
ARTICLE

RATIONING PUBLIC LANDS

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ABSTRACT

Visitation at national parks and other public lands has surged to record levels, a trend intensified in many places by the COVID-19 pandemic. Unfortunately, the popularity of public lands has led to congestion, a degraded outdoor experience, and damage to natural resources. In response, land managers have adopted capacity limits, reservation requirements, and other access restrictions.

The growing restrictions on access to public lands raise serious concerns. They threaten individual benefits that public lands generate for physical and mental health, as well as collective benefits to cultural identity and national unity. Restrictions on access often have disparate impacts on those who are economically disadvantaged or lack technological savvy. In addition, land managers sometimes institute these restrictions with little or no notice or opportunity for public input.

Although public land managers have various tools to accommodate high visitation, they sometimes have to ration access to public lands. Closures and other restrictions may be necessary to ensure public safety, maintain the quality of visitor experiences, or protect wildlife and other resources. This Article explores guidelines to assist land managers as they make difficult decisions about the restriction and allocation of access to public lands.

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INTRODUCTION

Visitation has surged to record levels at national parks, national forests, and other public lands.¹ In many places, the COVID-19 pandemic intensified a trend in rising visitation as people sought safe spaces outdoors to recreate, gather, or escape pandemic-related restrictions. However, the waning of the pandemic has not eased crowding on public lands. Having discovered—or rediscovered—the joys and benefits of recreating on public lands, Americans continue to visit in droves.

Unfortunately, high levels of visitation have led to congestion, a degraded outdoor experience, and damage to natural resources on public lands. Land managers have responded to these concerns by implementing measures such as establishing new transit options, informing visitors of less-crowded alternatives, and suggesting that people come outside of peak visitation periods. They have also adopted capacity limits, reservation requirements, and other access restrictions. Such restrictions on public access represent a significant break from the past, when land managers generally allowed or even encouraged public visitation.

Restrictions on access to public lands raise serious concerns. They put at risk the benefits public lands confer to physical and mental health, as well as collective benefits to cultural identity and national unity. Access restrictions often have disparate impacts on those who are economically disadvantaged or lack technological savvy. Access to nature, while not a constitutionally protected right, is a vital interest that land management agencies should foster in an equitable manner. Furthermore, agencies sometimes institute closures and other restrictions with limited process, depriving the public of input into these decisions. While land managers enjoy broad discretion under their governing authorities to set access policies, they should exercise that authority with reasonable amounts of transparency and public participation.

To accommodate high demand for access to public lands, governments can acquire land or take steps to make existing public lands more accessible. Nonetheless, closures and other access restrictions will often be necessary to ensure public safety, maintain the quality of visitor experiences, and protect wildlife and other resources. In some circumstances, public land managers will have to ration the public lands. This Article explores guidelines to assist land managers as they make difficult decisions about restricting and allocating access to public lands.

Part I provides background on the history and organization of public lands and explores land managers' responses to soaring recreational use. Although public lands are managed for diverse purposes under differing legal mandates, recreation has emerged as a leading, if not predominant, use of most public

¹ The relevant literature often uses the term “public lands” to refer to federally owned public land, although the term also may include land owned by state and local entities. In this Article, “federal land(s)” refers to land owned by the federal government, and “public land(s)” refers to lands owned by any governmental entity.

lands. The COVID-19 pandemic not only intensified growth in recreation on public lands, but also prompted land managers to adopt capacity-control measures they previously hesitated to implement. Part II examines the legal authorities governing land managers' decisions regarding access to public lands. These authorities structure and cabin agencies' decision making but nonetheless leave fairly broad discretion to decide when and how to allow access. Part III explores the reasons why the public should have access to public lands. The concept of a right of access to nature, though not universally recognized, underscores the importance of such access to individual and societal well-being. Finally, Part IV offers recommendations to public land management agencies for protecting resources and maintaining the quality of the public-lands experience, all the while accommodating, as much as possible, the growing enthusiasm for public lands.

I. BACKGROUND: GROWING LIMITATIONS ON ACCESS TO PUBLIC LANDS

The federal government manages approximately 640 million acres of public land, about 28% of land within the United States.² Four agencies administer the vast majority of this acreage: the Bureau of Land Management ("BLM") manages 244 million acres, the Forest Service manages 193 million acres, the U.S. Fish and Wildlife Service ("FWS") manages 89 million acres, and the National Park Service ("NPS") manages 80 million acres.³

The BLM and Forest Service administer their lands under multiple-use mandates. The BLM has a statutory mandate to manage its lands for "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values."⁴ Similarly, the Forest Service is to manage its lands "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."⁵ Historically, resource extraction dominated BLM and Forest Service lands: mining and grazing on BLM lands, and logging on Forest Service lands.⁶

In contrast, the FWS and NPS manage their lands under dominant-use mandates that direct each agency to prioritize a single management objective. The FWS's mandate is to "administer . . . lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans."⁷ The NPS is to manage its lands "to

² See KATIE HOOVER, LAURA B. COMAY, CAROL HARDY VINCENT & CHRISTOPHER R. FIELD CONG. RSCH. SERV., IF10585, THE FEDERAL LAND MANAGEMENT AGENCIES 1 (2021).

³ See *id.*

⁴ 43 U.S.C. § 1702(c) (defining "multiple use").

⁵ 16 U.S.C. § 528.

⁶ GEORGE C. COGGINS, CHARLES F. WILKINSON, JOHN D. LESHY & ROBERT L. FISCHMAN, FEDERAL PUBLIC LAND AND RESOURCES LAW 25-26 (7th ed. 2014) (noting Forest Service and BLM began as custodial agencies for lands used largely for timber extraction, ranching, and mining).

⁷ 16 U.S.C. § 668dd(a)(2).

conserve the scenery, natural and historic objects, and wildlife” and to provide for their enjoyment so as to “leave them unimpaired for the enjoyment of future generations.”⁸

Over time, the distinctions between these agencies’ management priorities have weakened as Congress has legislated additional directives that apply across the board.⁹ For example, the Endangered Species Act obligates each federal agency to avoid jeopardizing protected species even when that agency is not governed by a dominant-use mandate to conserve wildlife.¹⁰ Furthermore, consistent with their respective mandates, all four agencies have exercised their discretion to promote or allow recreation. Today, recreation has emerged as the predominant use of federal lands, regardless of the specific agency in charge.¹¹

A. *A History of Access Policy*

1. A Tradition of Open Access

Historically, the federal government imposed few restrictions on access to federal lands.¹² Federal lands were held as public domain, meaning that the land was available for settlers to establish ownership claims and not reserved for specific uses.¹³ People entered federal lands for a variety of reasons: to extract timber, minerals, and other resources; to hunt or graze animals; to stake out ownership claims; and to recreate.¹⁴ The federal government generally did little to restrict—and was largely unable to restrict—entry onto its massive landholdings.¹⁵

In the late nineteenth century, however, the federal government began to regulate entry and use of federal lands in a systematic fashion. Under the 1891 Forest Reserve Act, President Benjamin Harrison and his successors established millions of acres of forest reserves from land that had been in the public

⁸ 54 U.S.C. § 100101(a).

⁹ JOHN D. LESHY, *OUR COMMON GROUND: A HISTORY OF AMERICA’S PUBLIC LANDS* 586-87 (2021) (detailing blurring of agencies’ missions through congressional and executive action).

¹⁰ *See infra* notes 186-90 and accompanying text.

¹¹ *See infra* Part I.B.

¹² Robert B. Keiter, *The Emerging Law of Outdoor Recreation on the Public Lands*, 51 ENV’T L. 89, 90 (2021) [hereinafter Keiter, *Emerging*] (“The expansive federal public lands have long served as a kind of ‘commons’ for recreation, offering attractive open spaces where everyone was welcome and could pursue an array of outdoor activities.”).

¹³ *See* LESHY, *supra* note 9, at 49.

¹⁴ *See id.* at 429-30 (noting under multiple-use approach to public land policy, “[p]ractically all public lands permitted recreation”).

