. Since 1964, Congress had insisted that it decide each year how much money ought to be spent out of that Fund. The result was that, between 1965 and 2019, less than half of the more than forty billion dollars accruing to the Fund had been disbursed. With strong bipartisan support, Congress now made it a true revolving fund, permitting its revenues to be spent as they are accrued. This was a major victory for public lands everywhere.

THE PUBLIC LANDS TODAY

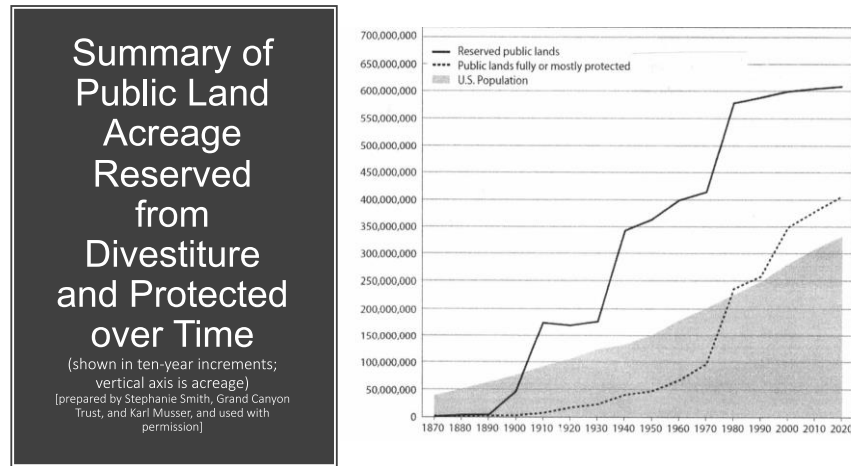
In the fall of 2021, President Biden reversed the Trump action on the Utah monuments,⁴⁰ and is restoring other public land protections Trump sought to undo or weaken. (At Bears Ears, a majority of the newly elected local county commissioners endorsed his action.) Despite the Democrats' very thin margins in Congress, he has not run into much opposition in these efforts. Trump's headline-grabbing action on the Utah monuments did not, in other words, reflect a change in public opinion, or significantly alter the direction of congressional legislation.

More broadly, what Congress and the Executive have been doing on public lands for more than a century has been supported by practically every opinion poll taken over the last several decades years, in the West as well in the rest of the nation. They show that large majorities of Americans across both political parties want more and better protected public lands, to provide open space and recreational opportunities and protect watersheds, wildlife and cultural resources.⁴¹ They agree, in other words, that holding and protecting large amounts of public land in national ownership, open to all, has been extraordinarily visionary and beneficial.

40. Press Release, White House, A Proclamation on Bears Ears National Monument (Oct. 8, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/08/a-proclamation-on-bears-ears-national-monument/>. Press Release, White House, A Proclamation on Grand Staircase-Escalante National Monument (Oct. 8, 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/10/08/a-proclamation-on-grand-staircase-escalante-national-monument/>.

41. See, e.g., *State of the Rockies*, COLO. COLL., <https://www.coloradocollege.edu/other/stateoftherockies/conservationinthewest/2022/2022-poll-results.html>.

This is captured in the following chart.⁴²



Because the public lands today reflect what the vast majority of the American people have sought, their story can fairly be regarded as a political success, showing the political process working as it is supposed to work, where Congress responds to and accurately reflects public opinion.

Bringing more attention to political success stories is particularly important in our polarized era where many are skeptical that anything good can come out of the Nation's capital. It was a major reason why I wrote the book.

This is not creeping socialism. All who live in areas with abundant public lands know that they provide many opportunities for private enterprise. Indeed, tourism and recreation-dependent businesses have become a major economic driver in many smaller communities around the West as well as elsewhere, making the economic contributions of traditional activities like mining, logging, and livestock grazing pale by comparison.

CHALLENGES TO PUBLIC LANDS

Now let me pivot to look briefly at the major challenges that face the public lands. The biggest are the interrelated ones of climate change and biodiversity loss. While both are global problems, both pose countless tests for public lands.⁴³

A changing climate alters natural qualities of public lands that were usually a major reason why the United States decided to retain or acquire them in the first place. "Your children's Yellowstone," the headline of an article in the *New York Times* warned not long ago, "will be radically different." The important reservoirs of biodiversity found on public lands are likewise threatened by what is now being called the sixth great extinction in the planet's history, a loss that the late eminent

42. "Reserved" means withholding such lands from divestiture laws like the homestead act, and held in national ownership. "Mostly protected" means generally (though not necessarily completely) protected from development through dam- and road-building and industrial activities like logging and mining.

43. LESHY, *supra* note 4, at 596-97.

biologist E. O. Wilson called the “folly that our descendants are least likely to forgive.” The two are intimately related: Degradation of biodiversity is an important driver of climate change, and vice-versa.

The history of America’s public lands can help inform how the nation confronts these challenges. For one thing, these lands furnish vivid demonstrations of the effects of climate change and biodiversity loss that can help sound the alarm, arouse public opinion and stimulate needed political action. The glaciers are rapidly disappearing from Glacier National Park. Florida’s Everglades and numerous other protected areas of public land along the coasts—including nearly one-third of the nation’s 550 national wildlife refuges—face inundation as the seas rise.

