WILDERNESS MANAGEMENT BY THE MULTIPLE USE AGENCIES: WHAT MAKES THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT DIFFERENT?

BY

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The organic statutes for the Forest Service and the Bureau of Land Management direct each agency to manage lands under its jurisdiction in accordance with nearly identical multiple use, sustained yield mandates. Like the dominant use agencies, the National Park Service and the Fish and Wildlife Service, the multiple use agencies are required to identify lands suitable for preservation as wilderness and must manage lands designated by Congress as wilderness pursuant to the Wilderness Act. Although the Forest Service and the Bureau of Land Management are subject to parallel statutory regimes, wilderness preservation practices in national forests and on public lands have diverged. More acres in, and a greater percentage of, national forests are protected as wilderness, and the Forest Service generally has been more receptive to wilderness preservation than the Bureau of Land Management. This Article explores whether the divergence is due to differences in the physical characteristics of the two land systems, agency culture and organization, interactions between the agencies' organic statutes and either the Wilderness Act or other statutes, agency management policies and procedures, degree of congressional commitment, and judicial treatment. After concluding that several of these factors have more explanatory power than others, the Article suggests statutory and administrative actions that would allow wilderness to be preserved as effectively on public lands as in national forests.

I. INTRODUCTION 448
II. POTENTIAL DISTINGUISHING FEATURES OF WILDERNESS MANAGEMENT BY THE MULTIPLE USE AGENCIES 453

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A. Physical Resource Characteristics 453
1. Objective Characteristics 454
2. Subjective Characteristics 455
B. History, Culture, and Organization 460
1. Pre-Wilderness Act Agency History 460
2. Timing and Impact of Wilderness Application 463
3. Agency Culture and Organization 465
C. Statutory Mandates 469
1. The Organic Statutes and the Wilderness Act 469
2. The Organic Statutes and Other Statutes 472
D. Agency Management Policies and Procedures 476
1. Agency Rules and Policies 476
2. Agency Planning Processes 479
E. Congressional Commitment 484
F. Judicial Treatment 486
III. THE FUTURE OF WILDERNESS PRESERVATION ON THE MULTIPLE USE LANDS 490
IV. CONCLUSION 494

I. INTRODUCTION

Each statute that governs management of the lands and resources owned by the federal government allows a different mix of uses. The organic statutes for the National Park Service (NPS) and the U.S. Fish and Wildlife Service (FWS) are often referred to as "dominant use" statutes, as they favor preservation, recreation, or fish and wildlife protection over extractive and commodity-production uses.[1] The statutes from which the U.S. Forest Service and the Bureau of Land Management (BLM) derive their authority, by contrast, direct the agencies to manage for enumerated multiple uses, none of which predominates over the others in the land system as a whole.[2] All four land management agencies are subject to the Wilderness Act of 1964,[3] the strongest preservation oriented mandate of any of the federal land management laws.[4] When it applies, the Wilderness Act may displace the

1 *See* 1, 2 & 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 2:17 (2d ed. 2013); 3 COGGINS & GLICKSMAN, *supra*, § 24:1; George Cameron Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of Multiple Use, Sustained Yield for Public Land Management*, 53 U. COLO. L. REV. 229, 235 (1982).

2 *See* 3 COGGINS & GLICKSMAN, *supra* note 1, § 30:1.

3 Wilderness Act, 16 U.S.C. §§ 1131–1136 (2006 & Supp. II 2008), *amended by* Pub. L. No. 111-11 (2006).

4 *See* 3 COGGINS & GLICKSMAN, *supra* note 1, § 25:1 ("While the Wilderness Act is the strongest legal expression of the preservation urge in the United States (and perhaps in the world), it is a legislative compromise that by no means reflects pure or absolute preservationism.").

dominant or multiple use mandate that would have otherwise applied to a tract of federal land, had it not been designated as official wilderness.[5]

The application of the Wilderness Act to the land management agencies may differ according to the terms of the Wilderness Act itself.[6] Differences may also arise because of the degree to which the nature and scope of uses permitted by an agency's organic statutes are consistent with wilderness preservation, the manner in which each agency's organic statute interacts with the Wilderness Act, and the manner in which the agency exercises any discretion vested in it by the combination of its organic statute and the Wilderness Act. Nevertheless, given that both the Forest Service and the BLM are subject to virtually identical multiple use, sustained yield mandates under their organic statutes,[7] one might expect that administration of the Wilderness Act in national forests and on the BLM public lands would operate in similar fashion.

That expectation is not matched by the reality of implementation of the Wilderness Act on multiple use lands. Designation and management of wilderness areas by the two agencies subject to either dominant use or multiple use mandates may be closer to each other than they are to Wilderness Act implementation within the other land system category.[8] The histories of Forest Service and the BLM management of designated and potential wilderness areas, however, do not fully align.[9] As George Coggins and I have noted more broadly, wilderness areas on lands owned by the federal government are managed by agencies with their own traditions, missions, and governing standards, with "no pretense of uniformity, or even coordination."[10]

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5 *See* Robert L. Glicksman & George Cameron Coggins, *Wilderness in Context*, 76 DENV. U. L. REV. 383, 400–01 (1999).

6 *See, e.g.*, 16 U.S.C. § 1132(b)–(c) (2006) (imposing different procedures on the Secretaries of Agriculture and Interior for reviewing the suitability of lands for preservation as wilderness). Other Wilderness Act provisions appear to apply in the same fashion to all agencies. *See, e.g.*, *id.* § 1132(d) (dictating procedures for both the Agriculture and Interior Secretaries in making recommendations for wilderness designations).

7 *See id.* § 1604(g) (requiring the Forest Service to adopt planning regulations using principles established under the Multiple-Use, Sustained-Yield Act (MUSYA)); *id.* § 529 (directing the Secretary of Agriculture to "develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom"); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(a) (2006) (requiring the Secretary of the Interior, acting through the BLM, to "manage the public lands under principles of multiple use and sustained yield").

8 *See, e.g.*, Daniel Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 ECOLOGY L.Q. 249, 262–63 (1988) (noting similarities in several aspects of the BLM and Forest Service approaches to wilderness management); Steven P. Quarles & Thomas R. Lundquist, *The Alaska Lands Act's Innovations in the Law of Access Across Federal Lands: You Can Get There from Here*, 4 ALASKA L. REV. 1, 4 (1987) (noting interplay of access to federal lands and wilderness designation and pointing out that granting rights-of-way across BLM and Forest Service lands is discretionary).

9 In this issue, Professor Sandra Zellmer compares wilderness management by the two dominant use agencies. Sandra B. Zellmer, *Wilderness Management in National Parks and Wildlife Refuges*, 44 ENVTL. L. 497 (2014).

10 Glicksman & Coggins, *supra* note 5, at 393.

The most obvious and objective manifestation of the differences in wilderness management experiences between the two multiple use agencies is the acreage of wilderness areas they administer. The National Wilderness Preservation System (NWPS) includes 109.5 million acres spread across 757 wilderness areas.[11] Of those acres, 36.1 million acres of wilderness are located in 439 units of the National Forest System, while only 8.7 million acres of public lands[12] found in 221 units administered by the BLM are part of the NWPS.[13] Thus, the Forest Service manages about four times the wilderness acreage as the BLM. On a percentage basis, the difference is even starker. Wilderness areas in national forests make up about 18.7% of the 193 million acres that comprise the National Forest System.[14] The comparable figure for the BLM is 3.5% of the 247.5 million acres of public lands.[15]

The differences between the two multiple use agencies in their approaches to wilderness designation and management, however, appear to extend beyond the number of acres Congress has required each agency to preserve as wilderness. The four federal land management agencies "clearly differ in their receptivity to wilderness designation and management. Both the Forest Service and the BLM, for example, have at times evinced hostility toward wilderness designation."[16] That hostility seems to be a more persistent strain of the BLM land management policy than for the Forest Service, at least by some assessments. According to Professor Coggins, writing in 1983, "the [BLM's] commitment to preservation was often questioned—most severely by its own employees."[17] He later put the matter

11 U.S. Fish & Wildlife Service, *Learn About Wilderness: National Wildlife Refuge System*, Aug. 2013, http://www.fws.gov/refuges/whm/pdfs/NWRS_WildernessFactSheet.pdf (last visited Apr. 19, 2014).

12 The BLM's organic act, the Federal Land Policy and Management Act, defines "public lands," in relevant part, as "any land and interest in land owned by the United States within the several states and administered by the Secretary of the Interior through the [BLM], without regard to how the United States acquired ownership. . . ." 43 U.S.C. § 1702(e) (2006). This article uses the term "public lands" in that sense. It uses the term "federal lands" to include all land owned by the federal government, including not only land managed by the Forest Service and the BLM, but land managed by other agencies, including the dominant use agencies. *See also* 1 COGGINS & GLICKSMAN, *supra* note 1, § 1:13 (discussing definitions of public lands and federal lands).

13 NATIONAL WILDERNESS PRESERVATION SYSTEM, SUMMARY FACT SHEET, *available at* www.wilderness.net/factsheet.cfm. *See also* FOREST SERVICE, LAND AREAS OF THE NATIONAL FOREST SYSTEM AS OF SEPTEMBER 30, 2012, FS-383, at 130–31 tbl. 2 (Jan. 2013) (listing wilderness acreage in the National Forest System by state); Lindsay Sain Jones, Note, *The Problem with the Bureau of Land Management's Delegation of Wildlife Management in Wilderness*, 47 GA. L. REV. 1281, 1285 (2013) (providing wilderness acreage figures for the BLM).

14 NATIONAL FOREST SERVICE, ABOUT US – MEET THE FOREST SERVICE, *available at* http://www.fs.fed.us/aboutus/meetfs.shtml ("National forests . . . encompass 193 million acres (approx. 78 million hectares) of land, which is an area equivalent to the size of Texas.").

15 BUREAU OF LAND MANAGEMENT, PUBLIC LAND STATISTICS 2012, Vol. 197, BLM/OC/ST-13/002+1165, at 13–14 tbl. 1-4, *available at* http://www.blm.gov/public_land_statistics/pls12/pls2012.pdf. The BLM has identified an additional 12.8 million acres of wilderness study areas. *Id.* at 218 tbl. 5-5.

16 Glicksman & Coggins, *supra* note 5, at 393.

17 George Cameron Coggins, *The Law of Public Rangeland Management III: A Survey of Creeping Regulation at the Periphery, 1934–1982*, 13 ENVTL. L. 295, 304 (1983).

even more bluntly, charging that "the BLM has evidenced a consistent antiwilderness bias."[18] He has also characterized wilderness designation as "antithetical to the agency's historic orientation."[19]

The Forest Service's track record in managing wilderness is certainly not free from controversy and criticism, contributing at times to "erosion of the agency's credibility and public trust."[20] In their landmark evaluation of Forest Service planning, however, Charles Wilkinson and Mike Anderson concluded that:

> The Forest Service can rightfully claim credit for pioneering the concepts and methods of wilderness planning. Thirty-six years before reference to "wilderness" appeared in any federal statute, the Forest Service began to establish wilderness areas. The management standards of the Wilderness Act of 1964 are nearly identical to Forest Service regulations written twenty-five years earlier.[21]

Wilkinson and Anderson added that "[t]he Forest Service began, and has remained, at the frontiers of administrative creativity and efficiency. It has made trailblazing contributions by . . . instituting the world's first wilderness program . . . ."[22]

These broad-brush generalizations are undoubtedly oversimplifications. The commitment of each agency to wilderness preservation before 1964 and to promoting the Wilderness Act's goals thereafter on lands within its jurisdiction has waxed and waned over time. Moreover, all four of the federal land management agencies jointly operate a wilderness management training center in Missoula, Montana.[23] According to Peter Appel, this cooperative venture "has undoubtedly contributed greatly to unifying the various agencies' visions of wilderness."[24] Nevertheless, a perception persists that the Forest Service has been a more faithful steward of lands worthy of

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18 George Cameron Coggins & Doris K. Nagel, *"Nothing Beside Remains": The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 512 (1990).

19 3 COGGINS & GLICKSMAN, *supra* note 1, § 25:12.

20 Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 334 (1985).

21 *Id.*

22 *Id.* at 371. For another comparison of the BLM and Forest Service experiences, *see* George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 97–98 (1982) ("For wilderness proponents, the BLM effort compared unfavorably with parallel Forest Service programs begun a half century earlier, and the BLM commitment to preservation has often been questioned.").

23 Arthur Carhart National Wilderness Training Center, *Who We Are*, http://carhart.wilderness.net/index.cfm?fuse=who (last visited Apr. 19, 2014) ("The National Wilderness Preservation System is managed by the Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, and U.S. Forest Service.").

24 Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 125 (2010). *See also id.* at 70 n.23 ("The similarity in wilderness management among the four agencies stems in no small part from the excellent guidance and training at the Arthur Carhart Wilderness Training Center, a facility in Missoula, Montana, which all four agencies operate cooperatively.").

preservation as wilderness than the BLM.[25] Further, as the discussion above indicates, at least one objective manifestation of the role that wilderness plays in the administration of public lands and national forests seems to bear out the more central role of the Forest Service in wilderness preservation.[26] Given that both agencies operate under the same multiple use, sustained yield mandate, a comparison of the records of the two agencies seems to be in order. Have the two agencies actually diverged in their reactions and approaches to wilderness preservation mandates? To the extent that they have, what factors might explain that divergence? Finally, do the disparate experiences of the BLM and the Forest Service provide any insight into the factors that are most likely to foster or thwart effective wilderness preservation on federal lands going forward?

This Article takes a somewhat impressionistic look at those questions. Part II identifies six factors that may have played a role in the approaches to wilderness designation and management that the two multiple use agencies have adopted. These include: the physical characteristics of the lands managed by the Forest Service and the BLM; the history, culture, and structure of each agency; differences in statutory mandates that govern the activities of the two agencies; differences in agency policies, including the implementation of land use planning responsibilities; congressional interest in and commitment to wilderness preservation on public lands and in national forests; and judicial treatment of wilderness related decisions by the two agencies. Part II assesses whether each of these factors has contributed to differences in the way wilderness preservation efforts have proceeded on public lands and in national forests. It concludes that of the six sets of variables, physical characteristics, agency culture and structure, the nature of Forest Service and BLM planning responsibilities under their organic acts, and congressional interest are probably the most important. Judicial review of agency decision making appears to be the least important, and may have even played a homogenizing role. Agency management policies have certainly diverged, but they have been inconsistent within a particular agency, and are likely to have been largely driven by some of the other variables. Part III builds on this assessment by recommending legal changes to strengthen wilderness preservation on multiple use lands by reinforcing the factors that have promoted preservation, and diminishing the role of factors that have undercut it. Part IV provides a brief conclusion.

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25 *Id.* at 123–24 (discussing agencies' different amenabilities to wilderness protection). Stewardship could be measured in different ways, such as by assessing the degree to which wilderness management has maintained the functioning and resilience of ecological processes or by the extent to which such management has maintained or interfered with wild conditions unaffected by human activities. While this article for the most part does not distinguish among such stewardship measures, it does analyze differences between wilderness protection by the Forest Service and the BLM by reference to the Wilderness Act's goals, which may reflect a preference for a certain measure. The Act's definition of "wilderness," discussed *infra* at § II.A, also bears on the appropriate point of reference for assessing the outcome of wilderness management. The article by Professor Zellmer in this volume of *Environmental Law* addresses this question in the context of NPS and FWS wilderness management.

26 COGGINS & GLICKSMAN, *supra* note 1, § 30:1; *supra* text accompanying notes 11–15.

II. POTENTIAL DISTINGUISHING FEATURES OF WILDERNESS MANAGEMENT BY THE MULTIPLE USE AGENCIES

Notwithstanding that both the Forest Service and the BLM administer lands they control under the same multiple use, sustained yield management standard, wilderness areas comprise a greater percentage of the National Forest System than lands within the BLM's domain.[27] In addition, the Forest Service appears to have been more receptive to managing its lands as wilderness and to promoting wilderness preservation goals than the BLM, at least for significant portions of the last century.[28] This Part identifies several factors that may have contributed to the greater role that wilderness preservation has played in national forests than on public lands administered by the BLM. It also assesses the likelihood that each factor has played a significant role in the history of wilderness designation and management on the two land systems.

A. Physical Resource Characteristics

One obvious explanation of why there are far more acres of wilderness in national forests than on public lands—and that a significantly higher percentage of national forests than public lands is comprised of wilderness—is that national forests harbor more wilderness-worthy terrain than public lands. Logically, an assessment of that hypothesis should begin with a definition of what qualifies as wilderness. Happily, the Wilderness Act defines wilderness:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.[29]

Unhappily, the definition has multiple components, some of which are subjective,[30] and some of which may contradict others.[31] These features of

27 *See supra* text accompanying notes 16–22.

28 *See supra* text accompanying notes 11–15.

29 16 U.S.C. § 1131(c) (2006).