¹⁵ *See id.* at 112-21 (describing post-Civil War exploitation of public lands for wood, forage, and minerals). Some federal lands were reserved in public ownership for Native American reservations, the military, and other specified purposes. *Id.* at 63-65.

domain.¹⁶ Congress set aside public domain lands as national parks, envisioning their recreational use while also directing the preservation of park resources.¹⁷ The government reserved or acquired land for wildlife refuges and prescribed that they be managed for wildlife conservation and recreation.¹⁸ The government also began regulating public domain lands by instituting a grazing permit system and other requirements.¹⁹ Congress ultimately determined that the federal government would retain ownership of public domain lands and would no longer subject them to settlement or disposal.²⁰

Notwithstanding these developments, the public largely remained free to access federal lands for recreational purposes, whether or not the land had been withdrawn from the public domain.²¹ In the early twentieth century, recreational use of the federal lands was relatively modest, yet each of the land management agencies recognized the importance of facilitating and expanding recreational access. Stephen Mather, the NPS's first director, believed that making parks accessible to the public was essential to building and maintaining political support for the parks.²² Citing its mandate to foster public enjoyment, the NPS avidly supported the construction of roads, railroads, and visitor facilities to enable tourists to visit the parks.²³ The NPS's efforts to attract visitors were

¹⁶ Forest Reserve Act of 1891, Pub. L. No. 51-561, ch. 561, § 24, 26 Stat. 1095, 1103 (1891) (granting U.S. president right to reserve federal land as reservation by public proclamation); LESHY, *supra* note 9, at 171-81 (detailing passage of Forest Reserve Act and its early implementation). The 1897 National Forest Organic Act authorized rules to govern their occupancy and use. Act of June 4, 1897, Pub. L. No. 55-2, ch. 2, 30 Stat. 11, 34 (1897).

¹⁷ See 54 U.S.C. § 100101(a); see also LESHY, *supra* note 9, at 329-30 (discussing NPS Organic Act).

¹⁸ COGGINS ET AL., *supra* note 6, at 788-92 (detailing growth of wildlife refuge system through executive and congressional action, beginning with Migratory Bird Conservation Act of 1929 and continuing with 1997 Refuge Improvement Act).

¹⁹ *Id.* at 128 (describing passage of Taylor Act's permit system).

²⁰ 43 U.S.C. § 1701(a)(1); see also LESHY, *supra* note 9, at 371 (discussing dwindling pace of privatization of public lands during 1920s and 1930s).

²¹ ROBERT B. KEITER, KEEPING FAITH WITH NATURE 260 (2003) [hereinafter KEITER, KEEPING FAITH] ("Until recently, the public domain has served primarily as an unregulated commons for recreation."); LESHY, *supra* note 9, at 429.

²² ROBERT B. KEITER, TO CONSERVE UNIMPAIRED: THE EVOLUTION OF THE NATIONAL PARK IDEA 15-16 (2013) [hereinafter KEITER, TO CONSERVE UNIMPAIRED] (describing Mather's aim to protect parks from exploitation through use of American citizens' emotional connections to them); LESHY, *supra* note 9, at 333 ("Mather concentrated his considerable talents of promotion and persuasion on building a political constituency for the [park] system.").

²³ Keiter, *Emerging*, *supra* note 12, at 94 (noting Congress instructed NPS to manage parks for public enjoyment); John Copeland Nagle, *How National Park Law Really Works*, 86 U. COLO. L. REV. 861, 876-77, 889 (2015) (describing general interest in making natural parks accessible and early efforts by NPS to build railroads and roads to enable visitation); KEITER, TO CONSERVE UNIMPAIRED, *supra* note 22, at 44-63 (noting NPS's early commitment to public enjoyment, evidenced by public statements, early alliances with railroads and automobile associations, marketing efforts, and construction of accommodations).

wildly successful—so much so that the agency later admitted that high levels of visitation were compromising park resources and values.²⁴

Other land management agencies also promoted visitor access. At its founding, the Forest Service viewed recreation as incidental to its primary objective of timber production.²⁵ However, public and congressional pressure eventually led the agency to accept recreation as equal in importance to other forest uses.²⁶ Like the NPS, the Forest Service capitalized on the growing popularity of the automobile by constructing new roads and trails to further access.²⁷ The agency fostered recreation at camping and picnic sites, managed wildlife habitats for recreational benefit, and designated primitive areas for wilderness recreation.²⁸ The FWS's management of national wildlife refuges also came to accommodate various recreational uses.²⁹ National wildlife refuges must prioritize wildlife conservation over recreation and are presumed closed to public access, unless opened for use by regulation, permit, or public notice.³⁰ Although the agency's primary objective is conservation, the FWS has opened many refuges to hunting, fishing, and other forms of wildlife-dependent recreation.³¹ Lastly, legislative and executive actions in the 1960s and 1970s nudged the BLM, which oversees federal lands not already set aside as parks, forests, wildlife refuges, or other designated areas, to incorporate recreation and preservation into its management priorities.³²

²⁴ KEITER, TO CONSERVE UNIMPAIRED, *supra* note 22, at 50 (discussing NPS's 1980 *State of the Parks* report).

²⁵ See LESHY, *supra* note 9, at 346.

²⁶ See *id.* at 346-47 (noting pressures, along with NPS rivalry, leading Forest Service to elevate recreation to equal standing with other uses).

²⁷ See *id.* at 348-49; Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENV'T L. REV. 345, 359-60 (1994) (describing Forest Service efforts to develop recreation beginning in 1915); Keiter, *Emerging*, *supra* note 12, at 94, 100-01 (detailing Forest Service's embrace of recreation during New Deal and following World War II).

²⁸ Keiter, *Emerging*, *supra* note 12, at 94, 100-01 (describing Forest Service's embrace of wilderness as recreational experience, and recreation as major use of national forests); Hardt, *supra* note 27, at 359-60 (noting Forest Service's efforts to develop camping and picnic sites).

²⁹ Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 461, 526-34 (2002) (explaining how governing statute establishes conservation as primary use, wildlife-dependent recreation as secondary use, and other uses as tertiary).

³⁰ 50 C.F.R. § 25.21 (2024).

³¹ See KEITER, KEEPING FAITH, *supra* note 21, at 259 (noting rise of downhill skiing in communities such as Aspen and Telluride as result of opened public lands, as well as dude ranches, river rafting, and outfitting). Wildlife-dependent recreation is defined as "hunting, fishing, wildlife observation and photography, or environmental education and interpretation." 16 U.S.C. § 668ee(2).

³² See LESHY, *supra* note 9, at 490-95 (describing legislative and political forces giving rise to modern BLM).

Public access did not necessarily translate into access for all, however.³³ The establishment of national parks, national forests, and the like often deprived Native Americans of access to traditional tribal lands and resources.³⁴ In creating Yellowstone, Grand Canyon, and other national parks, the federal government removed Native American tribes from ancestral lands, confined them to reservations outside park boundaries, and restricted their hunting and gathering activities.³⁵ Furthermore, prior to the civil rights era, state park systems in the South were largely closed off to Black Americans.³⁶ Indeed, the establishment of state and municipal parks often displaced minority communities and promoted the elitist interests of middle and upper-class Whites.³⁷ Following state laws on segregation, the NPS established separate facilities for Black Americans—or no facilities at all—in Jim Crow states.³⁸

2. Recreational Zoning

In the 1960s, Congress introduced new forms of recreational zoning on federal lands through the Wilderness Act and the legislation of national

³³ See Leah Asmelash, *Outdoor Recreation Has Historically Excluded People of Color. That's Beginning To Change*, CNN (Dec. 14, 2021, 3:19 PM EST), <https://www.cnn.com/2021/12/14/us/national-parks-history-racism-wellness-cec/index.html> [<https://perma.cc/WT2T-SAPS>].

³⁴ Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. L. REV. 213, 215 (2018) (describing how conservation laws worked in tandem with federal Indian policies of “Allotment and Assimilation” to dispossess tribes of land); PHOEBE S.K. YOUNG, *CAMPING GROUNDS: PUBLIC NATURE IN AMERICAN LIFE FROM THE CIVIL WAR TO THE OCCUPY MOVEMENT* 82-83 (2021) (discussing displacement of Native Americans from Yosemite Valley).

³⁵ Krakoff, *supra* note 34, at 231-37 (chronicling expulsion of Blackfeet, Crow, Shoshone, and Bannock Tribes from Yellowstone National Park to preserve myth that Yellowstone was uninhabited, and displacement of Havasupai Tribe in Grand Canyon National Park); KEITER, *TO CONSERVE UNIMPAIRED*, *supra* note 22, at 122-24 (noting similar instances at Mesa Verde and Mount Rainier National Parks).

³⁶ KangJae Jerry Lee, Mariela Fernandez, David Scott & Myron Floyd, *Slow Violence in Public Parks in the U.S.: Can We Escape Our Troubling Past?*, 24 SOC. & CULTURAL GEOGRAPHY 1185, 1193 (2022) (noting that in 1952, 180 southern state parks were available to White citizens but only twelve to Black Americans).

