

University of Colorado Law School

Colorado Law Scholarly Commons

The Future of Natural Resources Law and Policy
(Summer Conference, June 6-8)

2007

6-7-2007

Saving Special Places: Trends and Challenges with Protecting Public Lands [outline]

Robert B. Keiter

Follow this and additional works at: <https://scholar.law.colorado.edu/future-of-natural-resources-law-and-policy>



Part of the [Administrative Law Commons](#), [Animal Law Commons](#), [Biodiversity Commons](#), [Climate Commons](#), [Constitutional Law Commons](#), [Courts Commons](#), [Dispute Resolution and Arbitration Commons](#), [Energy and Utilities Law Commons](#), [Energy Policy Commons](#), [Environmental Law Commons](#), [Environmental Policy Commons](#), [Forest Management Commons](#), [Jurisdiction Commons](#), [Land Use Law Commons](#), [Law and Society Commons](#), [Legal Education Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Litigation Commons](#), [Natural Resource Economics Commons](#), [Natural Resources and Conservation Commons](#), [Natural Resources Law Commons](#), [Natural Resources Management and Policy Commons](#), [Oil, Gas, and Energy Commons](#), [Oil, Gas, and Mineral Law Commons](#), [Peace and Conflict Studies Commons](#), [President/Executive Department Commons](#), [Property Law and Real Estate Commons](#), [Science and Technology Law Commons](#), [State and Local Government Law Commons](#), [Sustainability Commons](#), [Torts Commons](#), [Urban Studies and Planning Commons](#), [Water Law Commons](#), and the [Water Resource Management Commons](#)

Citation Information

Keiter, Robert B., "Saving Special Places: Trends and Challenges with Protecting Public Lands [outline]" (2007). *The Future of Natural Resources Law and Policy (Summer Conference, June 6-8)*. <https://scholar.law.colorado.edu/future-of-natural-resources-law-and-policy/25>

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.



William A. Wise Law Library
COLORADO **LAW**
UNIVERSITY OF COLORADO **BOULDER**



Getches-Wilkinson Center Collection

Robert B. Keiter, *Saving Special Places: Trends and Challenges with Protecting Public Lands* [outline], in *THE FUTURE OF NATURAL RESOURCES LAW AND POLICY* (Natural Res. Law Ctr., Univ. of Colo. Law Sch. 2007).

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

Saving Special Places: Trends and Challenges with Protecting Public Lands

Robert B. Keiter
Wallace Stegner Professor of Law
University of Utah S.J. Quinney College of Law
Salt Lake City, UT 84112

I. Introduction

- A. Public lands have served multiple purposes in our history.
- B. Since the creation in 1872 of Yellowstone National Park as the world's first national park, one of those roles has been to preserve landscapes from private disposition or commercial development.
- C. Over the ensuing 135 years, the nation's commitment to preservation has grown along with its populace and economy. Today over 200 million acres or nearly one third of the public domain is in a protective status.
- D. Each of the four principal federal land management agencies—the National Park Service, U.S. Fish & Wildlife Service, Forest Service, and Bureau of Land Management (BLM)—now have responsibility for preserved lands. These lands are a part of multiple protected land systems that include national parks, wilderness areas, wildlife refuges, wild and scenic rivers, and the BLM's national landscape conservation system.
- E. Protection of our public landscapes has occurred through the political process, often by citizen-led campaigns, and the political nature of the preservation process shows no sign of abating.
- F. Both the purposes and strategies for federal land preservation have changed over time, just as the amount of protected acreage has grown. Those purposes have evolved from aesthetic monumentalism and scenic protection to biological diversity and ecosystem conservation. Moreover, where Congress originally took the lead in protecting public lands, that role has now also been assumed by the President, the agencies, and even the courts.
- G. What the future holds is always difficult to predict, but there is every reason to expect that even more acreage in ever-different designations will be transferred into the protected category.

II. Why Save Special Places: An Evolving Rationale

- A. The philosophy underlying preservation of public lands has evolved over time.