30 *See* Glicksman & Coggins, *supra* note 5, at 390 (characterizing "outstanding opportunities for solitude" and "primitive recreation" as subjective determinations). *See also* Wyo. v. U.S.

the definition make it difficult to devise a simple metric for land that clearly does or does not harbor the attributes of wilderness. As Fred Cheever has noted, "[J]ust because we all seem to agree that wilderness has value, that it satisfies a need many, many of us feel, does not mean we agree about what wilderness is or how to preserve it."[32]

1. Objective Characteristics

The most objective component of the definition of wilderness is that an area must be at least 5,000 acres in size or otherwise be of sufficient size as to make its preservation and use in an unimpaired condition practical.[33] Both multiple use agencies manage hundreds of millions of acres of land.[34] The issue is whether national forests and public lands include sufficiently large unimpaired, contiguous tracts to satisfy this wilderness criterion. With respect to national forests, the answer is clear. The Wilderness Act itself designated 9.1 million acres of national forests as instant wilderness.[35] When the Forest Service conducted its first Roadless Area Review and Evaluation (RARE) after the Act's adoption, it determined that an additional 58 million acres of national forest lands qualified as roadless tracts of at least 5,000 acres.[36] The RARE II process, which commenced in 1977, expanded that figure to about 62 million acres.[37] The Forest Service, in adopting a rule in 2001 governing management of roadless areas in national forests, identified

Dep't of Agric., 277 F. Supp. 2d 1197, 1234 (D. Wyo. 2003) ("Congress' definition of 'wilderness' contains both objective and subjective components. The objective components are that an area must be roadless and at least 5,000 acres in size."), *vacated on other grounds*, 414 F.3d 1207 (10th Cir. 2005).

31 *See* Sandra Zellmer, *Wilderness, Water, and Climate Change*, 42 ENVTL. L. 313, 323 (2012) (arguing that the terms natural and wild are "not synonymous" and "they can be outright contradictory. When surveyed about their ability to implement climate adaptation policies to preserve natural characteristics and processes, federal land managers indicated that the Act's directive to keep wilderness areas wild and untrammeled could act as a potential barrier to adaptive management interventions.").

32 Federico Cheever, *Talking About Wilderness*, 76 DENV. U. L. REV. 335, 341 (1991). *Cf.* Kevin Hayes, *History and Future of the Conflict over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 212 (2001) ("The lack of a unified concept of wilderness provides the courts little basis for resolving conflicts over whether land should be identified as wilderness, and as a result, most courts defer to the characterization by the agency charged with managing the particular piece of land in dispute. The agencies, however, must deal with the same conflicted definition.").

33 16 U.S.C. § 1131(c) (2006); *see also* PETER LANDRES ET AL., KEEPING IT WILD: AN INTERAGENCY STRATEGY TO MONITOR TRENDS IN WILDERNESS CHARACTER ACROSS THE NATIONAL WILDERNESS PRESERVATION SYSTEM 7 (2008), *available at* http://www.fs.fed.us/rm/pubs/rmrs_gtr212.pdf (identifying "four tangible qualities of wilderness that make the idealized description of wilderness character relevant and practical to wilderness stewardship": untrammeled, natural, undeveloped, and solitude or a primitive and unconfined type of recreation).

34 *See supra* notes 14–15.

35 Robert Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administration*, 34 ENVTL. L. 1143, 1149 (2004).

36 3 COGGINS & GLICKSMAN, *supra* note 1, § 25:8.

37 Wilkinson & Anderson, *supra* note 20, at 349–50.

58.5 million acres of roadless areas of at least 5,000 acres, slightly less than one-third of all National Forest System lands.[38]

The Wilderness Act did not designate any public lands as wilderness.[39] When Congress adopted the BLM's organic act—the Federal Land Policy and Management Act (FLPMA)—in 1976, it ordered the BLM to review roadless areas of 5,000 acres or more that had wilderness characteristics, and report to the President on the suitability of those areas for preservation as wilderness.[40] The initial BLM FLPMA inventory, prepared at the end of the Carter Administration, identified about twenty-three million acres outside Alaska that qualified as lands of sufficient size with wilderness characteristics.[41] Although some regarded that figure as "inordinately low,"[42] public lands at that time at a minimum included substantial amounts of land that satisfied this objective criterion for wilderness designation. The amount identified by the BLM was thirty-five million acres less than the amount identified in national forests, however.[43] The baseline for wilderness designation on public lands therefore started with a lower figure than the baseline resulting from the Forest Service's roadless area inventory processes.

2. Subjective Characteristics

A second, somewhat less definitive feature of wilderness under the statutory definition is that it "generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable."[44] According to John Leshy, large roadless areas in national forests "may be somewhat less seriously threatened with development than BLM lands, because they tend to be more remote and in terrain less accessible to motorized vehicles."[45] In addition, fewer major mineral deposits were discovered in tracts in national forests that were large enough to qualify as wilderness, at least at the time Congress adopted the

38 Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001); *id.* at 3250 (providing definition of "inventoried roadless area").

39 *See* 16 U.S.C. § 1132 (2006) (limiting initial designation of wilderness areas to "areas within the national forests"); Glicksman, *supra* note 35, at 1149.

40 43 U.S.C. § 1782(a) (2006).

41 Wilderness Inventory Results for Public Lands Under Administration of the Bureau of Land Management in the Contiguous Western States, 45 Fed. Reg. 75,574, 75,574 (Nov. 14, 1980) (identifying "23,772,000 acres, in 919 separate areas, as wilderness study areas (WSA's), out of a total 174 million acres of public lands that were subject to wilderness inventory" under FLPMA); 3 COGGINS & GLICKSMAN, *supra* note 1, § 25:12 (noting that "[t]he initial BLM inventory identified only about 23 million of the 174 million BLM acres outside Alaska as having wilderness characteristics").

42 3 COGGINS & GLICKSMAN, *supra* note 1, at § 25:12.

43 *Compare id.* (noting that the BLM's initial inventory included 23 million acres of land outside Alaska), *with* Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (noting that the Forest Service inventoried approximately 58.5 million acres of National Forest System lands).

44 16 U.S.C. § 1131(c) (2006).

45 John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. LAND RESOURCES & ENVTL. L. 1, 4 (2005).

Wilderness Act and in the early years of administrative wilderness designation. Even where oil, gas, or locatable minerals were known to exist, the remote location and rugged terrain tended to make extraction impractically expensive.[46] There was relatively little demand during this period for uses of potential wilderness areas in national forests that were incompatible with wilderness designation. Professor Leshy explains:

> The first areas designated [by Congress in the Wilderness Act] tended to have little value for timber or mining companies, especially when the high cost of extraction from remote areas was taken into account. Isolation and rugged terrain were, of course, important reasons why these remote areas had never been roaded, privatized, logged, or mined.[47]

Relatedly, public lands—at least before the growth in popularity of off-road vehicle recreation—were "less popular for outdoor recreation on foot and thus there [was] less popular pressure for their designation as official wilderness."[48]

Another condition for qualification as wilderness is that an area have "outstanding opportunities for solitude or a primitive and unconfined type of recreation."[49] The reference to "primitive" recreation harkens back to regulations adopted by the Forest Service in 1929 (known as the "L-20 regulations") that designated "primitive areas" in national forests within which the agency would maintain "primitive conditions of environment, transportation, habitation, and subsistence, with a view to conserving the

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46 *See* Wilkinson & Anderson, *supra* note 20, at 361 (noting that "the prohibitive costs of mining in remote and rugged wilderness or roadless areas frequently preclude development"). The development of hydraulic fracturing technology has made it feasible to extract natural gas deposits that were previously inaccessible. *See generally* Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145, 147–48 (2013) and Timothy Fitzgerald, *Frackonomics: Some Economics of Hydraulic Fracturing*, 63 CASE W. RES. L. REV. 1337, 1337–39 (2013) (summarizing recent technological developments in hydraulic fracturing technology). Fracking technology has made some national forests more attractive targets for oil and gas production. *See* REBECCA W. WATSON & NORA R. PINCUS, ROCKY MT. MINERAL L. FOUND., HYDRAULIC FRACTURING AND WATER SUPPLY PROTECTION—FEDERAL REGULATORY DEVELOPMENTS 271–72 (2012) (discussing potential horizontal drilling and hydraulic fracturing within the George Washington and Wayne National Forests). A comparison of maps of major shale gas deposits and the National Forest System helps identify potential fracking sites within national forests. *Compare* National Wildlife Federation, *Hydraulic Fracturing or "Fracking,"* http://www.nwf.org/What-We-Do/Energy-and-Climate/Drilling-and-Mining/Natural-Gas-Fracking.aspx (last visited Apr. 19, 2014) (showing national shale gas deposits), *with* USDA, Forest Service, *FSTopo or Primary Base Series / States & Territories*, http://fsgeodata.fs.fed.us/rastergateway/states-regions/states.php (last visited Apr. 19, 2014) (showing the national forest system).

47 Leshy, *supra* note 45, at 6. Leshy added, however, that "[e]ven then, Congress would often oblige the industries by gerrymandering wilderness boundaries to exclude areas where timber or minerals were thought to be present." *Id.*

48 Coggins, *supra* note 17, at 303 n.45. Professor Coggins added, however, that "the stark solitary qualities of the arid range have their admirers." *Id.* (citing EDWARD ABBEY, DESERT SOLITAIRE: A SEASON IN THE WILDERNESS 1–2 (1968)) (referring to Moab, Utah as "the most beautiful place on earth").

49 16 U.S.C. § 1131(c) (2006).

value of such areas for purposes of public education, and recreation."[50] The absence of a clear definition of primitive areas—either in the statute or in the L-20 regulations—diminishes the utility of the reference to that term in the definition of wilderness in ascertaining which areas qualify as wilderness.[51] Current Forest Service regulations are also unhelpful, defining primitive areas as "those areas within the National Forest System classified as *Primitive* on the effective date of the Wilderness Act, September 3, 1964."[52]

The statutory definition's reference to "opportunities for solitude" may reveal more about whether the concept of wilderness was likely to cover greater portions of national forests than public lands. Both the Forest Service and the BLM rely on the concept of "screening" to assess whether their lands possess the opportunities for solitude required to qualify as wilderness.[53] The Forest Service Handbook has directed field staff to consider the presence or absence of screening in assessing wilderness characteristics.[54] National forests do not lack for screening: of the 193 million acres included in the National Forest System, almost 140 million acres—roughly three-fourths—are forested.[55] On the other hand, the BLM characterizes well over half of the 247 million acres of public lands (approximately 154 million acres) as "scrub."[56] Scrub accounts for

50 Mitchel P. McClaran, *Livestock and Wilderness: A Review and Forecast*, 20 ENVTL. L. 857, 861 n.26 (1990) (quoting U.S. Forest Serv., U.S. Dep't of Agric., L-20 Regulations (1929)). *See also* THE FOREST HISTORY SOCIETY, U.S. FOREST SERVICE HISTORY, *available at* http://www.foresthistory.org/ASPNET/policy/Wilderness/1929_L-Reg.aspx (quoting provision of L-20 Regulations authorizing the establishment of primitive areas "to maintain primitive conditions of transportation, subsistence, habitation, and environment to the fullest degree compatible with their highest public use").

51 *See* Wilson v. Block, 708 F.2d 735, 753 (D.C. Cir. 1983) (quoting legislative history of the Wilderness Act stating that primitive areas had not been "defined with precision").

52 36 C.F.R. § 261.2 (2013).

53 *See* U.S. FOREST SERVICE, LAND MANAGEMENT PLANNING HANDBOOK FSH 1909.12 – CHAPTER 70, AMENDMENT NO. 1909.12-2007-1, at 16 (2007), *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev3_053167.pdf (providing factors for employees to use in determining whether an area provides solitude); U.S. Bureau of Land Mgmt., *Oregon Badlands Wilderness*, http://www.blm.gov/or/resources/recreation/badlands/ (last visited Apr. 19, 2014) (describing how trees and "rock outcrops provid[e] vegetative screening and plenty of solitude" in the Oregon Badlands Wilderness). The Forest Service describes "vegetative screening capability" as being "primarily a function of the height and physical structure of the leaves, branches, and stems of individual plants, including trees, shrubs, and herbaceous layers." U.S. FOREST SERVICE, LANDSCAPE AESTHETICS: A HANDBOOK FOR SCENERY MANAGEMENT, AGRICULTURE HANDBOOK NUMBER 701, app. at C-5 (1995), *available at* http://www.fs.fed.us/cdt/carrying_capacity/landscape_aesthetics_handbook_701_appendices.pdf.

54 *See, e.g.*, *supra* U.S. FOREST SERVICE, at note 53 ("Solitude is the opportunity to experience isolation from sights, sounds, and the presence of others from the developments and evidence of humans. To determine opportunities for solitude, look at the size of the area, presence of screening, distance from impacts, and degree of permanent intrusions.").

55 U.S.DEP'T OF AGRIC., AGRICULTURE FACT BOOK 2001–2002, 113 (2002).

56 *See* BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS, Volume 197, at 1, 54–56 (2013). The rest of the public lands is a mix of herbaceous lands (29.4 million acres), forests (29.2 million acres), barren land (8.1 million acres), wetlands (3.7 million acres, mainly in Alaska), moss/lichen covered land (4,064 acres, all in Alaska), open water (3.7 million acres), and a type categorized simply as "other" (2.3 million acres).

approximately 128 million acres—almost 74%—of the BLM's 174.2 million western lands.[57] Forested lands comprise only 10%—17.9 million acres—of public lands in the West.[58] Solitude can certainly be found amidst BLM scrubland, but in its 1978 *Wilderness Inventory Handbook*, issued two years after FLPMA ordered it to assess public lands for wilderness potential, the BLM assessed solitude by examining the area's size, natural screening, and ability to find a secluded spot.[59] Natural screening became a significant consideration in establishing Wilderness Study Areas (WSAs), as the BLM determined that certain areas did not provide sufficient solitude because they lacked outstanding vegetative or topographic screening.[60] Although the BLM now makes clear that solitude can be found in areas without screening,[61] its earlier policies adopting the Forest Service's view of solitude help account for its low number of WSAs.

The final feature of wilderness referred to in the Wilderness Act's definition of that term is whether areas "contain ecological, geological, or other features of scientific, educational, scenic, or historical value."[62] That portion of the definition refers to ecological features, but qualifies the reference by requiring that the features have scientific, educational, scenic, or historical value.[63] Although the statute is not without ambiguity, there does not appear to be any linguistically plausible way to interpret the definition as not applying the qualifying language "of scientific, educational, scenic, or historical value" to ecological features and geological features, as well as to "other features."[64] Perhaps as a result, as Sandi Zellmer has noted:

57 *See id.* at 54.

58 *Id.*

59 BUREAU OF LAND MGMT., WILDERNESS INVENTORY HANDBOOK: POLICY, DIRECTION, PROCEDURES, AND GUIDANCE FOR CONDUCTING WILDERNESS INVENTORY ON THE PUBLIC LANDS 13 (1978), *available at* http://www.blm.gov/ca/pa/wilderness/wilderness_pdfs/wsa/Wilderness_Inventory.pdf.

60 *See generally* BUREAU OF LAND MGMT., WILDERNESS REVIEW INTENSIVE INVENTORY (1980), *available at* https://archive.org/details/wildernessreview5518unit (providing a report on the final decisions of thirty selected units in southeast Oregon as well as proposed decisions on other intensively inventoried units in Oregon and Washington, eliminating 30 of the 38 considered areas, 23 of which were due, in whole or in part, to a lack of outstanding vegetative or topographic screening).

61 *See* BUREAU OF LAND MGMT., 6310-CONDUCTING WILDERNESS CHARACTERISTICS INVENTORY ON BLM LANDS (PUBLIC) 8 (2012) ("Outstanding opportunities for solitude can be found in areas lacking vegetation or topographic screening.").

62 16 U.S.C. § 1131(c) (2006).

63 *Id.*

64 16 U.S.C. § 1131(c) (2006). Had Congress not wanted to apply the qualifying language to ecological features, it could have defined wilderness, in relevant part, as areas which "may also contain ecological features, geological features, or other features of scientific, educational, scenic, or historical value." As the statute is written, applying the qualifying language only to "other features" leaves the adjectives ecological and geological hanging without a noun to which they refer. *Cf.* Appel, *supra* note 24, at 77 (asserting that "[T]he suitability of an area for inclusion as wilderness is linked not to its ecological or environmental value but to its ability to fulfill a particular type of human use, namely, the provision of solitude and primitive recreation.").

> [F]rom the outset, many wilderness areas were chosen for reasons other than their ecological amenities. Unlike the National Wildlife Refuge System and some other types of preserves, the wilderness system was not designed to ensure that areas with the most biodiversity potential are included; rather, Congress and wilderness advocates . . . were more concerned with recreational and aesthetic virtues.[65]

Given that emphasis, it is not surprising that more portions of national forests—which tend to feature more spectacular scenery and opportunities for hiking and camping in wooded areas—than of public lands were chosen as wilderness. John Leshy describes "'rock and ice' wilderness" as "the low-hanging fruit that Congress picked first."[66] Similarly, Professor Zellmer notes that "the wilderness system generally protects scenic areas of 'rock and ice' rather than wetlands, grasslands and other more biologically productive but less visually spectacular areas."[67] The BLM lands have been referred to as "the lands no one wanted," having been unclaimed and unreserved during the federal government's disposition of the public domain; "many viewed them as a vast arid wasteland of little use to anyone."[68] Had ecological value in isolation been the test, the wilderness designation patterns on the two multiple use systems might have been different. As FLPMA recognizes, public lands administered by the BLM have "ecological, environmental" value,[69] and one of the policies motivating FLPMA's adoption was land management to protect those values.[70]

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65 Zellmer, *supra* note 31, at 320.

66 Leshy, *supra* note 45, at 6.

67 Zellmer, *supra* note 31, at 320.

68 Kelly Nolen, *Residents at Risk: Wildlife and the Bureau of Land Management's Planning Process*, 26 ENVTL. L. 771, 774 (1996) (citing DYAN ZASLOWSKY & T.H. WATKINS, THESE AMERICAN LANDS: PARKS, WILDERNESS, AND THE PUBLIC LANDS 113 (2d ed. 1994)).

69 43 U.S.C. § 1701(a)(8) (2006). "[T]he public lands overseen by BLM are in fact incredibly diverse, encompassing grasslands, forests, high mountains, arctic tundra, and deserts." Nolen, *supra* note 68, at 774.