³⁷ *Id.* at 1190-91 (arguing municipal parks like Central Park were initiated by powerful Whites to inculcate White middle-class values at expense of immigrants, Black, Indigenous, and People of Color (“BIPOC”) communities, and working class).

³⁸ Kurt Repanshek, *How the National Park Service Grappled with Segregation During the 20th Century*, NAT'L PARKS TRAVELER (Aug. 18, 2019), <https://www.nationalparkstraveler.org/2019/08/how-national-park-service-grappled-segregation-during-20th-century> [<https://perma.cc/SBJ3-JPQE>] (noting in mid-1930s, NPS decided to abide by state custom and accommodate segregation in national parks in former Confederate states, as well as Kentucky, Maryland, Missouri, and West Virginia); LESHY, *supra* note 9, at 411 (“When African Americans sought campsites that the ‘separate but equal’ principle was supposed to furnish them, the Park Service often responded with the dodge that it would consider doing so only when ‘sufficient demand’ existed.”).

recreation areas. These designations reflected a heightened appreciation of different recreational needs and of recreation's expanding significance on public lands.

The 1964 Wilderness Act heralded a shift in access policy by prohibiting or restricting certain activities, including some forms of recreation, on federal lands designated by Congress as wilderness.³⁹ The statute seeks to preserve landscapes “where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”⁴⁰ Wilderness designations are overlaid on existing land classifications, and the designated land remains under the jurisdiction of the agency originally charged with managing it.⁴¹ To preserve wilderness values, the Wilderness Act prohibits roadbuilding, commercial enterprises, and motorized transport in designated wilderness areas.⁴² Notably, the statute does not close off wilderness areas to the public, nor does it explicitly cap visitation. Instead, it aims to facilitate a “primitive and unconfined type of recreation”⁴³ in these areas and leaves undisturbed the presumption of public access unless areas are specifically closed.⁴⁴ In designated wilderness, hiking, camping, canoeing, and horseback riding are generally allowed, mountain biking and off-road vehicle use are not, and other recreational uses are subject to case-by-case consideration.⁴⁵ Land managers frequently require permits for overnight use of wilderness areas and may also require them for day use.⁴⁶ Over

³⁹ See 1964 Wilderness Act, Pub. L. 88-577, §§ 2-7, 78 Stat. 890, 890-96 (codified at 16 U.S.C. §§ 1131-1136). Prior to the enactment of the Wilderness Act, the NPS and Forest Service experimented with the idea of setting aside “primitive” or roadless areas. LESHY, *supra* note 9, at 352-55 (“As roads began to proliferate in both parks and forests, the idea of preserving ‘unspoiled’ areas began to gain favor in both agencies, and over time it provided some fuel for competition between them.”).

⁴⁰ 16 U.S.C. § 1131(c).

⁴¹ CHRISTINE A. KLEIN, FEDERICO (FRED) CHEEVER, BRET C. BIRDSONG, ALEXANDRA B. KLASS & ERIC BIBER, *NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES* 566 (4th ed. 2018) (“Wilderness areas are managed by whatever land management agency controlled the land before the designation—*i.e.*, the U.S. Forest Service, National Park Service, U.S. Fish and Wildlife Service or, recently, the BLM.”).

⁴² 16 U.S.C. §§ 1131(a), 1133(c).

⁴³ 16 U.S.C. § 1131(c).

⁴⁴ Jan G. Laitos & Rachael B. Gamble, *The Problem with Wilderness*, 32 HARV. ENV'T L. REV. 503, 547 (2008).

⁴⁵ ANNE A. RIDDLE & KATIE HOOVER, CONG. RSCH. SERV., RL31447, *WILDERNESS: OVERVIEW, MANAGEMENT, AND STATISTICS* 7 (2022).

⁴⁶ See, e.g., *Wilderness Permits*, NAT'L PARK SERV., <https://www.nps.gov/yose/planyourvisit/wildpermits.htm> [<https://perma.cc/54MF-24NY>] (last visited Feb. 16, 2024) (requiring permit for overnight use in Yosemite Wilderness); *Obtaining a Wilderness Permit*, U.S. DEP'T OF AGRIC., https://www.fs.usda.gov/detail/sierra/passes-permits/?cid=fsbdev7_018115 [<https://perma.cc/F2H6-4LMB>] (last visited Feb. 16, 2024) (requiring permit for overnight use in Sierra National Forest Wilderness areas); *Wilderness: Mt. Adams*, U.S. DEP'T OF AGRIC., <https://www.fs.usda.gov/recarea/giffordpinchot/recarea/?recid=79411> [<https://perma.cc/SK5T-8Z6G>] (last visited Feb. 16, 2024) (requiring free, self-issuing permits for all entry into Gifford Pinchot National Forest Wilderness areas).

time, Congress has designated over 111 million acres of federal land in 44 states as wilderness.⁴⁷ However, less than one-fifth of federal land is designated as wilderness, and the majority of wilderness acreage is found in Alaska.⁴⁸

In the same year that it enacted the Wilderness Act, Congress also created the first of many national recreation areas—federal lands explicitly and primarily dedicated to recreational use.⁴⁹ Unlike national parks or national monuments, which prioritize conservation or preservation, national recreation areas focus primarily on meeting the growing demand for outdoor recreation.⁵⁰ The first few national recreation areas encompassed lands surrounding federal dams and reservoirs, but subsequent designations have also included a variety of public lands near major metropolitan areas.⁵¹

B. *The Growing Dominance of Recreation*

Today, recreation has become the primary use of federal lands.⁵² Within the National Park System, which includes national parks, national recreation areas, and nearly twenty other types of units, recreation's dominance is unsurprising.⁵³ In wildlife refuges, recreation has also grown in significance but remains subordinate to wildlife conservation.⁵⁴ However, on the multiple-use lands administered by the Forest Service and BLM, recreation's ascendance is remarkable. In both prominence and economic value, recreation has surpassed the logging, mining, and grazing activities that long dominated these multiple-use regimes.⁵⁵

Prior to the COVID-19 pandemic, recreational use of federal lands was already on the rise. The National Park System hosted close to 330 million

⁴⁷ LESHY, *supra* note 9, at 471.

⁴⁸ See RIDDLE & HOOVER, *supra* note 45, at i (“[A]pproximately 18% of federal land administered by the four major federal land management agencies is wilderness . . . approximately 52% of the total designated wilderness is in Alaska . . .”).

⁴⁹ LESHY, *supra* note 9, at 478-79.

⁵⁰ See *id.* at 478.

⁵¹ *Id.* at 480 (noting different settings of national recreation areas, including in metropolitan New York City and California's Bay Area).

⁵² Keiter, *Emerging*, *supra* note 12, at 90 (“Outdoor recreational activity is now ubiquitous across the nation's public lands . . .”); Jan G. Laitos & Rachael B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENV'T L. 1091, 1093 (2004) (declaring “preservation and recreation are becoming the primary use preferences” in management of natural resources); see also *Outdoor Recreation Satellite Account, U.S. and States, 2021*, BUREAU OF ECON. ANALYSIS (Nov. 17, 2023), <https://www.bea.gov/data/special-topics/outdoor-recreation> (reporting outdoor recreation accounted for 2.2% of U.S. GDP in 2022).

⁵³ Keiter, *Emerging*, *supra* note 12, at 98 (listing units Congress added to national park system in twentieth century).

⁵⁴ See *id.* at 100.

⁵⁵ *Id.* at 105, 112; see also LESHY, *supra* note 9, at 510, 587 (noting extractive uses occur today on relatively small fraction of acreage managed by multiple-use agencies).

visitors annually, double the level of the early 1970s.⁵⁶ Visitation numbers dropped during the initial months of the pandemic but rebounded as outdoor spaces reopened and outdoor gatherings were deemed relatively safe. Although recreational use of NPS lands dropped 27.6% in 2020 in the wake of pandemic-related closures, one-third of NPS units experienced at least one month of record visitation later that year.⁵⁷ Today, half of all recreation visits are concentrated at the twenty-three most visited units (out of over four hundred in the NPS system), and the greatest congestion tends to occur in these units, at entrances and exits, and at popular scenic viewpoints.⁵⁸

Other public lands have witnessed similar increases in visitation. In the decade prior to the pandemic, visitation to Forest Service lands gradually increased from 143 million visits to 150 million visits per year.⁵⁹ That figure jumped to 168 million visits in 2020, even in the wake of pandemic-driven stay-at-home orders and temporary closures.⁶⁰ Forest Service campground reservations also surged in 2020, especially near urban areas and national parks.⁶¹ BLM lands presently host approximately 80 million visits per year,⁶² up from 62 million visits in 2001,⁶³ and two-thirds of BLM sites saw increased visitation in 2020.⁶⁴ Finally, national wildlife refuges also have experienced a

⁵⁶ *Visitation Numbers*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/visitation-numbers.htm> [<https://perma.cc/76U3-C6A3>] (last updated Feb. 27, 2023).