- B. Originally, aesthetic and scenic preservation motivated creation of the early national parks. Wildlife conservation also figured prominently in early preservation campaigns, including creation of the first wildlife reserves during the early 1900s and designation of some early national parks.
- C. Recreation and tourism (visitation) were also recognized as important dimensions of the early preservation campaigns, as reflected in the dual conservation and public enjoyment mandates contained in the National Parks Organic Act of 1916.
- D. Once designated, national parks and other protected areas were often linked to the economic welfare of nearby “gateway” communities, which offered visitor accommodations and services and which thus developed an economic linkage with these protected federal landscapes.
- E. The wilderness concept introduced the idea that untrammeled and unmanaged nature merited protection, and that these areas could also offer compatible visitor and recreational experiences.
- F. By the latter part of the 20th century, biodiversity and ecosystem conservation had become an important preservation goal, as reflected in laws like the Endangered Species Act and the Wild and Scenic Rivers Act.
- G. Nature preservation concepts have also been extended to embrace cultural preservation, as reflected in national heritage area designations and such laws as Alaska National Interest Lands Conservation Act, and the King Range National Conservation Area.
- H. Today, the preservation impulse is an amalgam of motivations, with biodiversity and ecosystem conservation assuming an ever more important role.

III. Federal Preservation Strategies

- A. *A political landscape.* Because public land policy is shaped in political venues, preservation decisions are inevitably political in nature.
- B. *Congress.* Under the Constitution’s Property Clause, Congress has long played a primary role in federal land preservation. Congress is responsible for designating national parks, wilderness areas, wild and scenic rivers, and many wildlife refuges. Congress has adopted organic acts governing the major land preservation systems (e.g., National Parks Organic Act, Wilderness Act), as well as separate enabling acts for the individual protected areas, which may occasionally deviate from the overarching organic mandate. Further, Congress can override the land preservation decisions made by others; for example, Congress has the power to reverse a presidential national monument designation decision.

- C. *President.* In the Antiquities Act of 1906, Congress has delegated explicit land preservation authority to the President by empowering him to create national monuments in order to protect “objects of historic or scientific interest.” 16 U.S.C. § 431. In addition, the President can assert a withdrawal power to protect sensitive areas or resources from exploitation or development; this withdrawal power has a statutory basis in the Federal Land Policy and Management Act, 43 U.S.C. § 1714, and can also be linked to the President’s inherent constitutional executive powers (see *Midwest Oil Co. v. United States*, 236 U.S. 459 (1915)).
- D. *The agencies.* The federal land management agencies have long used their own administrative powers to protect roadless or sensitive lands. The Forest Service first employed this strategy to create primitive areas in 1924, which served as precursors to statutory wilderness created by the Wilderness Act of 1964. More recently, under the Clinton administration, the Forest Service used its general rulemaking authority to promulgate a controversial national forest roadless area rule that protected over 58 million acres of undeveloped, roadless forest land from further timber harvesting, mineral leasing, or road building. 66 Fed. Reg. 3244 (Jan. 12, 2001). Although the courts have differed over the legality of this roadless area protection strategy, the decisions have focused more on the process used to adopt the final rule and less on whether the agency has the legal authority to protect these lands. Compare *Kootenai Tribe v. Veneman*, 313 F.2d 1094 (9th Cir. 2002) with *Wyoming v. U.S. Dept. of Agriculture*, 277 F.Supp.2d 1197 (D. Wyo. 2003). The Bush administration’s revised national forest roadless rule, which effectively delegated the threshold roadless protection decision to state governors, has also been invalidated by the courts. 36 C.F.R. Pt. 294 (2006); *People ex rel. Lockyer v. U.S. Dept. of Agriculture*, 459 F.Supp.2d 874 (N.D. Cal. 2006). Under FLPMA, the BLM was authorized to designate wilderness study areas (WSAs) that enjoy significant statutory protection pending a final congressional wilderness designation decision. 43 U.S.C. § 1782(c); see *State of Utah v. Andrus*, 486 F.Supp. 995 (D. Utah 1979); but see *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (refusing to enforce the statutory “nonimpairment” standard).
- E. *Other agency protection strategies.* The federal agencies can also employ other administrative strategies to protect sensitive lands or resources from intensive development. Examples include the Forest Service’s Northwest Forest Plan that created special old growth reserves to protect the northern spotted owl, the Sierra Nevada Framework Plan that created old forest emphasis areas, the various research natural area designations, critical habitat designations under the Endangered Species Act, the BLM’s “areas of critical environmental concern” (ACECs) designations, and the Secretary of the Interior’s statutory withdrawal authority under FLPMA.
- F. *Courts.* The federal courts have long played a role in protecting undeveloped public lands until Congress has an opportunity to decide whether to make a wilderness designation. Even before the Wilderness Act, federal courts have

intervened to safeguard unroaded lands from development or motorized access. See *McMichael v. United States*, 355 F.2d 283 (9th Cir. 1965). Under the Wilderness Act, the FLPMA wilderness provision, and other laws, the courts have shown themselves willing to protect roadless areas pending a final congressional wilderness designation decision. See, e.g., *Parker v. United States*, 448 F.2d 793 (10th Cir. 1971); *California v. Block*, 690 F.2d 753 (9th Cir. 1982); *State of Utah v. Andrus*, 486 F.Supp. 995 (D. Utah 1979). In addition, the courts have blocked the agencies from opening protected areas to development. See, e.g., *State of California ex rel. Lockyer v. U.S. Forest Service*, 465 F.Supp.2d 942 (N.D. Cal. 2006) (enjoining logging in the Giant Sequoia National Monument).