70 *See* 43 U.S.C. § 1701(a)(8). Referring to lands administered by the BLM, one observer noted that "[i]n the past, inadequate ecological understanding of the 'forgotten' lands of the West led to an assumption that the lands were 'chiefly valuable' for grazing and raising forage crops." Erik Schlenker-Goodrich, *Moving Beyond Public Lands Council v. Babbitt: Land Use Planning and the Public Range Resource*, 16 J. ENVTL. L. & LITIG. 139, 180–81 (2001). More recently, the ecological value of areas of public lands such as riparian and wetland habitats has been better appreciated. *See, e.g.*, Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 534–35 (1997). The BLM issued regulations in 1995 to establish the fundamentals of rangeland health for grazing administration on public lands. The aim of the regulations was to:

> [A]ddress the necessary physical components of functional watersheds, ecological processes required for healthy biotic communities, water quality standards and objectives, and habitat for threatened or endangered species or other species of special interest. The [Interior] Department believes that these provisions are critical to ensuring that BLM's administration of grazing helps preserve currently healthy rangelands and restore healthy conditions to those areas that currently are not functioning properly, especially riparian areas.

B. History, Culture, and Organization

The greater role that wilderness preservation has played in national forests as compared to public lands is a function of more than just the physical characteristics of the two land systems and the manner in which those characteristics interact with the statutory definition of wilderness adopted in 1964. The pre-Wilderness Act history of land and resource management by the two multiple use agencies, the timing of the Wilderness Act's application to the two land systems, the impact of management and the activities it permitted before the Wilderness Act's adoption, and the organizational structure of the Forest Service and the BLM also affected the scope and nature of wilderness management by those agencies.

1. Pre-Wilderness Act Agency History

The Forest Service was attuned to preservation generally, and to preservation of wilderness-like lands in particular, much earlier than the BLM. In a sense, preservation was built into the Forest Service's DNA in a way that it was not for the BLM.[71] The Forest Service has often been criticized for prioritizing timber production over other multiple uses.[72] Demand for timber during and after World War II fueled this emphasis on maximizing timber production.[73] That emphasis, and particularly the Forest Service's authorization of clear-cutting, sparked criticism of the kind reflected in the Bolle Report[74] and the Church Guidelines in the early 1970s.[75] Those investigations and a court decision halting clear-cutting in a West Virginia national forest[76] helped prompt adoption of NFMA in 1976.[77]

Department Hearings and Appeals Procedures; Cooperative Relations; Grazing Administration—Exclusive of Alaska, 60 Fed. Reg. 9894, 9898 (Feb. 22, 1995) (codified at 43 C.F.R. pts. 1780, 4100). *Cf.* J.B. Ruhl, *The "Background Principles" of Natural Capital and Ecosystem Services—Did Lucas Open Pandora's Box?*, 22 J. LAND USE & ENVTL. L. 525, 532 (2007) ("Modern understanding of the ecological function of wetlands has raised them from wasteland status to an important public resource.").

71 *See* Mary Catherine Ishee, *Review and Management of Roadless Lands in Wilderness Planning*, 5 NAT. RESOURCES & ENV'T 3, 3 (1991) ("The Forest Service, more than any other federal agency, is to be credited with originating and developing the wilderness concept.").

72 H. Michael Anderson & Aliki Moncrief, *America's Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 434 (1999).

73 3 COGGINS & GLICKSMAN, *supra* note 1, at § 34:2.

74 ARNOLD BOLLE ET AL., UNIVERSITY OF MONTANA, A SELECT COMMITTEE OF THE UNIVERSITY OF MONTANA PRESENTS ITS REPORT ON THE BITTERROOT NATIONAL FOREST 1 (1970) (republished as S. DOC. NO. 115 (1970)).

75 *See* Erin Madden, *Seeing the Forests for the Trees: Employing Daubert Standards to Assess the Adequacy of National Forest Management under the National Forest Management Act*, 18 J. ENVTL. L. & LITIG. 321, 326 (2003). Senator Lee Metcalf of Montana in 1970 commissioned the Bolle Report, which criticized the agency's focus in a national forest in Montana on timber harvesting at the expense of the other enumerated multiple uses. The Report prompted Congress to conduct hearings (known as the Church Hearings, after Idaho Senator Frank Church) into Forest Service management practices, especially clear-cutting. *See generally* SENATE SUBCOMM. ON PUBLIC LANDS 72–S442–7, 92D CONG., REP. ON CLEARCUTTING ON FEDERAL TIMBERLANDS (Comm. Print 1972).

76 West Virginia Div. of Izaak Walton League v. Butz, 522 F.2d 945, 947 (4th Cir. 1975).

Notwithstanding such criticisms and practices, a commitment to preservation of wild lands is deeply rooted in the Forest Service's history. The utilitarian philosophy to which Gifford Pinchot, the first Chief of the Forest Service, was committed "was basically antithetical to the views of John Muir and other wilderness advocates."[78] Soon after Pinchot's departure in 1910, however, interest within the agency in preserving national forest lands surfaced, and agency scientists in the ensuing two decades criticized the significant expansion of the national forest road system, calling for permanent protection of wilderness regions of the forests.[79] In 1919, Arthur Carhart, a landscape architect employed by the Forest Service, persuaded the agency's office in Denver to halt development that threatened the scenic beauty of Trapper Lake in the White River National Forest.[80] During the 1920s, Carhart and another Forest Service employee, Aldo Leopold, began pressing for the creation of national forest wilderness areas.[81] In 1924, the Forest Service established the Gila Primitive Area, "the first formally protected wilderness in the United States, perhaps in the world," and the establishment of five more such areas followed shortly thereafter.[82]

In 1929, acting under the Forest Service Organic Act,[83] the Forest Service issued its first regulation—Regulation L-20—to protect primitive areas.[84] Regulation L-20 resulted in the creation of more than fourteen million acres of primitive area by 1939,[85] but the regulation permitted logging and the Forest Service regarded the designations as temporary.[86] In 1939, the agency replaced Regulation L-20 with the more protective "U Regulation," which resulted in reclassification of primitive areas as wilderness, wild, or recreation.[87] Road construction, logging, and motorized vehicle use were barred in the first two categories.[88] Although enthusiasm for wilderness protection diminished during and after World War II,[89] when Congress adopted the Wilderness Act in 1964, it designated as "instant wilderness" all 9.1 million acres that the Forest Service had classified as either wilderness

77 Michael M'Gonigle & Louise Takeda, *The Liberal Limits of Environmental Law: A Green Legal Critique*, 30 PACE ENVTL. L. REV. 1005, 1037–38 n.130 (2013).

78 Wilkinson & Anderson, *supra* note 20, at 335. *See also* Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 357 (1994) (stating that "under Pinchot, forest managers gave little consideration to providing for nonconsumptive forest uses or to preserving forests in their natural state").

79 Wilkinson & Anderson, *supra* note 20, at 335–36.

80 Dennis Roth, *The National Forests and the Campaign for Wilderness Legislation*, 28 J. OF FOREST HISTORY 112, 114 (1984).

81 Wilkinson & Anderson, *supra* note 20, at 336.

82 *Id.* at 337.

83 Organic Act of 1897, 16 U.S.C. § 528 (2006).

84 JOHN HENDEE, GEORGE STANKEY & ROBERT LUCAS, U.S. FOREST SERV., WILDERNESS MANAGEMENT 61 (1978).

85 Glicksman, *supra* note 35, at 1149; Wilkinson & Anderson, *supra* note 20, at 340–41.

86 Wilkinson & Anderson, *supra* note 20, at 338–41.

87 *Id.* at 340–41.

88 *Id.* at 340.

89 *See* Rohlf & Honnold, *supra* note 8, at 250 (stating that post-war demands for increases in development encouraged wilderness advocates to pursue statutory protection for these areas).

or wild under the U Regulation.[90] The Wilderness Act ordered the Forest Service to study the wilderness potential of additional lands previously classified as primitive areas, indicating that Congress was not satisfied with the scope of the Forest Service's previous protective efforts.[91] Its designation of all nine million acres of Forest Service wilderness and wild areas as permanent wilderness, however, represents a codification of the Forest Service's early, precedent-setting wilderness protection efforts.[92] While some of the Forest Service's wilderness protection efforts may have been motivated by a desire to avoid transfer of jurisdiction over its most scenic land to the NPS,[93] wilderness preservation was an agency priority well before adoption of the Wilderness Act.[94] Thus, the Forest Service's tradition of wilderness protection was "the starting point of the current wilderness preservation system."[95]

The BLM followed a completely different path toward wilderness preservation. Its efforts to protect wilderness came much later and, unlike the Forest Service's efforts, were not of its own initiative. The BLM was created in 1946 when the Grazing Service and the General Land Office merged within the Interior Department.[96] Until Congress enacted the BLM's organic act, FLPMA, in 1976, the agency's traditional mission involved transferring land to private interests and facilitating resource extraction.[97] As Michael Blumm explained, "Congress considered BLM lands temporary public lands—soon to be sold or granted to private owners. Thus, designating wilderness on BLM lands made little sense until the federal policy of disposition changed."[98] It was not until FLPMA's adoption that Congress settled on a policy that "the public lands be retained in Federal ownership"[99] and that those lands "be managed in a manner that will protect the quality of scenic, scientific, historical, ecological, [and] environmental . . . values," and "that, where appropriate will preserve and protect certain public lands in their natural condition. . . ."[100] Congress ordered the BLM to inventory its lands to determine their suitability for

90 Wilkinson & Anderson, *supra* note 20, at 345; Sandra Zellmer, *A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wilderness*, 34 ENVTL. L. 1015, 1043–44 (2004).

91 16 U.S.C. § 1132(b) (2006).

92 Wilkinson & Anderson, *supra* note 20, at 345.

93 HENDEE ET AL., *supra* note 84, at 35.

94 Hardt, *supra* note 78, at 379.

95 Anderson & Moncrief, *supra* note 72, at 434; *see also* Hardt, *supra* note 78, at 380 ("The Wilderness Act of 1964 continued the Forest Service tradition of preserving lands for primitive recreational opportunities . . .").

96 Bureau of Land Mgmt., *A Long and Varied History*, http://www.blm.gov/wo/st/en/info/About_BLM/History.html (last visited Apr. 19, 2014).

97 Hayes, *supra* note 32, at 211; PHILLIP O. FOSS, POLITICS AND GRASS: THE ADMINISTRATION OF GRAZING ON THE PUBLIC DOMAIN 8 (University of Washington Press 1960).

98 Michael C. Blumm & Andrew B. Erickson, *Federal Wild Lands Policy in the Twenty-First Century: What a Long, Strange Trip It's Been*, 25 COLO. NAT. RESOURCES, ENERGY AND ENVTL. L. REV. 1, 35 n.234 (2013).

99 43 U.S.C. § 1701(a)(1) (2006).

100 *Id.* § 1701(a)(8).

wilderness, for the first time raising the possibility of carving wilderness areas out of public lands.[101] By then, however, the prospects for wilderness designation were less promising than they had been when Congress created instant wilderness in national forests twelve years earlier.

2. Timing and Impact of Wilderness Application

The Wilderness Act designated all areas classified by the Forest Service as wilderness, wild, or canoe before September 3, 1964 as wilderness areas.[102] It also directed the Forest Service to review for wilderness suitability, additional areas that the agency had designated primitive and report the results to the president, who would submit recommendations to Congress.[103] Of the areas recommended by the president for wilderness designation, only those designated by act of Congress would become wilderness.[104] The Wilderness Act also specified the procedures, including public notice and hearings, which the Forest Service would be required to pursue before submitting its wilderness designation recommendations to the president.[105] The Act required the Secretary of the Interior to engage in similar review processes for the national parks and wildlife refuges.[106]

The Forest Service began its RARE I review in 1967, examining which national forest roadless areas should be included in the NWPS on top of the nine million acres of wilderness created by the Act itself.[107] That review process covered even more acres than the Wilderness Act required, identifying fifty-six million acres of roadless areas in national forests that might qualify for wilderness designation.[108] The Forest Service recommended that more than twelve million acres be added to the NWPS and that additional roadless areas be classified as wilderness study areas.[109] The courts enjoined the agency from releasing the remaining areas studied for timber harvesting, mineral extraction, and other uses based on National Environmental Policy Act (NEPA) violations.[110] The Forest Service commenced a second review process, RARE II, in 1977, which resulted in a recommendation that fifteen million acres be added to the NWPS, eleven million more acres be studied further, and thirty-six million acres be

101 *Id.* § 1782(a).

102 16 U.S.C. § 1132(a) (2006).

103 *Id.* § 1132(b).

104 *Id.*

105 *Id.* § 1132(d).

106 *Id.* § 1132(c)–(d).

107 Glicksman, *supra* note 35, at 1150.

108 *Id.*; Ishee, *supra* note 71, at 4 ("[T]he Forest Service also inventoried other roadless areas under its supervision that exceeded five thousand acres to ensure that suitable national forest lands were not overlooked as potential candidates for the NWPS.").

109 Sandra Zellmer, *The Roadless Area Controversy: Past, Present, and Future*, 48 ROCKY MT. MINERAL L. FOUND. 21-1, 21-9–21-10 (2002) *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1113&context=lawfacpub.

110 Glicksman, *supra* note 35, at 1150; Wyo. Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1251 (10th Cir. 1973).

released for multiple use management.[111] That set of recommendations was also aborted, however, due to NEPA violations.[112] As of 1982, therefore, the Forest Service remained unable to approve any uses in about sixty-two million acres of roadless areas that were inconsistent with wilderness preservation.

The Wilderness Act was silent on its application to public lands, neither designating any portions of those lands as instant wilderness nor requiring that the BLM engage in the kinds of processes for recommending wilderness acreage that the Act required of the Forest Service, the NPS, and the FWS.[113] Indeed, before FLPMA's adoption in 1976, "the federal government gave little attention and put few resources into BLM land management and conservation programs, apparently assuming that these lands would soon be privatized."[114] FLPMA changed the equation, requiring the BLM to assess whether roadless areas of 5000 acres or more were suitable for wilderness designation.[115] In addition, FLPMA required that the BLM manage these roadless areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness," subject to valid existing rights arising from pre-FLPMA activities such as mining, grazing, and mineral leasing.[116] The BLM therefore began assessing its lands for wilderness potential more than a decade after the Forest Service had done so. In the intervening years, portions of public lands that might have exhibited wilderness characteristics, such as lack of development or permanent improvements, were used in ways that precluded wilderness designation.[117] More importantly, the BLM's failure to initiate the kinds of preservation efforts in which the Forest Service had been engaged since the 1920s had already allowed road construction, grazing, and other uses that resulted in resource degradation.[118] The Interior Department's Solicitor General indicated in 1979, for example, that existing mining uses already intruded on roadless area landscapes and destroyed wilderness characteristics so as to preclude wilderness consideration in some of those areas.[119]

111 Zellmer, *supra* note 90, at 1044.

112 *See generally* California v. Block, 690 F.2d 753 (9th Cir. 1982).

113 16 U.S.C. §§ 1131–1136 (2006).

114 Blumm & Erickson, *supra* note 98, at 33.

115 43 U.S.C. § 1782(a) (2006).

116 *Id.* § 1782(c).

117 *See* 16 U.S.C. § 1131(c) (2006) (defining wilderness as "an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation. . .").

118 *See infra* notes 190–213 (discussing the impact of road building pursuant to R.S. 2477 on public lands). *Cf.* Hayes, *supra* note 32, at 235 ("Interim protection is important because diminished wilderness suitability in the interim period would preclude the BLM from recommending the degraded land for wilderness designation. . . .").

119 James N. Barkeley & Lawrence V. Albert, *A Survey of Case Law Interpreting "Valid Existing Right"—Implications for Unpatented Mining Claims*, 34 ROCKY MT. MIN. L. INST. 9–1, 9–39 (1988) (citing the Solicitor's written opinion on the matter)*; see also* Ishee, *supra* note 71, at 51 (concluding that "most established uses, particularly mining activities, generally involved roads or other intrusions on the landscape which tended to destroy an area's wilderness characteristics, precluding the area's designation as a WSA in the first place").

Another factor contributed to a reduced likelihood that wilderness designation would occur on public lands to an extent comparable to such designation in national forests. Congressional enthusiasm for wilderness designation had already waned by the time the BLM undertook its wilderness inventory.[120] Some western members of Congress who had championed wilderness protection had been replaced by individuals more concerned with protection of property rights and state and local prerogatives to control land use.[121]

3. Agency Culture and Organization

As Eric Biber noted recently, agency cultures differ from one another.[122] Those differences can affect how agencies implement their statutory responsibilities, particularly when the organic statute mandate is as replete with discretion as the multiple use, sustained yield mandates codified in NFMA and FLPMA.[123] The management policies and actions of both the Forest Service and the BLM have at times been tilted more toward extractive and consumptive uses—timber harvesting in the case of the Forest Service, and grazing in the case of the BLM—than toward preservation.[124] That bias may have posed fewer obstacles to wilderness protection in the Forest Service than in the BLM, however. The Forest Service began protecting wilderness areas decades before FLPMA first required the BLM to do so, perhaps facilitating efforts to shift toward a more preservation oriented stance after adoption of the Wilderness Act.[125] In addition, the Forest Service's relatively more centralized structure may have contributed to the

Even after the BLM designated wilderness study areas under FLPMA, it allowed off-road vehicle use in three-quarters of them. *See* John C. Adams & Stephen F. McCool, *Finite Recreation Opportunities: The Forest Service, the Bureau of Land Management, and Off-Road Vehicle Management*, 49 NAT. RESOURCES J. 45, 57 (2009). *See also id.* at 56 n.44 (asserting that although "the use of ORVs . . . does not actually preclude congressional action . . . in some instances ORV use permitted by past allocations has been used to press Revised Statute 2477 . . . claims in roadless areas, thus creating new 'roads' that would literally preclude wilderness designation").