⁵⁷ *A Review of the Impacts of Overcrowding in Our National Parks on Park Resources and Visitor Experiences, and Consideration of Strategic Approaches to Visitor Use Management: Hearing Before the Subcomm. on Nat'l Parks of the Comm. on Energy and Nat. Res.*, 117th Cong. 12 (2021) (statement of Michael T. Reynolds, Regional Director for Interior Regions 6, 7 & 8, Nat'l Park Serv.).

⁵⁸ *Id.* at 13 (“[This year] half of all our recreation visits are occurring at only the top 23 most-visited parks Crowding conditions tend to happen at hotspots and where entries and exits are limited.”); *About Us*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/national-park-system.htm> [<https://perma.cc/NZ9B-Z8QM>] (last updated Dec. 7, 2023) (stating National Park System has “expanded to 428 units”).

⁵⁹ U.S. FOREST SERV., NATIONAL VISITOR USE MONITORING SURVEY RESULTS NATIONAL SUMMARY REPORT (DATA COLLECTED FY 2014 THROUGH FY 2018), at 3 (2018) [hereinafter 2018 NVUM] (reporting National Forest System visitation estimates in recent years).

⁶⁰ U.S. FOREST SERV., NATIONAL VISITOR USE MONITORING SURVEY RESULTS NATIONAL SUMMARY REPORT (DATA COLLECTED FY 2016 THROUGH FY 2020), at 3, 11 (2020) [hereinafter 2020 NVUM].

⁶¹ Mostafa Shartaj, Jordan F. Suter & Travis Warziniack, *Summer Crowds: An Analysis of USFS Campground Reservations During the COVID-19 Pandemic*, PLOS ONE, Jan. 12, 2022, at 1, 2, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0261833> (finding increase in reservations in summer 2020 compared to 2019 near national parks and population centers).

⁶² U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT., PUBLIC LAND STATISTICS 2021, at 170 tbl.4-1 (2022).

⁶³ Keiter, *Emerging*, *supra* note 12, at 105.

⁶⁴ U.S. DEP'T OF THE INTERIOR, U.S. DEP'T OF AGRIC., IMPLEMENTATION OF THE FEDERAL LANDS RECREATION ENHANCEMENT ACT: REPORT TO CONGRESS 9 (2021) [hereinafter 2021 FLREA REPORT] (reporting increase in visitation at sites where agency estimates use).

rise in visitation from under 37 million visits in 2004, to approximately 60 million visits per year today.⁶⁵ Across the federal lands, reservations on Recreation.gov (a website used primarily to reserve campsites) doubled between 2020 and 2022.⁶⁶

Unfortunately, high levels of recreation on public lands have led to negative consequences, including damaged resources, degraded visitor experiences, and growing conflicts between users.⁶⁷ Recreational use can disturb and displace wildlife, resulting in adverse effects on animal behavior, habitat selection, energy expenditure, and reproductive success.⁶⁸ Heavy trail use can erode or compact soils, degrade water quality, and damage vegetation.⁶⁹ In comparison to foot traffic, off-road vehicle and all-terrain vehicle (“ATV”) use can be especially damaging, as these motorized vehicles cover more distance, produce more noise and air pollution, and impose greater mechanical force on the environment.⁷⁰ Visitors at overcrowded sites face busy trails, traffic jams, loss of natural quiet, and a generally less enjoyable outdoor experience.⁷¹ Finally, whereas conflicts in use previously tended to occur between extractive and

⁶⁵ Compare DEP’T OF THE INTERIOR, FISH AND WILDLIFE SERVICE: NATIONAL WILDLIFE REFUGE SYSTEM 2020 ACTION PLAN, at 2 (2020) (estimating “59.7 million annual visits”), with U.S. FISH AND WILDLIFE SERV., BANKING ON NATURE 2017, at 2, 16 tbl.2 (2019) (estimating 53.6 million visits in FY 2017), and Keiter, *Emerging*, *supra* note 12, at 104 (reporting 36.7 million visitors in 2004).

⁶⁶ *Lessons from the Field: Overcrowding in National Parks: Hearing Before the H. Nat. Res. Subcomm. on Oversight and Investigations*, 117th Cong. (2022) (statement of Jeff Bradybaugh, Zion Nat’l Park Superintendent) (“Recreation.gov, the online trip planning and reservation portal for federal sites, saw over 10 million reservations in 2022, almost double the amount made in 2020.”).

⁶⁷ Keiter, *Emerging*, *supra* note 12, at 108 (listing various consequences of recreational use on public lands, such as erosion and wildlife displacement from vehicles, and conflicts between different types of recreational users); ROBERT E. MANNING & LAURA E. ANDERSON, *MANAGING OUTDOOR RECREATION: CASE STUDIES IN THE NATIONAL PARKS* 10 (1st ed. 2012) (listing impacts on park resources, historical resources, quality of visitor experience, and quality of park facilities as examples of damage by recreational overuse).

⁶⁸ Solène Marion et al., *A Systematic Review of Methods for Studying the Impacts of Outdoor Recreation on Terrestrial Wildlife*, *GLOB. ECOLOGY & CONSERVATION*, June 2020, at 1, 1 (describing effects at individual animal level from human recreational disturbance); DAVID HUDDART & TIM STOTT, *OUTDOOR RECREATION: ENVIRONMENTAL IMPACTS AND MANAGEMENT* 32-33 (2019) (describing wide-ranging disturbance and displacement of wildlife from human recreation, such as nesting failures in various bird species); MANNING & ANDERSON, *supra* note 67, at 13 (charting varying negative effects of both direct and indirect human interactions with wildlife during recreation).

⁶⁹ See HUDDART & STOTT, *supra* note 68, at 21-29 (describing effects of trampling pressure on soil and vegetation when management on popular footpaths applied too late); MANNING & ANDERSON, *supra* note 67, at 10-12 (listing how trampling, camping, and other recreation damages soil, vegetation, and water quality).

⁷⁰ HUDDART & STOTT, *supra* note 68, at 142-45 (finding off-road vehicles more damaging to environment because they are likelier to cause damage over longer distances and produce pollution where previously there was none).

⁷¹ MANNING & ANDERSON, *supra* note 67, at 14-15.

recreational users, today such conflicts increasingly arise among hikers, hunters, bikers, ATV-riders, and other recreational users.⁷²

C. *Restrictions on Access*

Recognizing the growing problem of overcrowding on public lands, the NPS recently published a toolkit identifying ways to manage heavy visitation.⁷³ Tools include access management, transit services, visitor information, and limits on use.⁷⁴ These tools are available to all land management agencies and may be deployed jointly by federal and state agencies and nonprofits.⁷⁵

1. *Restrictions Before the Pandemic*

Prior to the COVID-19 pandemic, public land managers occasionally adopted modest limits on visitation and use, but generally refrained from imposing hard visitation caps.⁷⁶ In some areas, resource managers prohibited specific recreational activities or identified permissible recreational uses in hopes of mitigating conflicts between users.⁷⁷ Some trails were reserved for hikers, for example, while other trails were reserved for ATVs and other motorized vehicles.⁷⁸ In popular locations, the NPS instituted permit requirements for whitewater rafting, rock climbing, backcountry use, caving, diving, and fishing.⁷⁹ Requiring permits for specific activities can curb use while also

⁷² Keiter, *Emerging*, *supra* note 12, at 106, 108 (listing conflicts between different types of recreational visitors, such as adrenaline-seeking visitors versus those seeking solitude); MANNING & ANDERSON, *supra* note 67, at 15-16 (discussing theoretical conflicts between goals and values of recreational users).

⁷³ See generally NAT'L PARK SERV., *MANAGING CONGESTION: A TOOLKIT FOR PARKS* (2020) [hereinafter *MANAGING CONGESTION*].

⁷⁴ *Id.* at 2.