- G. *Land Exchanges*. One strategy for expanding and safeguarding protected areas is to use strategic land exchanges. 43 U.S.C. § 1716. This strategy can be used to “block up” federal landholdings, to alleviate inholding problems, and to address difficult boundary management issues. Whether initiated by the agencies or Congress, land exchanges can raise difficult and sometimes controversial valuation issues since the exchange must be for equal value.
- H. *Management Issues*. Once the lands are protected, an array of management issues has bedeviled the agencies over the years. How the agencies address and resolve these issues can—and will—influence future strategies for designating and protecting public lands. First is the question of whether protected areas, such as national parks and wilderness areas, should be actively or passively managed, i.e. what degree, if any, of human intervention is appropriate to ensure the area’s resource values are protected or restored. Second, how should the agencies reconcile protection of the landscape with recreational access, particularly off-road vehicles and snowmobiles. Third, can the multiple-use concept be effectively integrated with protected areas management—a question that has surfaced in the aftermath of the Babbitt-inspired multiple-use national monument designations, which are mostly off-limits to mining, energy, and logging but open to livestock grazing, hunting, and various recreational uses. Fourth, is it ever appropriate for the federal agencies to relinquish management responsibility to a non-federal or private entity, as the USFWS has considered doing in the case of the National Bison Range in Montana. See *National Parks Conservation Ass’n v. Stanton*, 54 F.Supp.2d 7 (D.D.C. 1999).

IV. Reflections on the Future

A. *Contemporary Tensions*. Traditionally, the preservation debate has been cast as pitting development (or resource use) against conservation (or non-use). The turn of the century Muir-Pinchot face-off over construction of the Hetch Hetchy reservoir in Yosemite National Park epitomizes this debate. While the same debate continues today, the preservation-utilization debate has become more complicated, particularly as recreational use of the public lands has continued to grow and diversify. It is no longer accurate (if it ever was) that a preservation decision inevitably portends adverse economic consequences for nearby citizens

or communities; rather, such a decision may stimulate tourism, recreational, and real estate activities, thus offering different but nonetheless positive economic incentives for nearby communities. But the proliferating recreational and tourism constituencies can find themselves at odds over the types of recreational activities permitted in the preserved area. Is mountain biking, for example, consistent with the preservation goals for a national park or wilderness area, where such activities are generally prohibited? These differences can pit an array of preservationist constituencies against one another over both designation and management decisions. It has also long been assumed that extractive development activities are incompatible with preservation, while tourism and recreation are compatible economic activities that offer local communities an economic return from nearby protected lands. But tourism and recreation, along with the second home development that nearby protected lands can stimulate, are not ecologically benign activities. They can bring hordes of people, trails, roads, and new construction to the area, which can fragment the landscape, disturb people-sensitive species, and adversely impact riparian and other sensitive areas.

B. Scenery, Recreation, and Science. Although the primary motivations for public land preservation have long been aesthetics and recreation, public concern over the environment and ecological damage has elevated biodiversity and ecosystem conservation on the preservation agenda. A major challenge is to translate these science-based concerns into a compelling political argument to support protecting sensitive public lands in wilderness or other protective designations. At the same time, ecological preservation proponents should not discount the emotional and human appeal of scenic and wildlife-focused protection arguments. The push toward ecological conservation might include creating new ecologically-based designations, perhaps ecosystem or biodiversity reserves. This raises the question of how to garner local support for such a designation.