120 *See* Leshy, *supra* note 45, at 5.

121 *Id.*

122 *See* Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. 78, 80 (2012). Peter Appel has cautioned that although the four federal land management agencies "quite possibly have different cultures about their amenability to wilderness protection, determining agency bias toward or against wilderness protection would be difficult. An obvious example is the case of the Forest Service, which has the longest history of wilderness protection but also, perhaps, the most long-standing objection to legislative rather than administrative protection of wilderness." Appel, *supra* note 24, at 123–24.

123 *See, e.g.*, National Forest Management Act of 1976, 16 U.S.C. §§ 1604(e)(1), 1607 (2006); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732 (2006).

124 Eric Biber, *Too Many Things To Do: How to Deal With the Dysfunctions of Multiple-Goal Agencies*, 33 HARV. ENVTL. L. REV. 1, 21–22 (2009).

125 *See supra* Part II.B.1.

filtering down of a commitment to wilderness preservation throughout all levels of the agency more effectively than at the BLM.[126]

Despite having engaged in efforts to protect wilderness as early as the 1920s, the Forest Service has often favored timber production over competing multiple uses such as recreation and preservation. Professor Biber traced this "mission orientation" to the legacy of Gifford Pinchot, who emphasized making national forests "useful and productive for local residents."[127] The agency's hiring, training, and personnel management practices "thoroughly socialized new employees into the Forest Service's mission" and instilled a "work culture focused on the ideals of timber production."[128] The bulk of those the agency hired in the 1950s were forestry school graduates, and the agency used probationary hiring periods to screen out those not willing to abide by the agency's cultural norms.[129] By the early 1980s, Forest Service employees generally favored timber production over environmental protection.[130] In fact, the agency's computer programmers even used models for the development of land use plans that favored timber production.[131]

The same hiring, training, and personnel management practices that induced this tilt toward timber production, however, at least according to Biber, also instilled a more general readiness to conform and to "'internalize' the perceptions, values, and premises of action that prevail in the Forest Service. . . . The Service hierarchy has historically been entirely staffed by internal promotion of employees with decades of service to the Service, again encouraging loyalty to the organization at all levels within it."[132] The upshot was a work force that was inclined to conform willingly to agency decisions.[133] Further, agency policy directions had always originated in the Chief's office.[134] Herbert Kaufman concluded in his classic study of the agency that the Forest Service's rigid hierarchy, employee professionalism,

126 Nolen, *supra* note 68, at 835.

127 Biber, *supra* note 124, at 22–23. Biber identified other factors that contributed to the Forest Service's prioritization of timber production, including the requirement that it do so in the 1897 organic act, the quantifiability of timber production goals, and pressure from Congress and high-level executive branch officials to promote timber harvesting to benefit the industry and communities dependent on the industry. *See id.* at 25–28.

128 *Id.* at 24 (citing HERBERT KAUFMAN, THE FOREST RANGER: A STUDY IN ADMINISTRATIVE BEHAVIOR (2006)).

129 *Id.* at 24–25.

130 *Id.* at 22.

131 *Id.*

132 *Id.* at 25 (quoting KAUFMAN, *supra* note 128, at 176).

133 *See id.*

134 *See* Wilkinson & Anderson, *supra* note 20, at 78. Wilkinson and Anderson describe the Forest Service structure in the mid-1980s as "essentially an uneasy compromise between the top-down and bottom-up theories. The NFMA regulations create a hierarchical structure designed to meet both national and local needs." *Id.* at 79; *see also id.* at 81 ("The Forest Service regards the regional foresters as mediators between local NFMA plans and the [national planning] program."). For a description of the Forest Service's current structure, with a link to an organization chart, see U.S. Forest Service, *Management's Discussion and Analysis: Organizational Structure*, http://www.fs.fed.us/plan/par/2003/final/html/mda/org_struct.shtml (last visited Apr. 19, 2014).

and clear objectives created a high degree of consistency among the various field offices.[135] As a result, statutory changes—such as the explicit inclusion of wilderness among the multiple uses referenced in NFMA[136]—or shifts in agency management priorities at the agency's highest levels were likely to be met with less resistance than if the agency had lacked this culture of loyalty, conformity, and top-down direction.[137] The willingness to buy into an increased emphasis on preservation was likely reinforced by diversification of the Forest Service's work force through hiring employees who reflected a shift in broader social attitudes toward a greater emphasis on environmental protection.[138]

A bias in favor of extractive and consumptive use was also rooted in BLM operations, especially with respect to grazing on public lands. As indicated above, wilderness preservation by the agency was not even a realistic possibility until Congress, in adopting FLPMA in 1976, codified a policy of retention rather than transfer of public lands into private hands.[139] For at least the first thirty years of its existence, the BLM operated on the premise that public lands were primarily a source of forage and mineral resources.[140] The agency opposed withdrawal of its lands from extractive uses.[141] Cecil Andrus, former Idaho Governor who later became President Jimmy Carter's Interior Secretary, characterized the agency as the Bureau of Livestock and Mining.[142]

According to some observers, the BLM's traditional identification with grazing and mining interests resulted from the agency's capture by these private interests.[143] The agency's structure, however, may have made it harder to counter capture than it was in the Forest Service. Capture of the Forest Service by the timber industry was in significant part a response to "leadership from the center."[144] The BLM capture, by contrast, was focused more at the local level.[145] In his 1960 study of the BLM, Phillip Foss concluded that the BLM's predecessor, the Grazing Service, was governed by

135 KAUFMAN, *supra* note 128, at 4, 204, 207.

136 16 U.S.C. § 1604(e)(1) (2006).

137 *Cf.* Biber, *supra* note 124, at 29 ("[A]fter the enactment of MUSYA as well as NFMA, the Forest Service did indeed begin to consider other goals besides timber production to a greater and greater extent, particularly in the later 1980s and 1990s."). The change was nevertheless not instantaneous. *See id.* at 29 ("Nonetheless, it took the Forest Service a number of years after the passage of both MUSYA and NFMA to change its status as an organization strongly oriented toward timber production.").

138 *Id.*

139 *See supra* notes 96–101 and accompanying text.

140 *See* Anderson & Moncrief, *supra* note 72, at 425.

141 *Id.* at 433.

142 Michael J. Shinn, Note, *Misusing Procedural Devices to Dismiss an Environmental Lawsuit—Lujan v. National Wildlife Federation, 110 S. Ct. 3177 (1990)*, 66 WASH. L. REV. 893, 908 n.153 (1991).

143 Nolen, *supra* note 68, at 771, 776 (citing PAUL J. CULHANE, PUBLIC LANDS POLITICS: INTEREST GROUP INFLUENCE ON THE FOREST SERVICE AND THE BUREAU OF LAND MANAGEMENT 17–19 (1981); Rod Greeno, *Who Controls the Bureau of Land Management?*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 51, 52–53 (1990)).

144 KAUFMAN, *supra* note 128, at 205.

145 *See infra* notes 146–148 and accompanying text.

advisory boards elected by stockmen.[146] Although these boards affected agency decisions at all levels, they were particularly influential at the local level, as they reinforced the tendency of BLM field staff to promote the needs of local constituents.[147] The boards wrote grazing regulations, allocated funds for range management, and even influenced the hiring of BLM employees.[148] BLM field personnel found themselves "susceptible to local pressure to favor extractive industries that are perceived as providing steady sources of jobs and money for the community."[149]

Unlike the Forest Service, the BLM lacked a strong tradition of adherence to policy decisions and management directives coming from the national office. The BLM had a more decentralized decision making structure, with a relatively unique system that lacked regional offices, which in the other land management agencies—including the Forest Service—supervised operations in several states.[150] Management decisions often were "made at the local level with little oversight by its national office."[151] This decentralized structure, coupled with the tradition of following the lead of local economic interests, presumably made it more difficult for a shift in priorities at the top from consumption toward preservation to influence decision makers lower down in the agency hierarchy.[152] The local boards lost sway after the adoption of FLPMA.[153] BLM policy shifted, fitfully, "away from its traditional indulgence of exploitive users"[154] in part because of increasing citizen pressure to devote the federal lands, including BLM lands, to

146 FOSS, *supra* note 97, at 81–82.

147 *Id.*

148 Greeno, *supra* note 143, at 52.

149 Nolen, *supra* note 68, at 776. *See also id.* at 837 (concluding that the BLM "often favors consumptive industries that promise local employment").

150 *Id.* at 835; *see* BUREAU OF LAND MGMT., TABLE OF ORGANIZATION (2013), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Business_and_Fiscal_Resources.Par.27384.File.dat/blm_org_chart.pdf (showing that the BLM's organization chart continues to reflect the use of state rather than regional offices).

151 Nolen, *supra* note 68, at 835. *See also* George Cameron Coggins and Margaret Lindebegj-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 64 (1982) ("The BLM and its predecessors have always emphasized decentralization; in fact, every BLM director has attempted to decentralize past decentralizations.").

152 *See* Nolen, *supra* note 68, at 800 ("Although policies emanate from national headquarters, national division chiefs often lack the power to enforce their directives. This produces inconsistent policy implementation and a lack of oversight of local BLM management decisions . . . .").

153 *See* 3 COGGINS & GLICKSMAN, *supra* note 1, § 33:11 (describing more limited role of the boards under FLPMA and regulations adopted during the Clinton Administration that required greater environmental group representation on the boards). FLPMA did provide for the establishment of grazing advisory boards "to offer advice and make recommendations to the head of the office involved concerning the development of allotment management plans and the utilization of range-betterment funds." 43 U.S.C. § 1753(b) (2006). Congress presumably sought to promote transparency in the interactions of advisory boards and the BLM by subjecting the boards to the Federal Advisory Committee Act. *Id.* § 1753(e). FLPMA's authorization to create advisory boards expired at the end of 1985. *Id.* § 1753(f).

154 Hayes, *supra* note 32, at 209.

recreational non-commodity uses.[155] Agency efforts to enhance wilderness protection were likely slowed and impaired, however, by the agency's traditional culture and its decentralized structure.[156] The BLM's lag in pursuing wilderness protection goals created greater opportunities for the entrenchment of uses inconsistent with wilderness designation.[157]

C. Statutory Mandates

The divergent histories of the Forest Service and the BLM may be a product not only of agency history, culture, and structure, but also of differences in the ways that statutes bearing on wilderness designation and management apply to the two agencies. Some differences are obvious, as discussed above.[158] Others emerge from analysis of both the Wilderness Act and the organic statutes for the two agencies, NFMA and FLPMA.

1. The Organic Statutes and the Wilderness Act

As indicated above, the Wilderness Act created nine million acres of instant wilderness in national forests but none on public lands.[159] Indeed, alone among the four principal federal land management agencies, the Act does not refer to the BLM or the public lands it administers at all.[160] All congressional direction for the designation of wilderness areas on public lands is therefore provided by FLPMA.[161] Similarly, the Wilderness Act established management standards for both WSAs and designated wilderness in national forests, while such prescriptions for public lands are rooted in FLPMA.[162]

The Wilderness Act directed the Forest Service within ten years of the Act's adoption to review for wilderness suitability all areas previously classified as primitive by the Forest Service.[163] FLPMA directed the BLM within fifteen years of FLPMA's adoption to review roadless areas of 5,000 acres or more identified by the BLM during an inventory of public lands

155 *See* Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 ECOLOGY L.Q. 140, 180 (1999).

156 *See* Nolen, *supra* note 68, at 837 (noting, 20 years after FLPMA's adoption, that "[t]here are some indications that BLM is moving away from this traditional deference to consumptive users, but much remains to be done."). Echoes of the agency's pro-industry mentality still surface. *See, e.g.*, Letter from Danielle Brian, Exec. Dir., Project on Gov't Oversight, to Ken Salazar, Sec'y, U.S. Dep't of the Interior, and Bob Abbey, Dir., U.S. Bureau of Land Mgmt (March 2, 2011), *available at* http://pogoarchives.org/m/nr/doi/blm-wyoming-20110302.pdf (describing an allegedly "cozy relationship" between a BLM field office and a company it was charged with overseeing).

157 *See supra* notes 113–119 and accompanying text.

158 *See supra* notes 6–15 and accompanying text.

159 *See* 16 U.S.C. § 1132(a) (2006); *supra* notes 90–95 and accompanying text.

160 16 U.S.C. §§ 1131–1136 (2006) (foregoing any mention of the BLM or public lands within the substantive portions of the statute).

161 *See* 43 U.S.C. § 1782(a)–(c) (2006).

162 *See* 16 U.S.C. § 1133(b) (2006); 43 U.S.C. § 1732(a)–(c) (2006).

163 16 U.S.C. § 1132(b) (2006).

required by FLPMA and make recommendations to the President as to their suitability for preservation as wilderness.[164] For both land systems, only Congress can designate official wilderness.[165] Aside from the time required to conduct wilderness review processes and the acreage covered by those processes (areas classified as primitive in national forests and roadless areas of at least 5,000 acres on public lands), the designation provisions do not differ significantly.[166]

The Wilderness Act specifies the standard for management of the areas being reviewed by the Forest Service for wilderness suitability, at least indirectly.[167] It requires that areas classified as primitive before adoption of the Wilderness Act "shall continue to be administered under rules and regulations affecting such areas" before the Act's adoption, until Congress determines otherwise.[168] Thus, any use restrictions that the Forest Service imposed on primitive areas before 1964 had to remain in place.[169] Regulation L-20, which the Forest Service adopted in 1929, limited resource extraction, permanent improvements, and road construction in primitive areas, except as authorized by the Chief of the Forest Service or the Agriculture Secretary.[170] According to one assessment, "[b]y today's standards, L-20 was not particularly protective" and allowed a considerable number of uses that were incompatible with wilderness.[171] The 1939 U Regulations imposed more stringent controls on wilderness and wild areas, which were primitive areas of more than 100,000 acres and between 5,000 and 100,000 acres, respectively.[172] Among the uses generally prohibited in these areas were road building, motorized transportation, timber cutting, and commercial and private development.[173] The regulations authorized exceptions for well-

164 43 U.S.C. § 1782(a) (2006). Section 201 of FLPMA requires the BLM to "prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern." *Id.* § 1711(a). The inventory by itself did not change standards for the management or use of the inventoried lands. *Id.* Areas of critical environmental concern are those in which "special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems." *Id.* § 1702(a).

165 16 U.S.C. § 1132(b) (2006); 43 U.S.C. § 1782(b) (2006). The Wilderness Act imposed on the Forest Service procedural obligations such as provision of public notice and the holding of public hearings that do not appear in FLPMA's wilderness designation provisions. *Compare* 16 U.S.C. § 1132(d)(1) (2006), *with* 43 U.S.C. § 1782(b) (2006).

166 *Compare* 16 U.S.C. § 1132, *with* 43 U.S.C. § 1782 (2006); *see also* Andrew Hartsig, *Settling for Less: Utah v. Norton*, 2004 UTAH L. REV. 767, 770–71.

167 *See* 16 U.S.C. § 1132(b) (2006).

168 *Id.*

169 *Id.*

170 Blumm & Erickson, *supra* note 98, at 9; Appel, *supra* note 24, at 72.

171 Martin Nie, *Administrative Rulemaking and Public Lands Conflict: The Forest Service's Roadless Rule*, 44 NAT. RESOURCES J. 687, 697 (2004).

172 *See* Blumm & Erickson, *supra* note 98, at 9–10 (manuscript at 8).

173 *See* Nie, *supra* note 171, at 697.

established uses, administrative needs, and emergencies.[174] In addition, some stock grazing and water storage project uses were grandfathered.[175]

FLPMA provides that during the period of roadless area review, the BLM must "continue to manage such lands according to [its] authority under this Act and other applicable law. . . ."[176] That provision seems to have allowed the BLM to alter the nature of management standards applicable to roadless areas under review, provided the standards were consistent with FLPMA provisions such as the duty to manage public lands under principles of multiple use and sustained yield.[177] Those principles, in turn, vest broad discretion in the BLM, as they "breathe discretion at every pore."[178] FLPMA adds, however, that management of lands under wilderness review must proceed "in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject to the continuation of existing mining and grazing uses and mineral leasing in the same manner and degree" as was in effect upon FLPMA's adoption.[179] Even those existing uses, however, were subject to the BLM's duty "to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection."[180]

It is difficult to compare the degree of protectiveness provided by the two regimes.[181] Professor Coggins has opined that FLPMA's standards for managing WSAs essentially codify the Wilderness Act's standards for managing such areas in national forests, as interpreted by the courts.[182] To the extent that the standard applicable to national forests bars certain uses entirely, while the standard for BLM study areas allows them, subject to regulatory constraints, the Forest Service standard would appear to reflect a more precautionary approach. If the BLM's regulatory framework fails to prevent impairing activities, for example, it might not be possible to remedy the harm in a way that restores the affected area's suitability for wilderness.[183]

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174 Appel, *supra* note 24, at 73–74.

175 *Id.* at 74.

176 43 U.S.C. § 1782(c) (2006).

177 *Id.* § 1732(a) (2006).

178 Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975). The *Strickland* court made that statement with reference to the Classification and Multiple Use Act, 43 U.S.C. § 1411. Courts have applied the same characterization to the analogous provisions of FLPMA. *See, e.g.*, Natural Res. Def. Council, Inc. v. Hodel, 624 F. Supp. 1045, 1058 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987).

179 43 U.S.C. § 1782(c) (2006).

180 *Id. See* Rocky Mountain Oil & Gas Ass'n v. Watt, 696 F.2d 734 (10th Cir. 1982) (holding that grandfathered uses were subject to the undue degradation standard).