We know what we have to do, and technology is rapidly advancing that facilitates solutions. At the most fundamental level, dealing effectively with these challenges requires a frank acknowledgment that society’s collective interest must outweigh shorter-term, narrower interests. It’s a problem of political will.

The history of America’s public lands provides, time and time again, examples of how our political system has done exactly that. Indeed, one could argue that the public lands represent some of the best thinking and acting in the interests of future generations the American political system has ever produced.

One of the concrete ways the public lands can continue to play that role is to facilitate the necessary transition to decarbonize the world’s economy. Recall this wise aphorism: The Stone Age did not end because we ran out of stones. It ended because humanity found better ways to meet its needs. In the same way, our dependence on fossil fuels for energy will not end because we have run out of fossil fuels. It will end as we collectively realize that weaning ourselves off fossil fuels is likely the only way humanity will avert catastrophe.

The public lands are already involved in that transition. Indeed, the Trump Administration unwittingly provided a dramatic illustration of it. In 2017 it pushed through Congress, on a strict party-line vote, legislation that the state of Alaska and oil companies had been promoting for a half-century—to auction off oil and gas leases on public lands in the Arctic National Wildlife Refuge. But when, in one of its last acts in January 2021, the Trump Administration held a lease sale, the result was a giant bust.

Major oil companies stayed away, in part because they feared investor and public disapproval, and in part because development costs in the region are high (it is no small irony that one reason for the high cost is rapidly melting permafrost, which makes installing the needed infrastructure much more expensive). Rather than raise billions of dollars to reduce the budget deficit as its promoters had promised, the sale yielded a paltry \$14 million in bids, most of them submitted by an agency of the state of Alaska.⁴⁴

44. Pub. L. No. 115-97, § 20001, 131 Stat. 2054, 2235-37 (2017). *Alaska Oil and Gas Lease Sales*, BUREAU OF LAND MANAGEMENT, <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/regional-lease-sales/alaska>. In early June 2022, more oil and gas companies relinquished leases in the Arctic Refuge. *Top oil and gas players pulling out of Alaska’s Arctic Wildlife Refuge*, S&P GLOBAL COMMODITY INSIGHTS, (June 3, 2022), <https://www.spglobal.com/commodityinsights/es/market-insights/latest-news/natural-gas/060322-top-oil-and-gas-players-pulling-out-of-alaskas-arctic-national-wildlife-refuge>.

In many other places on public lands both onshore and offshore, Trump administration efforts to promote more fossil fuel development have been thwarted by bipartisan opposition. At the same time, there has been a huge wave of interest in using public lands as sites for wind and solar energy projects. Indeed, in stark contrast to the auction bust in the Arctic Refuge, an Interior Department auction of leases to produce wind energy off the coast of Long Island, New York in late February 2022 attracted over four billion dollars in bids.⁴⁵

Regarding loss of biodiversity, my book contains numerous examples of how the public lands have historically helped stem that loss. Indeed, a longstanding goal of public land policy has been to rehabilitate environmental health.

The first major environmental restoration program in American history was that Weeks Act of 1911, which launched a program of buying up lands in the upper reaches of eastern, southern and midwestern watersheds, many of which had been logged over, in order to restore forests, reduce erosion, and help prevent destructive floods. The legislation was strongly supported by Democratic governors from the South and Republican governors from North, one of whom noted that it was the first time in American history that governors from the two regions had appeared jointly before Congress “to ask for something for the common welfare of the U.S.”⁴⁶ I also mentioned earlier the successful program Congress launched in the depths of the Great Depression to acquire prime wildlife habitat to reverse a sharp decline in the population of migratory birds. Such restoration programs produce jobs as well as offset carbon emissions.

Overall, our public lands comprise the great bulk of the 12% of U.S. lands and 26% of U.S. marine areas whose biodiversity is now generally considered protected. They are thus playing a prominent role in the Biden Administration’s America the Beautiful program, which aims at conserving 30% of the nation’s lands and waters by 2030 (nearly all the world’s nations have endorsed the 30 by 30 goal).⁴⁷

It is fitting that public lands play a primary role in this effort, for their protection has long made the United States a world leader in this space. America’s public lands have helped foster global networks of protected lands that today include biosphere reserves (now numbering more than 700 in more than 120 nations, including a dozen in the United States, all on public lands); world heritage sites that celebrate nature (now numbering more than 200 in nearly 100 nations, including 20 in the United States, mostly on public lands); and wetlands of international importance (now numbering well over 2,000 in more than 150 nations, including 40 in the United States that are, by acreage, nearly all on public lands).

Let me briefly address another major challenge public lands face, the so-called recreational explosion. As “recreate” means to restore or recover, it is unsurprising that many Americans turned to their public lands for relief and solace during the pandemic, smashing previous visitation records.

It’s desirable that people want to recreate on public lands. That opportunity needs to be safeguarded for all, regardless of their bank balances. But it can be

45. New York Bight, BUREAU OF OCEAN ENERGY MANAGEMENT, <https://www.boem.gov/renewable-energy/state-activities/new-york-bight>.