C. Thinking Big. With public land preservation increasingly linked with biodiversity and ecosystem conservation goals, there is a gathering consensus that protected areas must be both large and interconnected to provide adequate habitat and migration corridors. Numerous efforts have been undertaken to pursue these large-scale ecological preservation goals. At the governmental level, these include: the Northwest Forest Plan with its late successional reserves; the Sierra Nevada Framework with its old forest emphasis areas; the now-defunct Interior Columbia Basin Ecosystem Management Project (ICBEMP) with its protected nature reserves; creation of the Giant Sequoia National Monument adjacent to Sequoia National Park; and the Forest Service's roadless area rule that put over 58 million acres off limits to logging, mining, or roadbuilding. Non-governmental advocacy groups are pursuing other large-scale land protection initiatives including: the Greater Yellowstone, Crown of the Continent, and similar greater ecosystem concepts; the Yellowstone to Yukon continental-scale conservation initiative; the multi-state Northern Rockies Ecosystem Protection Act legislative proposal; and the Wildlands Project. Other ideas include the northern Great Plains

Buffalo Commons and the Great North Woods concepts, both of which seek to protect vast swathes of public and private lands.

D. Stitching the Landscape Together. Preservation efforts focused on biodiversity and ecosystem conservation will have to integrate publicly and privately owned lands into a system of interconnected nature reserves. The traditional strategies for doing this include land exchanges, conservation easements, coordinated management, targeted financial incentives, and regulatory constraints. This could include fusing natural and cultural preservation objectives, with a view toward preserving (and perhaps restoring) the landscape while integrating local residents and communities into the reconfigured landscape. They might be afforded a meaningful role in managing the protected area, offered conditional financial incentives geared toward promoting compatible economic activities, or provided non-impairing economic opportunities within the reserve itself (e.g., tourism, bioprospecting). Examples of this approach include the multiple-use national monuments, the United Nation's biosphere reserve program, and the National Park Service's heritage site designation. Congress has also passed several bills that combine wilderness designation with other conservation and economic development provisions, including the Steens Mountain Cooperative Management and Protective Area Act and the White Pine County Conservation, Recreation, and Development Act. The end result is a much greater tolerance for people either in or immediately adjacent to protected areas. This marks a significant departure from the original goal of the Yellowstone legislation and the Wilderness Act, which was to preserve natural areas free from any permanent human presence.

E. Preservation and Restoration. The traditional view of wilderness and other protected area designations has been to preserve relatively undisturbed landscapes, but there is no reason why future nature reserves could not be fashioned from once-harvested timber lands and other disturbed public lands. Early during the 20th century, the federal government reacquired the eastern and Midwestern forest lands and then spent the next several decades restoring these cut-over landscapes. Today these national forest lands provide valuable open space, recreational opportunities, and wilderness retreats for a large segment of the public. As the field of restoration ecology gains greater insights in how to restore damaged landscapes and as scientists gain greater understanding of the value of particular landscapes for biodiversity and other purposes, we should consider creating new restoration reserves to expand the preservation effort across the landscape. These restoration efforts could provide local employment opportunities and help address local fire management concerns. Such an approach could provide an opportunity to expand the effective boundaries of existing national parks and wilderness areas, and it would lay the groundwork for an entirely new network of protected areas that would realize their full potential over time. With proper planning, this approach could also serve as a pro-active response to the potential impact of global warming on the public lands and native biodiversity.

F. Preservation Politics Revisited. Public land preservation decisions are fundamentally political decisions, whether made at the congressional, presidential, or agency level. Though hard to gauge accurately, there seems to be growing public support for protecting environmental values on public lands and adding to the protected lands inventory. An ongoing challenge is securing local support for wilderness or other protective designations. Congress has proven receptive to hybrid, site-specific designations that often incorporate preservation and economic goals, which can therefore provide opportunities to secure statutory protection where a clear consensus is evident. The President and the agencies have also used hybrid designations to achieve basically preservationist goals. Some key questions are: 1) At what level preservation decisions should be made—national, state, or local; 2) whether and how the public should be involved in the issue; 3) how secure are administrative designations once political power shifts from one party to another, as it inevitably will.

G. The Funding Quandary. A major hurdle to contemporary preservation efforts is the lack of financial resources to acquire sensitive lands that are in private ownership. This has traditionally been done using funds from the Land and Conservation Fund, which consists of off-shore oil and gas royalty revenues, but these monies are not available unless Congress actually appropriates the funds. Is it possible to create a dedicated public land preservation funding source removed from the vicissitudes of every day politics? What are the most effective ways to off-set lost resource production revenues for the states and local communities with alternative tax revenues or funding sources?

H. Institutional Reform. Some key questions: Is there any benefit to be gained by consolidating the agencies responsible for the preserved lands? Is there any need to consider revisions to the basic organic mandates governing the protected lands? Are there benefits to be gained by converting some protected landscapes to national park status, a path that has been traditionally followed? Or are the political costs and interagency rivalries simply too great in each case?