181 *Cf.* Lawrence J. Cwik, *Oil and Gas Leasing on Wilderness Lands: The Federal Land Policy and Management Act, the Wilderness Act, and the United States Department of the Interior, 1981–1983*, 14 ENVTL. L. 585, 593–94 (1984) ("It is notable that the third subsection, section 603(c) [of FLPMA, 43 U.S.C. § 1782(c) (2006)], provides a standard for the BLM in managing wilderness study areas, since the Wilderness Act lacks a similar standard to guide the USFS in its management of wilderness study areas.").

182 3 COGGINS & GLICKSMAN, *supra* note 1, at § 25:16 (citing Parker v. United States, 448 F.2d 793 (10th Cir. 1971); Utah v. Andrus, 486 F. Supp. 995 (D. Utah 1979).

183 *See, e.g.*, Mont. Wilderness Ass'n v. Connell, 725 F. 3d 988, 997 (9th Cir. 2013) (recognizing that although the BLM did not violate FLPMA's nonimpairment mandate in

The standards for managing designated wilderness areas in national forests and on public lands do not differ. FLPMA provides that the Wilderness Act provisions applicable to national forest designated wilderness areas will also apply to administration and use of BLM wilderness areas and will govern activities that include "mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants."[184] The two agencies may implement those standards differently, and Congress may tighten or loosen management constraints in the legislation creating individual wilderness areas within the two land systems,[185] but the Wilderness Act's prescriptions apply equally to both.[186]

2. The Organic Statutes and Other Statutes

The differences between the manner in which the Wilderness Act and the organic statutes of the two multiple use agencies interact have only marginal potential to explain the Forest Service's more protective history. Those differences relate to the land base considered for wilderness designation and the potentially more precautionary approach to management of WSAs within national forests. Another, potentially more significant difference involves the manner in which the two agencies' organic statutes interact with other substantive legislation governing management and use of federal lands.

Although the management directives for the multiple use agencies derive principally from their organic statutes, agency management choices are also constrained by other legislation that imposes procedural or substantive mandates on all federal agencies, or all federal land management agencies. The National Environmental Policy Act (NEPA), for example, requires environmental evaluation of proposed major federal actions by all federal agencies, including the land management agencies.[187] The National

allowing increased use of existing ways in wilderness study areas, there was still a possibility that "a variety of factors—mapping, increased visitorship, more concentrated use brought about by the closure of more than half of the ways in WSAs—could increase use and degrade wilderness values").

184 43 U.S.C. § 1782(c) (2006).

185 *See* Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 849 (1993) ("If Congress designates an area as wilderness, the statute specifically creating the wilderness area may specify management criteria.").

186 *See* Harold Shepard, Comment, *Livestock Grazing in BLM Wilderness and Wilderness Study Areas*, 5 J. ENVTL. L. & LITIG. 61, 63 (1990) ("[O]nce a WSA is designated as wilderness under FLPMA, the Wilderness Act's administration and use provisions apply. Therefore, unless Congress expresses intent to treat each BLM wilderness area designation differently, the area will be managed in the same manner as a National Forest Wilderness area."). There have been examples of efforts to coordinate wilderness area management by the two agencies. *See, e.g.*, ASSOCIATION OF FISH AND WILDLIFE AGENCIES, POLICIES AND GUIDELINES FOR FISH AND WILDLIFE MANAGEMENT IN NATIONAL FOREST AND BUREAU OF LAND MANAGEMENT WILDERNESS (2007), *available at* http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2007/im_2007-052__.html.

187 42 U.S.C. § 4332(2)(C) (2006).

Historic Preservation Act (NHPA) requires agencies to consider the effects of federally assisted undertakings on sites or objects of special historic interest.[188] The Endangered Species Act (ESA) requires all federal agencies to carry out programs for the conservation of endangered or threatened species[189] and ensure that their actions do not jeopardize listed species or result in the destruction or adverse modification of those species' critical habitat.[190] There is typically little reason to expect that these provisions will alter the nature or extent of wilderness management on the multiple use lands in different ways for the Forest Service and the BLM.

One statute whose operation may have reduced opportunities for wilderness protection on the multiple use lands to a greater extent for the BLM than the Forest Service is Revised Statute 2477 of 1866 (R.S. 2477).[191] R.S. 2477, enacted as part of the Mining Act of 1866,[192] provided that "[t]he right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."[193] It was designed to facilitate access to mining sites and other developmental uses on federal lands.[194] When Congress adopted FLPMA, it repealed R.S. 2477.[195] FLPMA provides, however, that the statute did not have the effect of terminating any previously issued, permitted, or granted right-of-way.[196] Thus, any R.S. 2477 rights-of-way that were perfected before the adoption of FLPMA remain valid.

Michael Blumm has described R.S. 2477 as "a relic of the bygone frontier era of the nineteenth century" whose effects "remain a central obstacle for BLM wilderness."[197] The reason that R.S. 2477 has proved to be a greater hindrance to the BLM's wilderness protection than to the Forest Service's relates to the provision restricting R.S. 2477 rights-of-way to "the construction of highways over public lands, not reserved for public uses." The majority of national forest lands, particularly in the West, where both lands with wilderness characteristics and R.S. 2477 claims tend to be found,[198] were reserved by the early 1900s.[199] The federal government had

188 16 U.S.C. § 470f (2006 & Supp. I 2007).

189 16 U.S.C. § 1536(a)(1) (2006 & Supp. IV 2011).

190 *Id.* § 1536(a)(2).

191 Lode Mining Act of 1866, ch. 262, § 8, 14 Stat. 251, 253 (subsequently codified at 43 C.F.R. § 932) (repealed 1976).

192 *See* Blumm & Erickson, *supra* note 98, at 46.

193 Lode Mining Act, *supra* note 191, § 8 (1866).

194 *See* Blumm & Erickson, *supra* note 98, at 46.

195 Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2793 (1976).

196 43 U.S.C. § 1769(a) (2006).

197 Blumm & Erickson, *supra* note 98, at 46. According to Steve Bloch, conservation director of the Southern Utah Wilderness Alliance, local governments that file R.S. 2477 claims are "really out to thwart congressional wilderness designation." Phil Taylor, *Counties Want to Take the Roads Less Traveled—and Keep Them*, GREENWIRE, Sept. 3, 2013, http://www.eenews.net/greenwire/stories/1059986620 (last visited Apr. 19, 2014).

198 *See* JAMES RASBAND, JAMES SALZMAN & MARK SQUILLACE, NATURAL RESOURCES LAW AND POLICY 1231 (2d ed. 2009) ("Because the national forests were carved from the large tracts of

reserved more than 194 million acres of forested federal lands by the time President Theodore Roosevelt left office, an amount roughly equal to the acreage in the current National Forest System.[200]

The burden of proof lies with the party seeking to enforce a R.S. 2477 claim against the federal government.[201] Under principles of federal law borrowed from state law, a claimant typically must show that a landowner (here, the federal government) objectively manifested an intent to dedicate property to the public as a right-of-way and acceptance by the public, as reflected in continued public use.[202] As a result, local governments claiming R.S. 2477 rights-of-way in national forests are likely to have to prove that the right-of-way already existed and was being used more than one hundred years ago.[203] Litigants have in fact had difficulty proving they perfected their R.S. 2477 claims before reservation of the forest at issue.[204] The further back in time a reservation took place, the harder it will be for local government claimants to produce testimony and other evidence as to the state of use of the affected lands at the time of reservation.[205]

The proof problems facing claimants for R.S. 2477 rights-of-way are likely to be less onerous for claims relating to lands administered by the BLM.[206] The Tenth Circuit ruled in a R.S. 2477 case that Congress did not

public lands that remained at the end of the nineteenth and early part of the twentieth centuries, virtually all of them were in the Western states.").

199 *See* 1 COGGINS & GLICKSMAN, *supra* note 1, § 2:12 (discussing national forests in the West reserved before 1911 that "still form the core and bulk of the present national forest system"). *See also* GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 131 (6th ed. 2007) ("[T]he Forest Reserves were the first great system of public lands that had been withdrawn from the public domain. . . ."); Carol M. Rose, Book Review, *Property in All the Wrong Places?*, 114 YALE L.J. 991, 1011 (2005) (reviewing MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003) & KAREN R. MERRILL, PUBLIC LANDS AND POLITICAL MEANING: RANCHERS, THE GOVERNMENT, AND THE PROPERTY BETWEEN THEM (2002)) ("[T]he major national forest lands were reserved in the early 1900s.").

200 *See* CHRISTINE A. KLEIN, FEDERICO (FRED) CHEEVER & BRET C. BIRDSONG, NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES 294 (3d ed. 2013).

201 S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 768–69 (10th Cir. 2005).

202 *Id.* at 781–82.

203 *Cf.* The Wilderness Society v. Kane County, Utah, 581 F.3d 1198, 1221 (10th Cir. 2009) (noting that county's claimed R.S. 2477 rights "may well have been created and vested decades ago"), *on rehearing*, 632 F.3d 1162 (10th Cir. 2011).

204 *See, e.g.*, Cnty. of Shoshone of Idaho v. U.S., 912 F. Supp. 2d 912, 915, 942 (D. Idaho 2012) (denying the county's R.S. 2477 claim because the record did not support a finding that the claimed road, or any portions of it, was declared a county road by the county government before President Roosevelt's reservation of the national forest in 1906).

205 *See* Taylor, *supra* note 197 ("But witnesses who can testify to using the roads are getting old and dying, creating a sense of urgency" for R.S. 2477 claimants.").

206 *See* James R. Rasband, *Questioning the Rule of Capture Metaphor for Nineteenth Century Public Land Law: A Look at R.S. 2477*, 35 ENVTL. L. 1005, 1021 (2005) ("[T]he debate about R.S. 2477 is less significant in the case of national forests than with BLM lands. Because R.S. 2477 granted rights-of-way across only those public lands not otherwise reserved for a particular public use, once a national forest was created no more R.S. 2477 rights-of-way could be established on that 'reserved' land. Given the early date at which most forests were reserved, fewer roads had been constructed and proving the pre-reservation existence of those few roads after so many years is quite difficult.").

reserve public domain lands pursuant to the Coal Lands Act of 1910.[207] The D.C. Circuit concluded in a case involving federal reserved water rights that lands managed by the BLM were not reserved by FLPMA (which the court referred to as the Lands Policy Act).[208] As a result, some claim that public lands have never been reserved.[209] Others contest the persuasiveness of that position, arguing that Congress's declaration of a retention policy and withdrawal of public lands under FLPMA[210] amounted to the functional equivalent of a reservation of national forest lands.[211] Even if one accepts this argument, however, Congress withdrew public lands decades after it withdrew most of the national forests.[212]

That difference in timing does two things. First, it facilitates proof burdens for R.S. 2477 claimants seeking to establish rights-of-way for roads on public lands claimed to have been created much more recently than would have to be the case for those pursuing claims in most of the national forests. Second, it allowed much more time for activities associated with roads to occur on lands administered by the BLM, some of which may have been incompatible with wilderness preservation. As James Rasband noted, "before its 1976 repeal [R.S. 2477] may have created thousands of rights-of-way across public lands, which are laced with everything from graded and maintained county roads between ranching communities to rutted jeep trails leading to abandoned uranium mines and old, leaky water tanks."[213] The pursuit of R.S. 2477 claims has put thousands of miles of public lands at risk of degradation that disqualifies the land for wilderness preservation.[214]

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207 S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 425 F.3d 735, 784–88 (10th Cir. 2005).

208 Sierra Club v. Watt, 659 F.2d 203, 205–06 (D.C. Cir. 1981).

209 *See, e.g.*, Rasband, *supra* note 206, at 1021 (concluding that "BLM lands . . . have never been reserved for a specific purpose."); Barbara G. Hjelle, *Ten Essential Points Concerning R.S. 2477 Rights-of-Way*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 301, 309 (1994) ("While the BLM asserted that some lands may have been 'reserved or dedicated by an Act of Congress, Executive Order, Secretarial Order, or, in some cases, classification actions authorized by statute,' it also acknowledged that certain general withdrawals did not create reservations for public use under R.S. 2477."); Joris Naiman, *ANILCA Section 810: An Undervalued Protection for Alaskan Villagers' Subsistence*, 7 FORDHAM ENVTL. L. REV. 211, 234–35, n.85 (1996) ("Public lands administered by the Bureau of Land Management ('BLM') and open to mineral entry are unreserved."). *Cf.* Robert L. Glicksman & George Cameron Coggins, *Hardrock Minerals, Energy Minerals, and Other Resources on the Public Lands: The Evolution of Federal Natural Resources Law*, 33 TULSA L.J. 765, 796 (1998) ("The national forests are deemed reserved and thus entitled to the benefits of implied reserved water rights; not so the BLM public lands.").

210 Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701(a)(1), (4) (2006).

211 *See* 2 COGGINS & GLICKSMAN, *supra* note 1, § 14:8.

212 43 U.S.C. § 1701(a)(1), (4) (2006); 1 COGGINS & GLICKSMAN, *supra* note 1, § 2:12.

213 Rasband, *supra* note 206, at 1022.

214 *See* Tova Wolking, Note, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements over Federal Public Lands*, 34 ECOLOGY L.Q. 1067, 1072, 1106 (2007); John W. Ragsdale, Jr., *Individual Aboriginal Rights*, 9 MICH. J. RACE & L. 323, 372 (2004) ("[A] R.S. 2477 right-of-way, if improved, can preclude a wilderness designation for a federal tract"); Taylor, *supra* note 197, (repeating warning that if even a fraction of pending R.S. 2477 claims are deemed legitimate, "it could set off a cascade of threats to . . . wilderness study areas . . . and other protected lands across the West.").

D. Agency Management Policies and Procedures

Even if the statutory provisions governing wilderness designation and management were identical for the two multiple use agencies, the manner in which the two agencies have exercised that authority may be capable of yielding differential levels of protection by the two agencies. The organic statutes for both the Forest Service and the BLM require management using principles of multiple use and sustained yield.[215] In exercising the discretion afforded by that mandate, subject to constraints found in the Wilderness Act and in specific organic statute provisions that bear on wilderness designation or protection, the two agencies have shifted between more and less protective regimes. Differences in approach between the two agencies are likely a product of the factors discussed earlier in this article, including agency history, culture, and organization.[216] The nature of planning requirements imposed on the agencies by NFMA and FLPMA, however, may have contributed to more effective wilderness preservation in national forests.

1. Agency Rules and Policies

The Forest Service's record of protecting wilderness and potential wilderness areas is mixed, but relatively strong. Its process of inventorying national forest lands for potential wilderness covered more territory than the Wilderness Act required it to do.[217] But it violated NEPA in performing both its RARE I[218] and RARE II[219] inventories before Congress took things out of the agency's hands by determining which areas of national forests merited wilderness protection in a series of statewide wilderness bills beginning in 1984.[220]

In rules issued in 2001 at the end of the Clinton Administration,[221] the agency sought to protect roadless areas in national forests outside the parameters of the NWPS in what Charles Wilkinson called "an epic initiative."[222] During the Bush Administration, the Forest Service sought to

215 National Forest Management Act of 1976, 16 U.S.C. § 1604(e)(2) (2006); Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732(a) (2006).

216 *See* discussion *supra* Part II.B.

217 *See supra* note 108 and accompanying text.

218 Wyo. v. U.S. Dep't of Agric., 661 F.3d 1209, 1221 (10th Cir. 2011) (citing Wyo. Outdoor Coordinating Council v. Butz, 484 F.2d 1244, 1250 (10th Cir. 1973)).

219 California v. Block, 690 F.2d 753 (9th Cir. 1982).

220 3 COGGINS & GLICKSMAN, *supra* note 1, § 25:9.

221 Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

222 Charles Wilkinson, *Land Use, Science, and Spirituality: The Search for a True and Lasting Relationship with the Land*, 21 PUB. LAND & RESOURCES L. REV. 1, 9 (2000). Forest Service Chief Mike Dombeck similarly described the roadless rule as "one of the most significant conservation efforts in United States history." Glicksman, *supra* note 35, at 1146.

replace the Clinton roadless rule with a less protective version,[223] but the Ninth Circuit held that the agency violated both NEPA and the ESA in promulgating the rule.[224] The Tenth Circuit subsequently upheld the Clinton rule.[225] The court ruled in particular that the roadless rule did not usurp Congress' exclusive prerogative to designate official wilderness by creating de facto administrative wilderness areas,[226] and that NFMA did not repeal or limit the Forest Service's authority under its organic legislation to adopt a broad nationwide conservation rule.[227]

The Forest Service supplemented the roadless rule with its transportation management rules, which it adopted contemporaneously with the Clinton roadless rule.[228] That rule sought to restore forest health by managing the Forest System's road system.[229] It directed Forest Managers to identify the minimum road system needed for each forest[230] and, for roads that were no longer needed, decommission or convert them to trails.[231] Both of these decisions must be based on "a science-based roads analysis at the appropriate scale."[232] Under this rule, if an area would have wilderness characteristics but for an unnecessary road, the Forest Service can decommission the road for a future wilderness recommendation.[233]

The BLM's track record seems more uneven. Two years after the adoption of FLPMA, the BLM issued a Wilderness Inventory Handbook to guide field staff in inventorying and identifying wilderness characteristics on BLM lands.[234] The agency revised the Handbook in 2001, directing agency officials to continue identifying lands with wilderness characteristics as part of its duty to maintain an up-to-date inventory for land use planning purposes under section 202 of FLPMA.[235] The Interim Management Policy adopted in 1979 interpreted section 603's non impairment standard for wilderness study areas to apply only to those areas lacking grandfathered uses.[236] Areas with grandfathered uses would be subject to the less stringent standard barring unnecessary or undue degradation.[237]

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223 Special Areas; State Petitions for Inventoried Roadless Area Management, 70 Fed. Reg. 25,654 (May 13, 2005) (codified at 36 C.F.R. pt. 294). For a comparison of the Clinton and Bush rules, see generally Glicksman, *supra* note 35.