⁷⁵ Aedan Hannon, *As Visitor Pressure Rises, Public Land Managers Face New Challenges*, DURANGO HERALD (Dec. 2, 2021, 2:45 PM), <https://www.durangoherald.com/articles/as-visitor-pressure-rises-public-land-managers-face-new-challenges/> [<https://perma.cc/F7A9-7JNF>] (reporting on visitor management techniques used by Forest Service in San Juan National Forest, as well as executive order by Colorado governor bringing together "federal and state agencies and community organizations to balance recreation and conservation").

⁷⁶ KEITER, *KEEPING FAITH*, *supra* note 21, at 260-61.

⁷⁷ Laitos & Reiss, *supra* note 52, at 1107 (detailing how Denali National Park and Moab, Utah segregated off-road vehicles to specific areas or trails).

⁷⁸ *Id.*

⁷⁹ Keiter, *Emerging*, *supra* note 12, at 98-99 (describing NPS limits on Grand Canyon rafting and backcountry camping in 1980s); KEITER, *TO CONSERVE UNIMPAIRED*, *supra* note 22, at 29, 62, 84 (describing permitting of rafting, fishing, backcountry use, white-water rafting, and rock climbing by NPS); DOROTHY H. ANDERSON, DAVID W. LIME & THERESA L. WANG, *MAINTAINING THE QUALITY OF PARK RESOURCES AND VISITOR EXPERIENCES: A HANDBOOK FOR MANAGERS* 58-59 (1998) (listing types of permits required, including for caving and diving).

educating users on ways to minimize their impacts. Courts largely upheld prohibitions or restrictions on recreational activities to protect NPS resources.⁸⁰

While blanket closures or capacity limits were rare, public lands have always been subject to seasonal or emergency closures.⁸¹ Seasonal closures may occur when roads are impassable or to avoid wildlife disturbance.⁸² Emergency closures may involve various hazards and have risen as wildfire dangers have grown.⁸³ Government shutdowns have also led to closures of the national parks.⁸⁴ In general, agencies would close lands if they determined that entry would be unsafe, harmful to natural resources, or physically impossible, and not because visitation was excessive.

The NPS did adopt a few prepandemic capacity limits in the form of temporary road closures or prohibitions on private vehicle entry. In the 1970s, Denali National Park instituted a mandatory shuttle system for visitors wishing to travel beyond mile fifteen on the main park road.⁸⁵ Starting in 2000, Zion

⁸⁰ KEITER, TO CONSERVE UNIMPAIRED, *supra* note 22, at 73-74 (discussing cases).

⁸¹ *See id.* at 62-63 (noting as of 2013 “Park Service has never imposed visitor limits for attractive frontcountry venues”).

⁸² Closures may aim, for example, to reduce human-bear encounters or protect nesting grounds. *See, e.g.*, DAVID N. COLE, MARGARET E. PETERSEN & ROBERT C. LUCAS, MANAGING WILDERNESS RECREATION USE: COMMON PROBLEMS AND POTENTIAL SOLUTIONS 24 (1987); *Seasonal Closures for Nesting*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/event/seasonal-closures-nesting> [<https://perma.cc/A74R-HJ26>] (last visited Feb. 16, 2024) (announcing closure of sections of Assateague Island and Assawoman Island from March to September to protect shorebird nesting).

⁸³ *See, e.g.*, FOREST SERV.: PACIFIC SOUTHWEST REGION, REGIONAL ORDER NO. 20-07, EMERGENCY FOREST CLOSURE (Sept. 7, 2020), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd799214.pdf [<https://perma.cc/S4R5-5B22>] (ordering closure of National Forests in California due to fire danger, citing record heat and wind that year).

⁸⁴ CLINTON T. BRASS ET AL., CONG. RSCH. SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 25 (2018) (listing closure of all National Park Service Sites during 1996 government shutdowns); LAURA B. COMAY & CAROL HARDY VINCENT, CONG. RSCH. SERV., IF11079, NATIONAL PARK SERVICE: GOVERNMENT SHUTDOWN ISSUES (2019), <https://sgp.fas.org/crs/misc/IF11079.pdf> [<https://perma.cc/F65F-N882>] (noting NPS closed all parks and required all visitors to leave during 2013 shutdown); *cf.* Terry Richard, *Government Shutdown: U.S. Forest Service, National Parks Close Recreation Sites, Though Some Remain Open*, OREGONIAN (Oct. 1, 2013, 7:02 PM) https://www.oregonlive.com/travel/2013/10/us_forest_service_national_par.html [<https://perma.cc/4ZN2-29DL>] (explaining broad areas managed by Forest Service cannot be easily closed because they lack entry gates); Sylvie Yudin, *To Close or Not To Close: National Parks in the Face of Government Shutdowns*, GEO. ENV'T L. REV. (Jan. 24, 2019), <https://www.law.georgetown.edu/environmental-law-review/blog/to-close-or-not-to-close-national-parks-in-the-face-of-government-shutdowns/> [<https://perma.cc/39BM-GQTG>] (noting Trump administration, in contrast to previous administrations, kept national parks open during government shutdown).

⁸⁵ Britton L. Mace, Joshua D. Marquit & Scott C. Bates, *Visitor Assessment of the Mandatory Alternative Transportation System at Zion National Park*, 52 ENV'T MGMT. 1271, 1274 (2013).

National Park banned private traffic in Zion Canyon between March and November and required visitors to instead use a park shuttle.⁸⁶ In 2006, Arches National Park began to temporarily halt entry on heavy visitation days to ease overcrowding.⁸⁷ In 2018, Muir Woods National Monument established a mandatory reservation system for cars and a shuttle bus system for passengers on weekends.⁸⁸ Generally, however, land managers were reluctant to limit access due to deeply ingrained commitments to visitation and fear of a public backlash.

2. Restrictions Since the Pandemic

The COVID-19 pandemic triggered widespread, but not universal, closures of public lands. Federal, state, and local authorities closed public spaces to support shelter-in-place orders, and these emergency closures often included public lands.⁸⁹ However, a growing understanding of COVID-19 transmission and the effects of sheltering in place soon led to the realization that closures of public lands were “unsustainable, counterproductive, and even harmful.”⁹⁰ Because parks and other public lands could facilitate social distancing and promote general physical and mental health, they could be reopened to the

⁸⁶ *Id.* at 1275.

⁸⁷ K. Sophie Will, *We Analyzed a Year of Arches National Park Closure Data. Here's the Best Time To Visit*, SPECTRUM (June 8, 2021, 9:12 AM MT), <https://www.thespectrum.com/story/news/2021/06/08/here-best-days-and-times-visit-arches-national-park-utah/7499157002/> [<https://perma.cc/5H4M-GYYR>].

⁸⁸ Andrea Sachs, *National Parks and Forests Bring Back Reservation Systems To Control Crowds*, WASH. POST (Jan. 6, 2022, 12:00 PM), <https://www.washingtonpost.com/travel/2022/01/06/reservations-national-parks-forests/>.

⁸⁹ Sandy J. Slater, Richard W. Christiana & Jeannette Gustat, *Commentary, Recommendations for Keeping Parks and Green Space Accessible for Mental and Physical Health During COVID-19 and Other Pandemics*, PREVENTING CHRONIC DISEASE (July 9, 2020), https://www.cdc.gov/pcd/issues/2020/20_0204.htm [<https://perma.cc/34RF-PD4X>]; B. Derrick Taff et al., *US National Park Visitor Experiences During COVID-19: Data from Acadia, Glacier, Grand Teton, Shenandoah, and Yellowstone National Parks*, 38 PARKS STEWARDSHIP F. 145, 146 (2022) (noting most outdoor spaces in National Park System remained open during pandemic, but often with restrictions and visitor capacity limits); U.S. DEP'T OF THE INTERIOR OFF. OF INSPECTOR GEN., NO. 2020-CR-063, THE BUREAU OF LAND MANAGEMENT'S COVID-19 RESPONSE AT RECREATION MANAGEMENT AREAS 1-2 (2021) (noting BLM encouraged its state offices to follow state and local guidance in wake of pandemic and many BLM recreation areas remained open); *COVID-19 Closures*, CAL. DEP'T OF PARKS & RECREATION (May 22, 2020), https://web.archive.org/web/20200529023516/https://www.parks.ca.gov/?page_id=30355 (listing California state park closures and describing restrictions on activities and access).

⁹⁰ Zeynep Tufekci, *Keep the Parks Open*, ATLANTIC (Apr. 7, 2020), <https://www.theatlantic.com/health/archive/2020/04/closing-parks-ineffective-pandemic-theater/609580/> [<https://perma.cc/DC8G-CSRK>].

public.⁹¹ In urban areas, parks became critical spaces not only for promoting health but also for providing emergency shelter, food distribution, COVID-19 testing, and other essential services.⁹²

The pandemic nonetheless facilitated the adoption of capacity-control measures that land managers had previously hesitated to implement. The NPS frequently instituted such measures during the pandemic, and other federal, state, and local agencies did so as well. And while some measures were adopted as temporary responses or pilot projects, many have remained in place even as pandemic conditions eased.