46. LESHY, *supra* note 4, at 310.

47. Exec. Order No. 14,008, § 216, 86 Fed. Reg. 7619 (Jan. 27, 2021). U.S. DEP’T. OF INTERIOR, CONSERVING AND RESTORING AMERICA THE BEAUTIFUL (2021).

challenging to manage large numbers of recreational users while preserving meaningful visitor experiences and not loving the lands to death---destroying the very qualities that attract visitors.

Increasing visitation stresses not only the lands, but infrastructure and the personnel and budgets of the managing agencies. It also poses new challenges. Rather than wrestling with questions regarding logging or mining, public land managers are now much more likely to be struggling to balance recreational use with the protection of wildlife and cultural resources, and wrestling with whether and how to accommodate hikers, off-road-vehicle users, mountain and e-bikers, birdwatchers, wild horse lovers, target shooters, Instagram “geo-taggers,” sport hunters and anglers, climbers, and myriad other enthusiasts.

There is some good news on this front. That Great American Outdoors Act Congress enacted in 2020 with strong bipartisan support took a major step to address the maintenance backlog of the four major public land agencies. The Legacy Restoration Fund it established for that purpose has been called the largest single investment in public lands in at least fifty years.⁴⁸

Before closing, let me say a few words about President Biden’s naming of Deb Haaland, a member of Congress from New Mexico, to be Interior Secretary—the first Native American to hold a cabinet post in U.S. history. My book explores in some detail how, starting in the decades after World War II, Native American Nations have increasingly demanded, and often succeeded in winning, greater consideration of their strong connections to their ancestral lands that are now in public ownership. They have, for example, worked with Congress and the executive with some success to safeguard cultural sites and correct historical injustices. President Obama broke new ground by creating a special inter-tribal commission to advise the Interior Secretary on the management of the Bears Ears National Monument.⁴⁹

The United States is also—along with many other nations around the world—beginning to draw on the traditional knowledge of Indigenous Peoples for guidance in protecting biodiversity and dealing with the challenges of climate change; for example, by using fire as a landscape management tool, and in the West, to restore salmon runs so important to Indian culture.

The nation’s public lands offer many opportunities for redressing past injustices and healing societal wounds. In general, Native Nations and peoples strongly support protecting and restoring public land areas and values that are of particular cultural and spiritual significance to them, and Secretary Haaland and her team are making important contributions in this area.

CONCLUSION

Let me come back to where I started, to underscore that the political process ultimately sets public land policy. Because the American people have the final word,

48. Pub. L. No. 116-152, 134 Stat. 682 (2020). Press Release, National Parks Conservation Association, NPCA Celebrates Park Victory Decades in the Making (Jul. 22, 2020) <https://www.npca.org/articles/2618-npca-celebrates-park-victory-decades-in-the-making>.

49. LESHY, *supra* note 4, at 563-74.

the future of these lands is going to be determined largely by how Americans, and especially rising generations, react to the changes now underway.

Daunting questions loom. Will voters continue to support protecting public lands as a changing climate takes its toll? As biodiversity suffers? As iconic places on public lands become crowded? What if rejecting rather than respecting the teachings of science becomes a dominant attitude? If partisan rhetoric intensifies? If the American political system becomes more dysfunctional? Will candidates for political office, especially in places where public lands are abundant, continue to believe that protecting these lands enhances the quality of life?

The answers will determine whether the long-standing, bipartisan consensus on the general direction of public land policy will endure or unravel. For public lands to have a bright future, younger, more diverse generations of people from all walks of life need to engage with them, and with the political system. Good policy doesn't just happen; it comes about because people advocate for it.

So far, for all its imperfections, the American political system has bridged political party, regional, and other divisions to produce a result that most Americans today strongly support. As President Richard Nixon put it in 1971, it has given the nation "breathing space," a vast public asset that nurtures national pride, physical and mental health, and a spirit of community in an increasingly diverse nation. It has offered tens of millions of people life-changing encounters with nature, and public-lands-related tourism has become the economic anchor of many communities.

Public land policy has also begun, admittedly tardily, to better reflect societal diversity and to acknowledge past injustices. Although Native Americans, women, and people of color were largely excluded from participating in most of the key political decisions that kept these lands in public ownership, that is happily no longer the case. Because these lands remain subject to the will of the electorate—a group defined more broadly than ever before—they can help redress some of the injustices of the past, to again demonstrate our ability as a people to work together and find common ground.

In his seminal work *The Wealth of Nations*, published the same year as the Declaration of Independence, the Scottish philosopher Adam Smith, the champion of free-market capitalism, made a strong case for private ownership of land, but for a single exception. A "great and civilized" nation, he wrote, ought to own and hold lands "for the purposes of pleasure and magnificence" for everyone's benefit.⁵⁰

That the national government, responding to public opinion, has heeded Smith's advice is, as my book documents in much detail, a bipartisan success story deserving of celebration—a welcome counter to the political polarization and distrust that currently plagues us.

50. LESHY, *supra* note 4, at 600-01.