224 California *ex rel.* Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1005 (9th Cir. 2009).

225 Wyo. v. U.S. Dep't of Agric., 661 F.3d 1209, 1220 (10th Cir. 2011).

226 *Id.* at 1229, 1234.

227 *Id.* at 1270.

228 66 Fed. Reg. 3206 (Jan. 12, 2001) (codified at 36 C.F.R. pts. 212, 261, and 295).

229 *Id.* at 3206–07.

230 *Id.* at 3217 (codified at 36 C.F.R. § 215.5(b)(1)).

231 *Id.* (codified at 36 C.F.R. § 215.5(b)(2)).

232 *Id.*; Ctr. for Sierra Nevada Conservation v. U.S. Forest Serv., 832 F. Supp. 2d 1138, 1144 (E.D. Cal. 2011).

233 66 Fed. Reg. at 3217–18 (Jan. 21, 2001).

234 Federal Land Policy and Management Act, 43 U.S.C. § 1711 (2006); *see also* Blumm & Erickson, *supra* note 98, at 35–36, 37 (citing BUREAU OF LAND MGMT., WILDERNESS INVENTORY HANDBOOK (1978)).

235 *See* Blumm & Erickson, *supra* note 98, at 41–42.

236 *Id.* at 44.

237 43 U.S.C. § 1782(c) (2006); *see also* Blumm & Erickson, *supra* note 98, at 44.

The BLM's efforts to protect lands with wilderness characteristics during the Clinton Administration, exemplified by a reinventory of 5.7 million acres of public lands in Utah, sparked litigation by opponents of additional wilderness designations in the state.[238] The BLM's implementation of its wilderness protection responsibilities took a sharp turn toward the less protective side of the spectrum when the George W. Bush Administration entered into a settlement with Utah's governor that was "a major victory for wilderness opponents."[239] Among other things, the federal government agreed that it had no authority to apply the section 603(c) non-impairment standard in managing additional WSAs outside those established under the section 603 inventory process.[240] It also agreed not to designate any new WSAs under section 202 or manage any additional lands after 1993 under the non impairment standard.[241] Much of that settlement was vitiated by the Ninth Circuit as inconsistent with FLPMA.[242]

The BLM's wilderness protection regime twisted back toward the more protective end of the spectrum when in response to the Ninth Circuit's decision, Kenneth Salazar, the Obama Administration's Interior Secretary, issued an order declaring a new Wild Lands Policy.[243] The order, issued in response to the absence of comprehensive long-term national guidance on how to identify and manage lands with wilderness characteristics, directed the BLM to inventory lands with wilderness characteristics not already classified as WSAs or designated as wilderness.[244] It declared protecting the wilderness characteristics of public lands "an integral component" of the BLM's multiple use mission.[245] These "wild lands" would be subject to a management standard prohibiting impairment unless the agency documented reasons for impairment and imposed reasonable mitigation measures to minimize harm to wilderness characteristics.[246] This effort was short-lived, however, because Congress enacted an appropriations rider barring the Interior Department from implementing the Policy.[247] Secretary

238 *See* Blumm & Erickson, *supra* note 98, at 41–43.

239 *Id.* at 43. Two percent of Utah's land, or 1.16 million acres, is comprised of wilderness acreage. The figures for Alaska, California, and Washington are 16, 15, and 10%, respectively. Wilderness Statistics Reports, *Wilderness Acreage Compared to State Land Area*, http://www.wilderness.net/NWPS/chartResults?charttype=AcreageByStateCompare (last visited Apr. 19, 2014).

240 *See* Blumm & Erickson, *supra* note 98, at 43.

241 *See id.* at 43–44.

242 Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1124 (9th Cir. 2010).

243 *See* U.S. Dept of the Interior, Order No. 3310, PROTECTING WILDERNESS CHARACTERISTICS ON LANDS MANAGED BY THE BUREAU OF LAND MANAGEMENT (2010), *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf.

244 *See* Blumm & Erickson, *supra* note 98, at 53.

245 *See* Order No. 3310, *supra* note 243, § 1.

246 *Id.* § 5(d)(3); Blumm & Erickson, *supra* note 98, at 54.

247 The Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. 112-10, § 1769, 125 Stat. 155 (Apr. 15, 2011).

Salazar withdrew the Policy,[248] amending the BLM's field guidelines manual instead to mandate new inventories to identify additional lands with wilderness characteristics and require planners to consider wilderness characteristics in resource management plans and site-specific projects.[249] The manual avoided creating a new land use designation, did not use the word "impair," and referred to the agency's discretion to manage wilderness values as one potentially appropriate multiple use.[250]

This summary of Forest Service and BLM policies and actions to identify potential wilderness areas and manage existing wilderness areas is not meant to provide a comprehensive assessment of wilderness-related overarching policies since the adoption of NFMA and FLPMA. Rather, it is designed to reveal the shifting priorities of both agencies, with more or less emphasis being afforded to wilderness protection. The Forest Service may have reversed course somewhat less frequently than the BLM, but the roadless rule saga provides a cogent example of the Forest Service's differential receptivity to wilderness protection over time. The actions discussed are probably more revealing of differences among presidential administrations than of stark differences in approaches to wilderness protection between the multiple use agencies.

2. Agency Planning Processes

One aspect of the multiple use agencies' implementation of NFMA and FLPMA may have greater traction in explaining the more protective orientation of the Forest Service than the individual policy adoptions, reversals, and repeals discussed in the preceding section. Both multiple use agencies are required by their organic statutes to engage in land use planning and to conform their decisions to adopted plans.[251] The Forest Service planning process may have contributed more to effective wilderness protection in national forests than on public lands because of its more structured nature and greater detail, including specific references to wilderness protection. As Michael Blumm has argued, "prohibiting certain activities through national rulemaking can offer wild lands significant protections, effectuating the same long-term preservation goals as the non-impairment standard or the provisions of the Wilderness Act."[252] The Forest Service, but not the BLM, has implemented its planning responsibilities largely through the adoption of comprehensive planning regulations.

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248 *DOI Secretary Memorandum to BLM Director*, June 1, 2011, http://www.doi.gov/news/pressreleases/upload/Salazar-Wilderness-Memo-Final.pdf (last visited Apr. 19, 2014).

249 *See* Blumm & Erickson, *supra* note 98, at 55.

250 *See* Olivia Brumfield, *The Birth, Death, and Afterlife of the Wild Lands Policy: the Evolution of the Bureau of Land Management's Authority to Protect Wilderness Values* 40–41, *available at* http://works.bepress.com/michael_blumm/19/ (the BLM's interpretation of FLPMA "reflected the fundamental principle at the heart of BLM's pre-settlement and Wild Lands era interpretation of FLPMA: that wilderness is one of the resources that BLM must both inventory and balance as part of its multiple-use mandate.").

251 16 U.S.C. § 1604 (2006); 43 U.S.C. §§ 1712, 1732(a) (2006).

252 Blumm & Erickson, *supra* note 98, at 59.

Of the four federal land management agencies, the Forest Service has the most experience with land use planning, having engaged in planning of various kinds almost since its inception.[253] Because it regarded planning as a prerequisite to good management, it developed and implemented plans for decades with no requirement that it do so other than the 1897 Organic Act's decree that it regulate the "occupancy and use" of national forests to protect against their destruction.[254] The agency developed guides for local and regional planning after the adoption of the MUSYA, leading to the adoption of multiple use management plans that helped facilitate coordinated resource use.[255] The Forest and Rangeland Renewable Resources Planning Act of 1974[256] required the Forest Service to adopt long-range, system-wide plans.[257] Two years later, NFMA added requirements for unit-level planning,[258] making the Forest Service planning statutes "the most extensive of any federal land agency."[259]

NFMA requires the Forest Service to assure that land and resource management plans for units of the National Forest System provide for multiple use and sustained yield in accordance with the MUSYA, "and, in particular, include coordination of . . . wilderness" with the other multiple uses.[260] The agency must issue regulations that include guidelines and standards for planners.[261]

Among other things, the guidelines must ensure consideration of the economic and environmental aspects of renewable resource management, including the protection of wilderness, among other multiple uses.[262] Permits, contracts, and other actions allowing use of the forest must be consistent with the applicable plan.[263]

The planning regulations in effect for most of NFMA's history were adopted in 1982.[264] The agency announced in the preamble to the regulations that they required integrated planning, including planning for wilderness and other multiple uses, together with resource protection activities.[265] The regulations addressed both wilderness designation and management.[266] In response to comments, the agency removed a restriction in the proposed rules that would have required that only roadless areas of 5,000 acres or more be considered for wilderness designation.[267] The regulations provided

253 2 COGGINS & GLICKSMAN, *supra* note 1, §§ 16:29, 16:30.

254 *See* Wilkinson & Anderson, *supra* note 20, at 15.

255 2 COGGINS & GLICKSMAN, *supra* note 1, § 16:30.

256 Pub. L. No. 93-378, 88 Stat. 476 (codified at 16 U.S.C. § 1602).

257 2 COGGINS & GLICKSMAN, *supra* note 1, § 16:30.

258 16 U.S.C. § 1604 (2006).

259 Wilkinson & Anderson, *supra* note 20, at 11.

260 16 U.S.C. § 1604(e)(1) (2006).

261 *See id.* § 1604(g).

262 *Id.* § 1604(g)(3)(A).

263 *Id.* § 1604(i).

264 National Forest System Land and Resource Management Planning, 47 Fed. Reg. 43,037 (Sept. 30, 1982).

265 *Id.* at 43,026.

266 *See, e.g.*, *id.* at 43,047–48.

267 *Id.* at 43,034

that lands recommended for wilderness designation under the RARE process but not designated either for wilderness or further planning, as well as lands whose designation as primitive areas had been terminated, would be managed for uses other than wilderness.[268] When revising a forest plan, the regulations required planners to evaluate roadless areas within and adjacent to the forest as potential wilderness areas.[269] The evaluation criteria included the values of an area as wilderness; the values foregone and effects on management of adjacent lands resulting from wilderness designation; feasibility of management as wilderness; proximity to other designated wilderness and contribution to the NWPS; and anticipated long-term changes in plant and animal species diversity and the effects of such changes on the values for which wilderness areas were created.[270] In terms of management of existing wilderness areas, the regulations prohibited timber harvesting.[271] Planners had to provide for limiting and distributing visitor use so as not to impair the values for which wilderness areas were created, and evaluate and provide for appropriate wildfire, insect, and disease control measures desirable for protecting wilderness or adjacent areas.[272] The planning regulations also required compliance with separate regulations governing establishment and management of wilderness areas adopted pursuant to authority provided by the 1897 Organic Act[273] and the Wilderness Act.[274]

The Forest Service amended its planning regulations in 2000,[275] but it repealed and replaced those regulations in 2005.[276] A federal district court invalidated the 2005 regulations on the basis of noncompliance with both NEPA and the ESA.[277] A second set of Bush Administration planning rules

268 *Id.* at 43,047–48 (codified at 36 C.F.R. § 219.17(a)).

269 *Id.* at 43,038 (codified at 36 C.F.R. § 219.17(b)). The areas that had to be evaluated for recommendation as wilderness included all previously inventoried wilderness resources not yet designated that remained essentially roadless; areas contiguous to existing wilderness, primitive areas or administratively proposed wildernesses; areas contiguous to roadless and undeveloped areas in other federal ownership that had identified wilderness potential; and areas designated by Congress for wilderness study, administrative proposals pending before Congress, and other pending legislative proposals which had been endorsed by the President. *Id.* (codified at 36 C.F.R. § 219.17(b)(1)).

270 *Id.* (codified at 36 C.F.R. § 219.17(b)(2)).

271 *Id.* at 43,046–47 (codified at 36 C.F.R. § 219.14(c)(1)).

272 *Id.* at 43,048 (codified at 36 C.F.R. § 219.18).

273 16 U.S.C. § 551 (2006).

274 47 Fed. Reg. 43,048 (codified at 36 C.F.R. §§ 219.18, 293.1–17).

275 National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514 (Nov. 9, 2000).

276 National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule, 70 Fed. Reg. 1022 (Jan. 5, 2005).

277 Citizens for Better Forestry v. U.S. Dep't of Agric., 481 F. Supp. 2d 1059, 1100 (N.D. Cal. 2007).

issued in 2008[278] met the same fate.[279] The Obama Administration issued new planning rules in 2012.[280]

The 2012 planning regulations have not been in effect long enough to have significantly affected Forest Service planning. Charles Wilkinson has nevertheless interpreted them as supporting the conclusion that "[i]n total, the Forest Service is no longer a multiple-use agency in the traditional sense. Best understood, the cardinal elements of its mission are now sustainability, protection of biodiversity, and restoration."[281] The direction in which the agency intends to move under the 2012 regulations is foreshadowed by revisions to the Forest Service Handbook proposed in 2013.[282] Under those revisions, plans for units that include designated wilderness areas must provide for wilderness management in accordance with the requirements of the Wilderness Act and the law that established the particular wilderness area.[283] In developing plan components for designated or recommended wilderness areas, the handbook would require the responsible official to consider measures to protect and enhance the wilderness characteristics of the areas, and management on adjoining lands in other federal or state ownership, especially when adjoining other congressionally designated wilderness areas.[284] If areas are recommended for wilderness, the proposal would require the plan to "protect ecological and social characteristics so that the wilderness character of the recommended area is not reduced before congressional action regarding the recommendation."[285] The proposal would authorize standards or guidelines for placing limits or conditions on projects or activities with the potential to adversely affect the wilderness character of existing wilderness, wilderness study, or recommended wilderness areas, and would declare existing wilderness, recommended wilderness areas, or wilderness study areas not suitable for timber production.[286]

Planning by the BLM under FLPMA has been less rigorous, both generally and with respect to wilderness protection. FLPMA requires that the BLM develop land use plans and manage those lands under principles of multiple use and sustained yield in accordance with those plans.[287] The statute provides nine criteria for the development of resource management

278 National Forest System Land Management Planning, 73 Fed. Reg. 21,468 (Apr. 21, 2008).

279 Citizens for Better Forestry v. U.S. Dep't of Agric., 632 F. Supp. 2d 968, 981–82 (N.D. Cal. 2009).

280 National Forest System Land Management Planning, 77 Fed. Reg. 21,162 (Apr. 9, 2012) (to be codified at 36 C.F.R. pt. 219).

281 Charles Wilkinson & Daniel Cordalis, *Heeding the Clarion Call For Sustainable, Spiritual Western Landscapes: Will the People Be Granted a New Forest Service?*, 33 PUB. LAND & RESOURCES L. REV. 1, 46 (2012).

282 U.S. DEP'T OF AGRIC., LAND MANAGEMENT PLANNING HANDBOOK, PROPOSED FS1909.12, CHAPTER 20, VERSION—02/14/2013, *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5409939.pdf.

283 *Id.* at 96.

284 *Id.*

285 *Id.*

286 *Id.* at 11, 97.

287 43 U.S.C. §§ 1712(a)–(c), 1732(a) (2006).

plans that are "remarkable mostly for their lack of specificity,"[288] and none of the criteria refers to wilderness preservation.[289] The BLM must "use and observe the principles of multiple use and sustained yield" in developing plans,[290] but, unlike NFMA,[291] the recitation of uses found in FLPMA's definition of multiple use does not include wilderness.[292] At a minimum, the FLPMA planning provisions place less prominence on wilderness preservation than the analogous NFMA provisions. Indeed, FLPMA actually seems to disfavor large-scale protective uses such as wilderness preservation. The statute requires the BLM to report any management decision that excludes one or more of the principal or major uses for two or more years on a tract of 100,000 acres or more to both Houses of Congress, which then have an opportunity to adopt a concurrent resolution of disapproval terminating the management decision.[293]

The FLPMA provisions governing land use planning are notorious for the lack of guidance and structure they provide to the BLM.[294] The statute affords the agency "nearly unbridled discretion," leaving local planners susceptible to interests such as grazing and mining whose goals tend to conflict with wilderness preservation.[295] At best, as one court put it, FLPMA plans serve as "a course filter."[296] Although the statute does not require that it do so,[297] the BLM has issued regulations governing the planning process.[298] Like the statute, the regulations do not provide the kind of specific guidance reflected in NFMA planning regulations.[299] Most importantly for present purposes, the current BLM planning regulations are devoid of even a single reference to wilderness or its role in the multiple use, sustained yield

288 2 COGGINS & GLICKSMAN, *supra* note 1, at § 16:22.

289 43 U.S.C. § 1712(c)(1)–(9) (2006).

290 *Id.* § 1712(c)(1).

291 16 U.S.C. § 1604(e)(1) (2006).

292 The definition provides that the resources encompassed by the term multiple use "includ[e], but [are] not limited to" a list that does not refer to wilderness. 43 U.S.C. § 1702(c). Accordingly, the statute does not prohibit consideration of wilderness as a multiple use. *See also* 43 C.F.R. § 1601.0–5(f) (definition of multiple use in BLM planning regulations also does not refer to wilderness).

293 43 U.S.C. § 1712(e)(2) (2006); *See also* 43 C.F.R. § 1610.6 (1983). That legislative veto provision is almost certainly unconstitutional under *Immigration and Naturalization Services v. Chadha*, 462 U.S. 919 (1983). *See* Robert L. Glicksman, *Severability and the Realignment of the Balance of Power over the Public Lands: The Federal Land Policy and Management Act of 1976 After the Legislative Veto Decisions*, 36 HASTINGS L.J. 1, 39–40 (1984) (applying *Chadha* factors to congressional disapproval of large-tract management decisions); *Cf.* Yount v. Salazar, 933 F. Supp. 2d 1215 (D. Ariz. 2013) (declaring legislative veto in § 1712(c)(1) of FLPMA to be unconstitutional).