Reservation requirements, combined with capacity limits, have been a common tool to address overcrowding. In response to the pandemic, the NPS adopted entry reservation systems it had long been contemplating at Rocky Mountain National Park and Yosemite National Park.⁹³ “[T]o help comply with visitor health and safety directives and [ensure] availability of parking,” the Forest Service established a reservation requirement in 2020 to enter a section of the El Yunque National Forest in Puerto Rico.⁹⁴ The agency adopted a similar requirement at the Brainard Lake Recreation Area in Colorado in 2021.⁹⁵ More recently, such requirements have continued or been expanded.⁹⁶ In 2022, Arches

⁹¹ *Id.* (discussing various benefits of going outside during pandemic, including low risk of catching COVID, improved physical health, and improved mental health).

⁹² NAT’L RECREATION & PARKS ASS’N, CORONAVIRUS (COVID-19) AND PARKS AND RECREATION: RESPONSE AND RECOVERY 5-8 (2021) (sharing multiple examples of local parks and recreation departments supporting and leading COVID-19 response efforts).

⁹³ Elisabeth Kwak-Hefferan, *8 Ways To Ease Overcrowding at Our National Parks*, 5280 (Sept. 2020), <https://www.5280.com/8-ways-to-ease-overcrowding-at-our-national-parks/> [<https://perma.cc/4C7V-EJ8Y>] (discussing pros and cons of various methods of easing overcrowding at parks, including reservation systems).

⁹⁴ Angel Hume, *How Much Does It Cost To Visit El Yunque?*, SWEATLODGERADIO.COM (Mar. 21, 2021), <https://www.sweatlodgeradio.com/how-much-does-it-cost-to-visit-el-yunque/> [<https://perma.cc/8PDL-E9GR>]; see also *El Yunque National Forest-Alerts & Notices*, FOREST SERV. (Sept. 11 2020), <https://web.archive.org/web/20201017005221/https://www.fs.usda.gov/alerts/elyunque/alerts-notices/?aid=61142>.

⁹⁵ John Meyer, *Reservations Will Be Required for Brainard Lake, Mount Evans Beginning in June*, DENVER POST (May 4, 2021, 1:29 PM), <https://www.denverpost.com/2021/05/04/reservations-will-be-required-for-brainard-lake-mount-evans-beginning-in-june/> [<https://perma.cc/DN2A-L736>].

⁹⁶ Yosemite National Park suspended its entry reservation requirement in 2023 and is evaluating visitation patterns as it decides how to proceed. Kurtis Alexander, *Yosemite Drops Booking System*, S.F. CHRON., Nov. 19, 2022, at A001 (reporting termination of reservation policy and intent to develop new crowd control plan). Extreme crowding at the park in summer 2023 has galvanized public support for reinstating reservation requirements. Kate Galbraith, *Yosemite Visitors Ask for Crowd-Control Measures*, S.F. CHRON., July 17, 2023, at A001 (reporting surge in requests for reservation system on Yosemite’s Facebook page). In 2024, the park will require reservations to drive into or through the park from 5 AM to 4 PM every day during peak season and on weekends and holidays during shoulder season. *Permits and Reservations*, NAT’L PARK SERV.,

National Park piloted a timed reservation system for vehicle entry during daylight hours between April and October.⁹⁷ The Forest Service piloted a similar program in 2022 in the Waterfall Corridor of the Columbia River Gorge to spread out visitation and encourage use of alternative modes of transportation.⁹⁸

In addition to reservations for entry, reservations are increasingly required for popular recreational experiences too. Federal agencies first turned to lotteries and permit requirements to ration whitewater rafting opportunities,⁹⁹ and Yosemite National Park began to require a permit to summit Half Dome in 2013.¹⁰⁰ Since the onset of the pandemic, permit or reservation requirements have expanded to other recreational activities, including: hiking the top section of Angels Landing in Zion National Park;¹⁰¹ hiking Old Rag Mountain in Shenandoah National Park;¹⁰² summiting Mt. Whitney in the Inyo National

<https://www.nps.gov/yose/planyourvisit/permitsandreservations.htm> (last updated Dec. 13, 2023).

⁹⁷ *Arches National Park Utah: Make Your Reservation*, NAT'L PARK SERV. <https://www.nps.gov/arch/planyourvisit/timed-entry-reservation.htm> [<https://perma.cc/9MWR-W35P>] (last updated Nov. 9, 2023) (allowing guests to book timed entry tickets); Allison Pohle, *National Parks Strain Under Visitor Influx*, WALL ST. J., June 14, 2021, at A3 (reporting 15% increase in visitors to Arches and resulting logistical problems); Melissa Yeager, *Want an Epic US National Park Experience in 2022? Mark These Dates in Your Calendar*, LONELY PLANET (Dec. 23, 2021), <https://web.archive.org/web/20211224144251/https://www.lonelyplanet.com/articles/us-national-parks-reservations-2022> (stating Arches would implement reservation system, with reservations costing \$2). In 2023, Arches retained its timed entry system, with minor modifications. *Arches Will Implement Updated Pilot Timed Entry System in 2023*, NAT'L PARK SERV. (Dec. 16, 2022), <https://www.nps.gov/arch/learn/news/news12162022.htm> [<https://perma.cc/B2FJ-LPUB>].

⁹⁸ *Agencies to Launch New Waterfall Corridor Timed Use Permits May 24*, FOREST SERV. (Apr. 15, 2022) [hereinafter *Waterfall Corridor Permits*], https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd1016304.pdf [<https://perma.cc/F6FW-ZMLZ>]. After the pilot ended in September 2022, visitation rebounded, leading to “[c]ongestion, frustration and long backups . . . through the fall even during inclement weather.” HDR, *EVALUATION STUDY: HISTORIC COLUMBIA RIVER HIGHWAY WATERFALL TIMED-USE PERMIT PILOT 33* (2022).

⁹⁹ COLE ET AL., *supra* note 82, at 25.

¹⁰⁰ U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., *YOSEMITE NATIONAL PARK: HALF DOME TRAIL STEWARDSHIP PLAN FINDING OF NO SIGNIFICANT IMPACT 1, 3* (2012), https://www.nps.gov/yose/learn/management/upload/Final_HD-FONSI-package.pdf [<https://perma.cc/HRX5-PZDC>]. Prior to adopting a permit system allowing 300 hikers per day, Yosemite had adopted an emergency measure that required permits for weekend users from 2010 to 2012. *Id.* at 1, 3.

¹⁰¹ Yeager, *supra* note 97.

¹⁰² *Shenandoah National Park Releases Details for Old Rag Pilot Project*, NAT'L PARK SERV. (Jan. 21, 2022), <https://www.nps.gov/shen/learn/news/2022-01-21-old-rag-day-use-ticket.htm> [<https://perma.cc/RMF8-ST6F>]; *Great Smoky Mountains: Visitor Experience Stewardship*, NAT'L PARK SERV., <https://www.nps.gov/grsm/learn/management/ves.htm> [<https://perma.cc/2NRA-EYFQ>] (last updated Jan. 18, 2024) (assessing visitation statistics under parking permit pilot).

Forest;¹⁰³ day-hiking in the Central Cascades Wilderness, an area managed by the Forest Service;¹⁰⁴ and hiking sandstone formations at The Wave, an area on the Utah-Arizona border administered by the BLM.¹⁰⁵ Several popular drives on federal lands now require a permit, including: Going-to-the-Sun Road in Glacier National Park;¹⁰⁶ Cadillac Summit Road in Acadia National Park;¹⁰⁷ the Forest Service's Mount Evans Scenic Byway in Colorado;¹⁰⁸ and the BLM's Red Rock Canyon Scenic Drive in Nevada.¹⁰⁹ Furthermore, while reservations have long been required for popular campgrounds, voluminous demand has made many of these campground reservations extremely difficult to obtain.¹¹⁰

Fees for entry and reservations also can limit access. Fees can relieve overcrowding by discouraging or shifting visitation.¹¹¹ However, fees can also disproportionately exclude low-income visitors.¹¹² Nonetheless, overall impacts on visitation may be modest when fees are low and make up a relatively small

¹⁰³ *Mount Whitney Lottery—Permit Reservations*, FOREST SERV., <https://www.fs.usda.gov/detail/inyo/passes-permits/recreation/?cid=stelprdb5150055> [<https://perma.cc/MFF2-K3VK>] (last visited Feb. 16, 2024).