294 *See, e.g.*, Nolen, *supra* note 68, at 795 ("BLM's efforts to comply with FLPMA's planning mandates have been hindered by the statute's lack of specific requirements and guidelines for the planning process."). *See also* 2 COGGINS & GLICKSMAN, *supra* note 1, at § 16:19 (stating that section 1712 of FLPMA "embodies a general command to plan but is otherwise open-ended").

295 *See* Nolen, *supra* note 68, at 832.

296 Chihuahuan Grasslands Alliance v. Norton, 507 F. Supp. 2d 1216, 1221 (D.N.M. 2007), *vacated and remanded*, 545 F.3d 884 (10th Cir. 2008).

297 *See* 2 COGGINS & GLICKSMAN, *supra* note 1, at § 16:19.

298 43 C.F.R. §§ 1601.0-1 to 1610.8.

299 *See* Nolen, *supra* note 68, at 795–96.

management regime established by FLPMA. Because wilderness receives less attention under the statutory and regulatory structures that governs the BLM's planning activities than it does under the analogous NFMA and Forest Service regulatory provisions, it should be unsurprising that the BLM appears to give shorter shrift to wilderness preservation in the adoption of plans that allocate public lands among available multiple uses.[300]

E. Congressional Commitment

Notwithstanding the obligations of the multiple use agencies to inventory their lands to identify areas with wilderness characteristics for potential inclusion in the NWPS, only Congress may designate lands as official wilderness.[301] The Wilderness Act itself designated 9.1 million acres of national forest lands as "instant wilderness"[302] and no BLM lands.[303] Since that time, Congress has added twenty-seven million additional acres of national forests to the NWPS, but only 8.7 million acres of public lands.[304] That discrepancy may be a reflection of congressional perceptions of the suitability of the two land systems for wilderness preservation and the legislature's interest in protecting lands within the domains of the two multiple use agencies.

The Forest Service engaged in its RARE I and II inventory processes for identifying land with wilderness characteristics in the 1970s.[305] Dissatisfied with that process, Congress embarked on adoption of a series of bills that designated wilderness on a state-by-state basis.[306] Congress has regularly added acreage to the NWPS, enacting wilderness bills in almost every year since 1968.[307] But relatively little of that acreage has come from public lands, at least compared to the amount the BLM identified as suitable for wilderness protection. The BLM completed its initial section 603 inventory in

300 Professor Coggins and I have previously surmised that "BLM land use planning apparently has been characterized by a commitment to the status quo and a studied ignorance of congressional purposes underlying the statutory planning commands." 2 COGGINS & GLICKSMAN, *supra* note 1, § 16:28.

301 16 U.S.C. § 1132(b)–(c) (2006); 43 U.S.C. § 1782(b) (2006).

302 Zellmer, *supra* note 90, at 1043.

303 *Id.* at 1045.

304 *See supra* notes 12–13 and accompanying text.

305 *See supra* notes 36–38, 108–112 and accompanying text.

306 *See* Blumm & Erickson, *supra* note 98, at 14–15. The high points in terms of total designated acreage were 1994 (7.6 million acres); 1984, the year Congress adopted statewide wilderness bills for eighteen states (totaling 8.2 million acres); and 1980 (60.76 million acres), the year Congress adopted the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 3101–3233 (2006). *See Wilderness Statistics Reports, Number of Wilderness Acres Legislated by Year*, http://www.wilderness.net/NWPS/chartResults?chartType=legislatedAcreage (last visited Apr. 19, 2014).

307 The 112th Congress was the first since the 1960s to not designate even a single new wilderness acre. Phil Taylor, *Hastings Promises Votes on Mich., Nev. Bills Next Month*, E&E DAILY, Dec. 13, 2013, http://www.eenews.net/stories/1059991804/print (last visited Apr. 19, 2014). The 113th Congress added about 32,000 acres to the NWPS system in early 2014. *See* Sleeping Bear Dunes National Lakeshore Conservation and Recreation Act, Pub. L. No. 113-87, § 3(a), 128 Stat 1017 (2014).

1980, identifying wilderness characteristics on about twenty-three million acres.[308] The NWPS today includes only 8.7 million acres of public lands, less than three percent of the lands over which the BLM has jurisdiction, notwithstanding the fact that, at least by one account, twenty-four million additional acres are included in WSAs and "millions more acres have wilderness characteristics."[309] Congress has therefore paid relatively scant attention to public lands as a resource deserving of preservation as wilderness. A floor statement by a Senator from Wyoming may explain that posture:

> We are talking about Bureau of Land Management lands. We are not talking about Forest Service. We are not talking about wilderness. . . . These are low production lands. These are not national parks. These are very low rainfall, low moisture content areas, so they are very unproductive.[310]

That sentiment is consistent with the characterization of public lands as the "lands no one wanted," or those "left over" after the more attractive federal lands had been claimed for other uses, including preservation.[311]

But Congress has hampered designation of public lands for wilderness preservation through more than just inaction and neglect. It has used the appropriations process to thwart administrative efforts to place a greater priority on preservation of public lands.[312] I will mention two prominent examples. In 1995 and 1996, Congress first temporarily halted and then permanently barred the Interior Department from implementing proposed rules that would have placed a time limit on the filing of R.S. 2477 claims with the BLM and adopted a uniform definition of the kind of use needed to perfect a R.S. 2477 claim.[313] Those regulations would have eliminated many of the R.S. 2477 claims outstanding at the time.[314] In 2011, as indicated above, a rider to a defense appropriations act prohibited the Department from implementing Interior Secretary Salazar's Wild Lands Policy, putting the brakes on wilderness protection for millions of acres of BLM lands.[315] Through both action and inaction, therefore, Congress has blocked the addition of public lands acreage to the NWPS.

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308 Brumfield, *supra* note 250, at 1.

309 *See* Blumm & Erickson, *supra* note 98, at 37.

310 Nolen, *supra* note 68, at 773 (citing 141 CONG. REC. S9913 (daily ed. July 13, 1995) (statement of Sen. Thomas)).

311 *See* Leshy, *supra* note 45, at 6 (noting that BLM lands have been perceived as undesirable).

312 Congress took steps inconsistent with wilderness preservation in the national forests, too. It enacted logging bills, for example, that pressured the Forest Service to build new roads to access timber sales. *See* Blumm & Erickson, *supra* note 98, at 18.

313 *Id.* at 49 (citing Pub. L. No. 104-59, § 349(a)(1), 109 Stat. 568, 617–18 (1995) (creating a temporary moratorium on new rules); Pub. L. No. 104-208, § 108, 110 Stat. 3009-200 (1996) (permanently barring new rules without express Congressional authorization)). *See also* Wolking, *supra* note 214, at 1078–79 (characterizing political context of the bills).

314 *See* Blumm & Erickson, *supra* note 98, at 49.

315 *See supra* notes 247–250 and accompanying text; Blumm & Erickson, *supra* note 98, at 58.

F. Judicial Treatment

The most comprehensive study of litigation involving wilderness protection concluded that the courts tend to rule in favor of claims that land management agency decisions were not protective enough and against claims that the agencies were too protective.[316] Professor Appel did not purport to determine whether any of the land management agencies fared better in defending wilderness-related decisions than others. He warned, moreover, that further empirical research would be needed to draw any such conclusions, and that designing a study to draw agency-specific conclusions would be conceptually difficult for at least two reasons. First, the number of wilderness areas and wilderness acreage differs by agency, so that one agency's fate in court might have a disproportionately large or small impact on wilderness protection more generally.[317] Second, judicial treatment of one agency's decisions may affect how other agencies are required to implement their wilderness protection responsibilities.[318] Taking Appel's warnings to heart, and given the limited space available to me in this volume, I will not embark on the kind of careful empirical evaluation that might shed the most light on any differential impact that judicial decisions may have had on the fate of wilderness preservation on the two multiple use land systems. Rather, relying on illustrative cases, this section will elaborate on George Coggin's premise that while "[t]he statutes governing Forest Service and BLM WSA management differ considerably, . . . judicial interpretation has ironed out some of the differences."[319] In other words, judicial review has tended to have a homogenizing effect on implementation of the Wilderness Act by the Forest Service and the BLM, with no immediately apparent stark differences in the way the courts treat reviewability of agency decisions concerning wilderness, decisions involving substantive challenges to wilderness designation choices, or decisions bearing on management of designated wilderness areas.

The Supreme Court has erected or heightened a series of threshold barriers to bringing suits in environmental litigation, especially since its standing ruling in *Lujan v. National Wildlife Federation* in 1990.[320] These

316 *See* Appel, *supra* note 24, at 66–67.

317 *Id.* at 123–24.

318 *Id.*

319 3 COGGINS & GLICKSMAN, *supra* note 1, § 25:13.

320 497 U.S. 871 (1990). The lower courts have held that plaintiffs in some cases had standing to challenge BLM or Forest Service decisions with allegedly adverse consequences for wilderness preservation. *See, e.g.*, Idaho Conservation League v. Mumma, 956 F.2d 1508, 1510, 1518 (9th Cir. 1992) (holding that environmental groups had standing to challenge a Forest Service decision to recommend against wilderness designation for 43 roadless areas); Wilderness Soc'y v. Robertson, 824 F. Supp. 947, 950 (D. Mont. 1993) (holding that development of mining claim in wilderness area would adversely affect the conservation, recreational, and aesthetic use and enjoyment of the area by plaintiff's members); Colo. Envtl. Coal. v. Lujan, 803 F. Supp. 364, 368 (D. Colo. 1992) (holding that environmental groups had standing to challenge the Interior Secretary's failure to prepare a supplemental environmental impact statement on a decision to remove five WSAs from areas recommended for wilderness designation). Developmental interests seeking greater access to wilderness or potential wilderness have on

decisions have tended to limit access to the courts more for public interest plaintiffs than for commercial interests affected by agency decisions.[321] The Supreme Court's only decision directly relating to wilderness preservation provides an example of that dynamic. In *Norton v. Southern Utah Wilderness Alliance*,[322] environmental groups sued the BLM alleging, among other things, that the agency violated its obligation under FLPMA's non-impairment standard for managing WSAs[323] and the provisions of a resource management plan by failing to monitor and take action to prevent degradation of such areas as a result of off-road vehicle (ORV) use.[324] The plaintiffs relied on section 706(1) of the Administrative Procedure Act, which authorizes courts to compel agency action unlawfully withheld or unreasonably delayed.[325] The Court held that the district court lacked jurisdiction to compel the BLM to restrict ORV use because the plaintiffs' request for an order mandating action to comply with neither the non-impairment standard nor the plan qualified as a request for "a *discrete* agency action that [the BLM] is *required* to take."[326]

Although the Court has never decided a case involving the Forest Service's alleged noncompliance with substantive wilderness preservation mandates, it has blocked suits for review of land and resource management plans on ripeness grounds.[327] The Court reasoned that withholding judicial consideration until plan implementation would not have imposed significant hardship on the plaintiffs, review at the time of adoption would hinder the Forest Service's efforts to refine its policies through plan revisions and applications, and review before site-specific application to a project such as a timber sale would suffer from the absence of the focus that site-specific application would provide.[328] The Court in *Norton* echoed this reasoning, characterizing land use plans as actions that guide and constrain, but do not prescribe agency actions.[329] To the extent that land use planning is a useful mechanism for integrating wilderness preservation into multiple use management,[330] both *Norton* and *Ohio Forestry* will impair the extent to

occasion foundered on standing grounds. *See, e.g.*, Stupak-Thrall v. Glickman, 346 F.3d 579, 583 (6th Cir. 2003) (alleging wrongful inclusion of lake in wilderness area). *Cf.* Utah v. Babbitt, 137 F.3d 1193, 1197 (10th Cir. 1998) (holding that Utah and related entities interested in developing the state's school trust lands lacked standing to assert challenges to a wilderness inventory of public lands in the state); Cnty. of St. Louis v. Thomas, 967 F. Supp. 370, 377 (D. Minn. 1997) (holding that counties and canoe outfitters seeking to invalidate restrictions on motorized access to wilderness areas lacked standing to assert NEPA claim).

321 *See, e.g.*, William W. Buzbee, *Expanding the Zone, Tilting the Field: Zone of Interest and Article III Standing Analysis After* Bennett v. Spear, 49 ADMIN. L. REV. 763, 766 (1997).

322 542 U.S. 55 (2004).

323 43 U.S.C. § 1782(c) (2006).

324 *Norton*, 542 U.S. at 60–61.

325 Administrative Procedure Act, 5 U.S.C. § 706(1) (2006).

326 *Norton*, 542 U.S. at 64–66.

327 Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 739 (1998).

328 *Id.* at 733–36.

329 *Norton*, 542 U.S. at 71.

330 *See supra* § II.D.2.

which litigants may rely on the courts to force agencies to afford adequate programmatic consideration to wilderness protection.[331]

The lower courts have addressed a series of cases involving Forest Service or BLM decisions affecting wilderness designation or management of WSAs. In most of those cases, the courts have taken positions that narrowed agency authority to eliminate areas within national forests or public lands from wilderness consideration or allow activities that jeopardized wilderness values and characteristics. In one case, for example, a district court reversed a BLM order that lands in which the United States did not own subsurface mineral rights be removed from its wilderness inventory.[332] The Ninth Circuit, in a significant opinion, vacated a BLM resource management plan as a result of the agency's failure to consider wilderness values in the accompanying environmental impact statement.[333] In doing so, it rejected the BLM's contention that assessment of wilderness characteristics is relevant to the agency's management only in the context of its time-limited section 603 inventory process.[334] The court ruled ruled that the section 202 inventory process includes ongoing identification of wilderness characteristics, concluding that FLPMA's multiple use mandate provides the BLM with discretion to manage lands with wilderness values even if they are not designated wilderness areas or WSAs resulting from the section 603 inventory process.[335] A district court ruled that section 603(c) imposes two management constraints—nonimpairment and undue degradation—not just one, and that a company that had acquired mineral location claims before FLPMA's adoption was subject to the stricter of the two standards because it had not yet begun on-the-ground operations before FLPMA's enactment.[336] The Tenth Circuit upheld an injunction against road construction adjacent or near to WSAs.[337]

The courts also have issued protective rulings in cases involving the Forest Service. The Tenth Circuit upheld a district court order enjoining a Forest Service timber sale that would have destroyed presidential and congressional options for considering a national forest area for wilderness designation.[338] The Ninth Circuit subsequently blocked release of lands included in the Forest Service's RARE II inventory to multiple use management based on noncompliance with NEPA.[339] The Ninth Circuit

331 *Compare* Wilderness Soc'y v. Norton, 434 F.3d 584, 590–95 (D.C. Cir. 2006) (holding that environmental group failed to prove injury in fact for some claims alleging action unlawfully withheld or unreasonably delayed by the NPS, but that the group had standing on another claim).

332 Sierra Club v. Watt, 608 F. Supp. 305, 344 (E.D. Cal. 1985).

333 Oregon Natural Desert Ass'n v. Bureau of Land Mgmt., 625 F.3d 1092, 1095 (9th Cir. 2010).

334 *Id.* at 1111–13.

335 *Id.*

336 Utah v. Andrus, 486 F. Supp. 995, 1004 (D. Utah 1979).

337 Sierra Club v. Hodel, 848 F.2d 1068, 1096–97 (10th Cir. 1988), *overruled on other grounds by* Vill. of Los Ranchos De Albuquerque v. Marsh, 956 F.2d 970 (10th Cir. 1992).

338 Parker v. U.S., 448 F.2d 793, 796 (10th Cir. 1971).

339 California v. Block, 690 F.2d 753, 765 (9th Cir. 1982).

invalidated the Bush Administration's weak roadless area management rule,[340] and the Tenth Circuit upheld the more protective Clinton roadless rule.[341]

In a few cases, however, the courts have approved decisions by the multiple use agencies that eliminated areas from qualifying as wilderness[342] or allowed potentially impairing uses.[343] A district court held, for example, that WSA status did not preclude the BLM from making decisions on mineral lease applications.[344] Another court refused to enjoin a potentially damaging ORV race through WSAs.[345] Yet another rejected environmental groups' claims that BLM regulations for surface management of hardrock mining claims violated the agency's duty under FLPMA section 603(c) to prevent permanent impairment of WSAs.[346] The Ninth Circuit upheld a Forest Service permit allowing road construction through potential wilderness areas.[347]

Judicial decisions involving challenges to management of designated wilderness areas by both the Forest Service and the BLM also have tended to be protective. The courts have refused to allow repair and maintenance of roads[348] and dams[349] or rehabilitation of a fire lookout[350] within wilderness areas. One district court ruled that the Forest Service was obligated to consider the impact of allowing snowmobiles outside a wilderness on noise levels within the area.[351] Another court upheld the BLM's power to condition activities under mineral leases executed before wilderness designation by retaining a power to forbid drilling found to be incompatible with wilderness protection.[352] The courts have even found some recreational activities to be inconsistent with wilderness protection. The Ninth Circuit held, for example, that the Forest Service violated the Wilderness Act by issuing a series of multi-year special use permits to commercial packstock operators.[353] In another case, the Eighth Circuit reversed a Forest Service decision allowing motorized portages that could have adversely affected wilderness

340 California *ex rel.* Lockyer v. U.S. Dep't of Agric., 575 F.3d 999, 1004–05 (9th Cir. 2009).

341 Wyoming v. U.S. Dep't of Agric., 661 F.3d 1209, 1220 (10th Cir. 2011). For a comparison of the Clinton and Bush roadless rules, *see* Glicksman, *supra* note 35.