¹⁰⁴ See generally FOREST SERV., CENTRAL CASCADES WILDERNESS PERMIT SYSTEM FREQUENTLY ASKED QUESTIONS (2022), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd997280.pdf [<https://perma.cc/V578-LKE6>].

¹⁰⁵ *Coyote Buttes North (The Wave)*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/recreation/permits-and-passes/lotteries-and-permit-systems/arizona/coyote-buttres-north> [<https://perma.cc/9K5Y-J496>] (last visited Feb. 16, 2024).

¹⁰⁶ Yeager, *supra* note 97; *Glacier National Park Vehicle Reservations*, NAT'L PARK SERV., <https://www.nps.gov/glac/planyourvisit/vehicle-reservations.htm> [<https://perma.cc/M3NT-UHL3>] (last updated Jan. 23, 2024).

¹⁰⁷ Sachs, *supra* note 88.

¹⁰⁸ *Mount Blue Sky Recreation Area & Scenic Byway*, FOREST SERV., <https://www.fs.usda.gov/recarea/arp/recarea/?recid=28508> [<https://perma.cc/VX2B-BA8U>] (last visited Feb. 16, 2024).

¹⁰⁹ *BLM Offers Online Passes, Timed Entry Reservations for Red Rock Canyon NCA on Recreation.gov*, BUREAU OF LAND MGMT. (Sept. 16, 2020), <https://www.blm.gov/press-release/blm-offers-online-passes-timed-entry-reservations-red-rock-canyon-nca-recreationgov?> [<https://perma.cc/P6GM-UAZA>] (announcing reservations for Red Rock Canyon starting October 2020); *Planning Your Visit to Red Rock Canyon National Conservation Area*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/national-conservation-lands/nevada/red-rock-canyon-national-conservation-area/planning-your-visit> [<https://perma.cc/9MM5-4HLQ>] (last visited Feb. 16, 2024) (requiring timed entry reservation between October 1 and May 31).

¹¹⁰ See *Campsites at National Parks 'Harder Than Getting Beyonce Tickets'*, SCI. FRIDAY, at 01:10 (May 13, 2022), <https://www.sciencefriday.com/segments/national-park-camping-reservations-inequities> [<https://perma.cc/7KQA-KF3L>] (noting odds of obtaining reservation for popular campground in 2021 during initial moments of availability was 0.3%).

¹¹¹ Suiwen (Sharon) Zou, *National Park Entrance Fee Increase: A Conceptual Framework*, 28 J. SUSTAINABLE TOURISM 2099, 2101 (2020) (“A sophisticatedly designed fee structure can relieve crowdedness and congestion during peak seasons . . . facilitate the provision of better services and influence visitor behaviors.” (citations omitted)).

¹¹² *Id.* at 2110.

fraction of total visitation costs.¹¹³ Generally speaking, transportation and lodging costs are much more substantial than entrance fees and thus have a greater effect on visitation.¹¹⁴

The NPS charges entrance fees at 105 of the 472 sites it manages or assists in managing.¹¹⁵ These fees range from \$20-\$35 per motor vehicle (which covers vehicle occupants) or \$10-\$20 per person (if not entering via vehicle).¹¹⁶ Entry fees are typically valid for one week.¹¹⁷ Where reservations are required for entry, nominal reservation fees (including service fees) are charged in addition to entrance fees.¹¹⁸ The FWS charges an entrance fee of \$3-\$5 per person or vehicle at “some 30” of the approximately 550 national wildlife refuges it manages.¹¹⁹ The Forest Service and BLM are not allowed to charge entry fees but may charge *recreation* fees at sites where specified amenities are available.¹²⁰

Federal land management agencies generally have not charged fees to curb visitation. The vast majority of federal lands charge no entry fees. When fees are charged, they are relatively modest, even at the most popular national park system sites. A 2017 proposal to more than double entrance fees at seventeen of the most visited national parks was abandoned after encountering overwhelming

¹¹³ *Id.* at 2101 (noting public generally supports imposition of fees, but not increases in fee amounts); David Ostergren, Frederic I. Solop & Kristi K. Hagen, *National Park Service Fees: Value for the Money or a Barrier to Visitation?*, 23 J. PARK RECREATION ADMIN. 18, 31-32 (2005) (suggesting total costs of visiting national parks, as opposed to entrance fees specifically, may be barrier to visitation).

¹¹⁴ Laurel Wamsley, *Fees To Enter Popular National Parks Would Skyrocket Under Interior Department Plan*, NPR (Oct. 25, 2017, 8:23 PM ET), <https://www.npr.org/sections/thetwo-way/2017/10/25/560118955/fees-to-enter-popular-national-parks-would-skyrocket-under-interior-department-p> [<https://perma.cc/2DRG-JP5M>] (quoting economist John Loomis noting fees haven't kept pace with inflation and that costs of transportation and lodging are greater deterrents to visitation).

¹¹⁵ *Entrance Fees by Park*, NAT'L PARK SERV., <https://www.nps.gov/aboutus/entrance-fee-prices.htm> [<https://perma.cc/VU9G-VFAG>] (last updated Jan. 25, 2024). An annual pass, which covers entry fees at national parks and refuges, and day use fees on other federal lands, costs \$80. *Plan Your Visit: Entrance Passes*, NAT'L PARK SERV., <https://www.nps.gov/planyourvisit/passes.htm> [<https://perma.cc/37K9-HRQF>] (last updated Jan. 1, 2024).

¹¹⁶ *Entrance Fees by Park*, *supra* note 115.

¹¹⁷ *Travel Tips*, NAT'L PARK SERV., <https://www.nps.gov/planyourvisit/travel-tips.htm> [<https://perma.cc/4C7G-EVRL>] (last updated Nov. 4, 2019).

¹¹⁸ Sachs, *supra* note 88.

¹¹⁹ *Federal Recreation Passes*, U.S. FISH & WILDLIFE SERV., <https://www.fws.gov/service/federal-recreational-lands-passes> [<https://perma.cc/R8JE-EDQF>] (last visited Feb. 16, 2024); Fischman, *supra* note 29, at 468 (describing organizational structure of refuge system); *see also* 50 C.F.R. § 25.55(b)(1) (2024) (authorizing single-visit permit fee not to exceed \$3 per person or \$7.50 per noncommercial vehicle).

¹²⁰ *See infra* notes 242-45 and accompanying text.

public opposition.¹²¹ The federal government dropped that proposal, which sought to raise revenue to address a maintenance backlog, out of fear that visitation—and revenue—would decline.¹²² Indeed, the NPS has taken a position against limiting use through permit pricing, explaining that its “authority for cost recovery does not support congestion pricing” but allows only the offsetting of administrative costs.¹²³

To accommodate more users, land managers can limit length of use.¹²⁴ Campgrounds on public lands commonly allow stays of up to fourteen consecutive days at a campsite.¹²⁵ Aside from camping reservations, however, land managers generally do not restrict visitation by limiting length of use. Timed-entry permit systems, for example, require visitors to enter during a specified time slot but allow them to stay as long as desired.¹²⁶ This is likely because enforcing time limits on visits would be difficult and unpopular.

D. *State & Local Lands*

Although this Article focuses on federal lands, state-owned lands also play a significant role in facilitating access to nature and public recreation. State-owned lands are frequently more accessible to the public than federal lands because of their widespread distribution and proximity to population centers.¹²⁷

¹²¹ See Wamsley, *supra* note 114 (reporting on proposed fee increases, budget cuts, and public reaction to proposal); Darryl Fears, *Interior Dept. Rethinks Big Increases in Park Fees*, WASH. POST, Apr. 4, 2018, at A3 (reporting Interior Department chose not to go through with price hikes after over 100,000 negative public comments were entered).

¹²² See Fears, *supra* note 121, at A3.

¹²³ YOSEMITE NAT'L PARK, HALF DOME TRAIL STEWARDSHIP PLAN—ENVIRONMENTAL ASSESSMENT PUBLIC COMMENT AND RESPONSE REPORT 12 (2012), reprinted in U.S. DEP'T OF THE INTERIOR, NAT'L PARK SERV., *supra* note 100, at 38, 49.

¹²⁴ MANNING & ANDERSON, *supra* note 67, at 22.