342 *See, e.g.*, Smith v. U.S. Forest Serv., 33 F.3d 1072, 1073 (9th Cir. 1994) (ruling timber sale could proceed regardless of the fact that the Forest Service did not first consider designating the area as wilderness).

343 *See, e.g.*, Wilson v. Block, 708 F.2d 735, 739 (D.C. Cir. 1983) (ruling that ski area expansion into roadless area was not prohibited because area was neither designated as nor contiguous to a primitive area).

344 Mountain States Legal Found. v. Hodel, 668 F. Supp. 1466, 1475 (D. Wyo. 1987).

345 Sierra Club v. Clark, 774 F.2d 1406, 1409 (9th Cir. 1985).

346 Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 45–46 (D.D.C. 2003).

347 Montana Wilderness Ass'n v. U.S. Forest Serv., 655 F.2d 951, 952 (9th Cir. 1981).

348 Barnes v. Babbitt, 329 F. Supp. 2d 1141, 1155 (D. Ariz. 2004).

349 High Sierra Hikers Ass'n v. U.S. Forest Serv., 436 F. Supp. 2d 1117, 1132–38 (E.D. Cal.), *reconsideration denied*, 2006 WL 2472832 (E.D. Cal. 2006).

350 Wilderness Watch v. Iwamoto, 853 F. Supp. 2d 1063, 1071 (W.D. Wash. 2012), *motion for relief from judgment granted by* 2012 WL 6766551 (W.D. Wash. 2012).

351 Izaak Walton League of Am., Inc. v. Kimbell, 516 F. Supp. 2d 982, 995–96 (D. Minn. 2007).

352 Getty Oil Co. v. Clark, 614 F. Supp. 904, 921 (D. Wyo. 1985).

353 High Sierra Hikers Ass'n v. Blackwell, 390 F.3d 630, 640–41 (9th Cir. 2004).

character.[354] In a limited number of other cases, however, the courts upheld decisions by the two agencies that were alleged to be inconsistent with wilderness preservation.[355]

This brief, incomplete survey of judicial decisions concerning wilderness preservation indicates that the Supreme Court has erected obstacles to judicial review of agency decisions affecting wilderness in ways likely to affect BLM and Forest Service decisions alike. The lower court cases concerning wilderness designation, management of potential wilderness, and management of official wilderness for the most part reflect the proclivity identified by Professor Appel to take a protective approach. This survey does not reveal any obvious sense in which the courts have treated decisions by the two multiple use agencies in disparate fashion.

III. THE FUTURE OF WILDERNESS PRESERVATION ON THE MULTIPLE USE LANDS

This Part considers whether Congress or the multiple use agencies should initiate changes that would reduce or eliminate differences in the manner in which the Forest Service and the BLM manage wilderness and potential wilderness. That question, in turn raises a larger question: whether it makes any sense to have two agencies, using distinct administrative structures within two different Departments to manage two separate federal land systems under essentially the same multiple use, sustained yield mandate. Twenty years ago, Professor Coggins and I suggested the possibility of merging the two multiple use agencies into a single National Forest and Range Service to govern all federal lands subject to a multiple use mandate.[356] We also urged limiting the jurisdiction of such a Service to lands open to extractive use, while vesting control over all lands devoted primarily to noncommodity uses, including wilderness areas currently located in the national parks or on the public land, in a newly consolidated National Park and Wildlife Service.[357] We claimed then that these changes would produce more efficient administration of the federal lands and stronger wilderness protection.[358]

At the same time, we acknowledged that reconfiguring the jurisdiction of the federal land management agencies would be difficult and acrimonious, given the jealously with which regulatory turf (and allocation of congressional committee review of agency action) is guarded.[359] The likelihood of change of the scope we envisioned is perhaps even slimmer today, given congressional gridlock on most significant public policy issues,

354 Friends of the Boundary Waters Wilderness v. Robertson, 978 F.2d 1484, 1485 (8th Cir. 1992).

355 *See, e.g.*, Wilderness Watch, Inc. v. Bureau of Land Mgmt., 799 F. Supp. 2d 1172, 1176, 1180 (D. Nev. 2011) (upholding BLM decision to allow helicopter training of police in wilderness areas); Wolf Recovery Found. v. U.S. Forest Serv., 692 F. Supp. 2d 1264, 1266 (D. Idaho 2010) (holding the same for darting and collaring of wolves by helicopter).

356 Glicksman & Coggins, *supra* note 5, at 394.

357 *Id.*

358 *Id.*

359 *Id.*

including but not limited to those involving environmental and public natural resources law.[360] Changes of the magnitude Professor Coggins and I discussed do not seem to be in the offing any time soon. Even a more modest realignment involving consolidation of the two multiple use agencies into one agency with jurisdiction over wilderness areas currently located in national forests and on public lands seems unlikely. At the same time, fiscal austerity considerations might make some members of Congress sympathetic to a potentially money-saving consolidation. In addition, the two multiple use agencies have begun working together in endeavors such as land use planning.[361] Such endeavors have the potential to develop interconnections between the two agencies that could lessen the shock of merging them. Finally, Congress has been willing to tackle much more challenging agency reconfigurations. The creation of the Department of Homeland Security (DHS) in 2002 entailed the integration of twenty-two different federal agencies into a new department.[362] Although the events of 9/11 created a unique impetus to reorganize, the resulting reallocation of agency authority indicates that large-scale shifting of agency responsibilities is not impossible.

If Congress were to consider such a consolidation, however, it is not clear whether the new agency's approach to wilderness preservation would assimilate more of the Forest Service's values and practices or those of the historically less protective BLM. The creation of a single, consolidated multiple use management agency with control over all current multiple use lands therefore would not inherently translate into stronger protection of federal lands with wilderness characteristics. Professor Coggins and I

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360 *See generally* Sandra Zellmer, *Treading Water While Congress Ignores the Nation's Environment*, 88 NOTRE DAME L. REV. 2323, 2325, 2327 (2013) (arguing that "[t]he bitterly partisan nature of environmental issues in Congress today suggests that comprehensive, thoughtful reforms tailored to the problems faced by modern society are unlikely," and urging "'portaging strategies' that offer an opportunity to work around the congressional logjam and move the environmental ball forward through non-legislative means."). Todd Aagaard has addressed the same phenomenon:

> Environmental lawmaking in Congress has stagnated. Despite widespread agreement that inadequacies exist in the canonical environmental law statutes, Congress has not passed a major environmental statute since the Clean Air Act Amendments of 1990. Both parties have failed in attempts to pass their key environmental legislative initiatives, and bipartisan legislative efforts on environmental issues have been virtually unheard of.

Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1240–41 (2014).

361 *See, e.g.*, REVISION OF SAN JUAN NATIONAL FOREST PLAN AND BLM TRES RIOS FIELD OFFICE RESOURCE MANAGEMENT PLAN, *available at* http://www.fs.usda.gov/main/sanjuan/land management/planning (describing process for joint land and resource management plan and final EIS to address long-term management of about 2.4 million acres of national forest and BLM lands in southwestern Colorado).

362 *See* The Department of Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (codified as amended at 6 U.S.C. §§ 1–596); *see also* Dep't. of Homeland Sec., *Creation of the Department of Homeland Security*, http://www.dhs.gov/creation-department-homeland-security (last visited Apr. 19, 2014) (providing links to documents that created and modified the Department of Homeland Security).

favored stronger wilderness protection, for reasons we described twenty years ago (and to which I still subscribe),[363] but those supporting consolidation as a way to achieve more efficient federal land management would not necessarily take the same approach.

Assuming the goal is to strengthen wilderness protection, changes of lesser magnitude than a fundamental reconfiguration of all four federal land management agencies, or just the two multiple use agencies, may be a more viable means of accomplishing that goal. The changes identified here for the most part are therefore designed to elevate wilderness protection on public lands, not lower such protection in national forests to more closely resemble the level that has characterized management of public lands by the BLM. The recommendations derive from the analysis above identifying aspects of the laws governing national forests and BLM lands, and administrative implementing actions, that have tended to make the Forest Service a stronger proponent of wilderness preservation than the BLM.

One reason Congress has designated more wilderness acreage in national forests than on public lands is that the physical characteristics most associated with wilderness are found more frequently in national forests—the "rock and ice" formations and evergreen forests that most easily evoke images of archetypal wilderness.[364] That conception of wilderness appears too narrow, however. Fifteen years before Congress passed the Wilderness Act, Aldo Leopold noted that the areas managed as wilderness in the Rocky Mountains were mainly forested lands.[365] He explained the absence of a more diverse range of ecosystems dedicated to preservation as the product of a "brand of esthetics which limits the definition of 'scenery' to lakes and pine trees."[366]

As Congress continues to address statewide wilderness legislation, it should consider placing greater emphasis on the portion of the statutory definition of wilderness that refers to ecological value.[367] Congress need not confine itself to areas meeting all components of the Wilderness Act's definition of wilderness; it can designate any areas it chooses as wilderness subject to the management prescriptions of the Wilderness Act. Areas may merit inclusion if they meet some of the characteristics of wilderness under the current statutory definition, such as natural state and opportunities for solitude and primitive recreation, even if they do not meet others, such as the 5,000 acre minimum size criterion or scenic value.[368] In particular, Congress should consider eliminating the required linkage between ecological features and "other features of scientific, educational, scenic or

363 *See* Glicksman & Coggins, *supra* note 5, at 400.

364 *See supra* Parts II.A.2, II.E.

365 ALDO LEOPOLD, A SAND COUNTY ALMANAC 268 (1966).

366 *Id.*

367 16 U.S.C. § 1131(c)(4) (2006).

368 Scientists have developed programs that use spatial data to map lands to determine the distribution of wilderness characteristics. *See, e.g.*, Steve Carver, James Tricker & Peters Landres, *Keeping it Wild: Mapping Wilderness Character in the United States*, 131 J. ENVTL. MGMT. 239 (2013). These kinds of programs may be useful in identifying areas that meet all or most of the traditional statutory criteria of wilderness but that have not yet been so designated.

historical value."[369] An area's ecological value alone may warrant its preservation, even if it is not "scenic" in the classic sense. Even if that linkage is retained, eligibility for wilderness designation should not be confined to the uniform conception of scenic value that Leopold criticized.[370] An ecological feature need not be unique or spectacular to vest it with scientific or educational value, particularly in the absence of a complete understanding of the manner in which ecosystems function and the role that each feature of an ecosystem plays in its vitality and resilience. Flexibility in the application of the definition of wilderness may be required in any event, as climate change alters the physical characteristics of the federal lands.[371] Some of the features that triggered an area's designation of wilderness may disappear, while changes in ecosystem characteristics linked to climate change may make other areas newly desirable as targets of wilderness preservation. Similarly, climate change will challenge accepted understandings of what qualifies as "natural" for purposes of the definition of wilderness, as human-induced changes in climate alter landscapes and ecosystems.[372]

Some organic statute fixes are capable of ratcheting up the level of wilderness protection on public lands. One obvious change would be to add wilderness to the recitation of multiple uses for which the BLM is required to manage so that it parallels NFMA's definition of multiple use.[373] Another change that would enhance wilderness preservation on public lands would be to codify the restrictions on R.S. 2477 claims that the Interior Department proposed during the Clinton Administration but that Congress barred the agency from implementing.[374] Because wilderness preservation appears to have been more successfully integrated into the NFMA planning process

369 16 U.S.C. § 1131(c)(4) (2006).

370 LEOPOLD, *supra* note 365, at 268.

371 For descriptions of how climate change has already begun to alter federal lands and resources, see Zellmer, *supra* note 31, at 325–26 (describing the effects of climate change on wilderness areas); Robert L. Glicksman, *Governance of Public Lands, Public Agencies, and Natural Resources*, *in* THE LAW OF ADAPTATION TO CLIMATE CHANGE: U.S. AND INTERNATIONAL ASPECTS 441, 441–46 (Michael B. Gerrard & Katrina Fischer Kuh, eds., 2012). *Cf.* Michael Burger, *Environmental Law/Environmental Literature*, 40 ECOLOGY L.Q. 1, 19 (2013) ("Climate change . . . blurs the boundary between nature and culture, posing specific threats to our understandings of place, wilderness, seasonality, natural phenomena and human values seeded deep in the American consciousness by Henry David Thoreau.").

372 *See, e.g.*, Jedediah Purdy, *American Natures: The Shape of Conflict in Environmental Law*, 36 HARV. ENVTL. L. REV. 169, 220 (2012) (noting difficulties that will arise as "climate change induces ecological shifts that undermine the implied baseline of a 'natural' state that the Wilderness Act preserves"). *Cf.* Alejandro E. Camacho, *Transforming the Means and Ends of Natural Resources Management*, 89 N.C. L. REV. 1405, 1407 (2011) ("By exerting increased stress on already taxed ecosystems and causing or accelerating fundamental ecological changes from prior conditions, climate change makes the significant costs and ultimate unsuitability of . . . the Wilderness Act's passive management goals particularly evident.").

373 *Compare* National Forest Management Act of 1976, 16 U.S.C. § 1604(e)(1) (2006) (including wilderness in the recitation of multiple uses), *with* Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1702(c) (2006) (excluding wilderness in the recitation of multiple uses).

374 *See supra* notes 313–315 and accompanying text.

than the analogous process under FLPMA,[375] it would be desirable to amend FLPMA's planning mandate to include the kind of specificity reflected in NFMA and, in particular, to require the BLM, like the Forest Service, to coordinate wilderness preservation—and place it on a par—with other commodity and non-commodity multiple uses.[376]

Finally, in the absence of these kinds of statutory amendments, administrative actions are capable of raising the profile of wilderness protection on public lands. The President could initiate a reorganization of the BLM to provide for a more centralized policymaking process that is less susceptible to the influence of extractive users whose activities are inconsistent with wilderness preservation than the agency has at times been.[377] An Interior Secretary committed to wilderness preservation could adopt more specific planning regulations, modeled after the 2012 Forest Service planning rules,[378] which strengthen the requirements for both identifying public lands of potential value as wilderness and managing lands that Congress has designated as official wilderness.

IV. CONCLUSION

Two of the four federal land management agencies operate under essentially the same multiple use, sustained yield mandate. One might have expected the Forest Service and the BLM to implement their wilderness designation and management responsibilities in similar fashion. Such has not been the case. Although the Forest Service's wilderness preservation record has not been spotless, and the agency's policies have moved in more or less protective directions during the past fifty years, the footprint of wilderness protection in national forests is decidedly more prominent than it has been on public lands administered by the BLM. In part, the fact that larger swaths of national forests than of public lands have been protected as wilderness is due to the different characteristics of the two land systems—national forests are simply home to more of the unspoiled scenic vistas that Congress has traditionally been willing to designate as official wilderness.

I have argued that several other differences between the two multiple use agencies also have contributed to the lesser role of wilderness preservation in the BLM's domain. These include a long-standing practice of protecting wilderness in national forests that the BLM lacks, the later application of the Wilderness Act to public lands, the relatively more

375 *See supra* Part II.D.2.

376 16 U.S.C. § 1604(e)(1) (2006).

377 *See, e.g.*, Nolen, *supra* note 68, at 839 (recommending that to facilitate uniform policy implementation throughout the agency, the BLM's national office be given greater oversight capabilities, state headquarters should be reorganized into regional offices so as to reduce the BLM's susceptibility to pressure from state government officials and members of Congress, and local BLM offices should be required to report to the regional and national offices regularly regarding development and implementation of resource management plans, designation and protection of areas of critical environmental concern, and restoration and protection of wildlife habitat).

378 *See supra* notes 281–287 and accompanying text.

centralized administrative structure of the Forest Service, subtle differences in the organic statutes of the two agencies (such as the absence of an explicit reference to wilderness in FLPMA's definition of multiple use), the more significant impact of R.S. 2477 rights-of-way on public lands, the greater specificity of statutes and regulations governing the Forest Service's planning process under NFMA, and the absence of any explicit reference to wilderness in either FLPMA's planning provisions or BLM planning regulations.

Extractive use interests and their political allies undoubtedly regard the level of constraints on development arising from the Wilderness Act as excessive and would be likely to favor weakening wilderness preservation mandates on both land systems, but particularly in national forests. The long battle over the Forest Service's effort to adopt the roadless rule supports that supposition.[379] For those who applaud the Wilderness Act's goal of "secur[ing] for the American people of present and future generations the benefits of an enduring resource of wilderness" that will remain "unimpaired for future use and enjoyment,"[380] the concern is rather that the multiple use agencies will subordinate wilderness protection values to the promotion of multiple uses, including mineral extraction, timber harvesting, range, and motorized vehicle recreation, likely to be inconsistent with those values.[381]

With the enactment of the roadless rule and the latest iteration of its planning rules, the Forest Service seems committed, for now, to diligent protection of those areas of national forests with wilderness characteristics. The BLM has not pursued similarly protective policies, though sometimes Congress has blocked its efforts to do so. Both Congress and the BLM have the capacity to promote more effective wilderness protection on public lands through statutory and regulatory changes described in this article. The risk of failing to do so is the permanent loss of the opportunity to achieve the Wilderness Act's goals in the largest federal land system.

379 *See supra* text accompanying notes 222–233.

380 16 U.S.C. § 1131(a) (2006).

381 *See, e.g.*, Michael I. Jeffery, Q.C., *Public Lands Reform: A Reluctant Leap Into the Abyss*, 16 VA. ENVTL. L.J. 79, 127 (1996) (discussing criticisms that the multiple-use mandate has granted agencies too much discretion, allowing them to approve projects that "avoid the spirit of the law") (citing Michael Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 407 (1994); GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 624 (3d ed. 1993)).

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