¹²⁵ See, e.g., *Camping on Public Lands*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/recreation/camping> [<https://perma.cc/8JZY-Y4VF>] (last visited Feb. 16, 2024) (noting “[c]amping stay limits vary by location but are generally about two weeks within a month period”); *How Long Can You Camp in a National Forest?*, BOONDOCKERS BIBLE (Sept. 16, 2023), <https://www.boondockersbible.com/knowledgebase/how-long-can-you-camp-in-a-national-forest/> [<https://perma.cc/95A4-H2AP>] (noting about half of National Forests and Grasslands limit camp stays to fourteen days); Sara Sheehy, *The Guide to State Park Reservations in All 50 States*, CAMPENDIUM (Mar. 31, 2023), <https://go.campendium.com/state-park-camping-reservations/> [<https://perma.cc/RY38-592Q>] (listing maximum length of stay for state park systems).

¹²⁶ See, e.g., *Waterfall Corridor Permits*, *supra* note 98 (“Once you arrive, you can stay as long as you like.”); *Are You Visiting Arches National Park Between April 3 & October 3, 2022?*, DISCOVERMOAB, <https://www.discovermoab.com/wp-content/uploads/2022/03/Arches-Timed-Entry-Info.pdf> [<https://perma.cc/CTW8-4P2B>] (last visited Feb. 16, 2024) (noting reservations have no maximum time limit).

¹²⁷ Steven M. Davis, *Preservation, Resource Extraction, and Recreation on Public Lands: A View from the States*, 48 NAT. RES. J. 303, 343 (2008) (noting state public lands are far more frequently visited than federal lands); MARGARET WALLS, PARKS AND RECREATION IN THE

State-owned lands comprise over 200 million acres, less than one-third the acreage of federally owned lands.¹²⁸ The majority of state-owned land—nearly 150 million acres—consists of trust lands dedicated to generating revenue for public schools and other public institutions.¹²⁹ Mindful of their fiduciary duties, state land managers traditionally promoted intensive resource extraction on trust lands to maximize revenue generation.¹³⁰ However, courts have sometimes recognized that a management approach that promotes recreation, aesthetic values, open space, and habitat may be consistent with trust obligations as well.¹³¹

Public access concentrates on the minority of state-owned lands not held in trust. These lands include some 14 million acres in state parks, 2.7 million acres in state natural areas, 19.8 million acres in state forests, and 19.1 million acres in state wildlife management areas geared toward game production or conservation.¹³² Compared to national parks, state parks are more oriented toward industrial tourism and revenue generation, and devote less attention to conservation and protecting ecological resources.¹³³ State parks are also more likely to have golf courses, swimming pools, and other developed recreational amenities.¹³⁴ Although the 8,000 plus state parks collectively comprise a small

UNITED STATES: STATE PARK SYSTEMS 3 (2009) (noting significant state park acreage in Northeastern states).

¹²⁸ Davis, *supra* note 127, at 303, 304 (noting federal lands are roughly 660 million acres while state lands total 200 million acres).

¹²⁹ See *id.* at 307 (reporting three-fourths of state-owned lands are in trusts); Uma Outka, *State Lands in Modern Public Land Law*, 36 STAN. ENV'T L.J. 147, 178 (describing origin of state land grants and their purpose “for the benefit of schools and other public institutions, with conditions on their use and management”).

¹³⁰ Outka, *supra* note 129, at 182-83 (“It would be difficult for land managers to show that long-term preservation justifies forgoing immediate income absent a clear and direct promise of economic returns in the future.”).

¹³¹ *Branson Sch. Dist. v. Romer*, 161 F.3d 619, 638 (10th Cir. 1998) (upholding amendment to Colorado Constitution changing standards for managing state school lands); *Ebey v. Avoyelles Par. Sch. Bd.*, 03-765 (La. App. 3 Cir. 12/17/03), 861 So. 2d 910, 919-20 (holding school board “may legitimately include a concern for clean air and water, species preservation, family recreation activities as well as providing consistent income for the support of public education” in managing trust lands).

¹³² Davis, *supra* note 127, at 307; see WALLS, *supra* note 127, at 1 (noting state parks “serve two and a half times as many visitors as the National Park System with only 16 percent of the acreage”).

¹³³ See Davis, *supra* note 127, at 333 (“The primary mission of state parks, as defined by one commentator, is to provide ‘resource-based outdoor recreation opportunities to the public at modest cost.’”).

¹³⁴ See *id.* (“[I]t is no longer exceptional to find state parks with golf courses, swimming pools, resorts, marinas, conference centers, ski facilities, hundreds of improved and electrified campsites, and, of course, many miles of access roads to reach all these amenities.”).

fraction of National Park System acreage, they host over 800 million visits per year, more than double the number of NPS visits.¹³⁵

Mirroring the trends on federal lands, visitation at state parks has risen over the last few decades and will likely continue to grow.¹³⁶ Many state parks witnessed record levels of visitation after COVID-19 related closures were lifted.¹³⁷ In response to the high demand, some state and local parks now require or encourage advance reservations for access or parking. For example, popular state parks in Texas have adopted capacity limits, and the state advises visitors to purchase day passes in advance to guarantee access.¹³⁸ New Hampshire adopted a similar reservation system at the onset of the pandemic and has retained it to limit capacity at its state parks.¹³⁹ Several state parks in Hawaii now require nonresident visitors to make advance reservations.¹⁴⁰ Other state and local parks faced with overcrowding require parking reservations during the high season, on weekends, or even year-round.¹⁴¹

¹³⁵ Jordan W. Smith, Emily J. Wilkins & Yu-Fai Leung, *Attendance Trends Threaten Future Operations of America's State Park Systems*, 116 PNAS 12775, 12775 (2019).

¹³⁶ *Id.* at 12778-79 (predicting increased visitation as climate change lengthens peak visitation season).

¹³⁷ Erin E. Williams, *A Pivotal Period for State Parks: Century-Old Systems Face Funding Shortfalls, Climate Crises and More*, WASH. POST, Apr. 10, 2022, at F4 (noting New York, Texas, and Oregon reported record state park visitation in 2021).

¹³⁸ *Park Reservation Information, Day Pass FAQs*, TEX. PARKS & WILDLIFE, <https://tpwd.texas.gov/state-parks/park-reservation-information/day-pass-faqs> [<https://perma.cc/83UQ-7R3Z>] (last visited Feb. 16, 2024).

¹³⁹ *Day-Use Reservations*, N.H. STATE PARKS, <https://www.nhstateparks.org/planning/day-use-reservations> (last visited Feb. 16, 2024); Kristen Carosa, *Visitors to State Parks in New Hampshire Encouraged To Make Reservations Online*, WMUR (Sept. 30, 2020, 12:04 AM), <https://www.wmur.com/article/visitors-to-state-parks-in-new-hampshire-encouraged-to-make-reservations-online/34215183> [<https://perma.cc/G429-UPXF>].

¹⁴⁰ Zoe Dym, *‘Āao Valley Becomes 4th State Park to Require Reservations for Tourists*, HAW. PUB. RADIO (Apr. 21, 2023, 11:22 AM HST), <https://www.hawaiipublicradio.org/local-news/2023-04-21/iao-valley-becomes-4th-state-park-to-require-reservations-for-tourists> [<https://perma.cc/7DN6-99AH>].

¹⁴¹ *See, e.g., Timed-Vehicle Reservation System*, COLO. PARKS & WILDLIFE, <https://cpw.state.co.us/placestogo/parks/EldoradoCanyon/Pages/vehiclereservations.aspx> [<https://perma.cc/4DWS-BALF>] (last visited Feb. 16, 2024) (requiring vehicle reservations at Colorado state park on summer weekends); *Mountain Bridge State Park, Reservations*, S.C. ST. PARKS, <https://reserve.southcarolinaparks.com/mountain-bridge> [<https://perma.cc/U8NW-CJYD>] (last visited Feb. 16, 2024) (requiring parking reservations at South Carolina state park on weekends); *Correction: Hidden Falls Parking Reservation System Is Now Live, No Fees or Reservations Required Mondays Through Thursdays*, CNTY. OF PLACER (Aug. 28, 2017), <https://www.placer.ca.gov/619/Hidden-Falls-parking-reservations> [<https://perma.cc/9P5X-XAWS>] (requiring parking reservations at Placer County, California park on weekends); *Uvas Canyon County Park*, SANTA CLARA CNTY. PARKS, <https://parks.sccgov.org/santa-clara-county-parks/uvas-canyon-county-park> (last visited Feb. 16, 2024) (requiring parking reservations in Uvas Canyon County Park, California).

II. LAWS RELEVANT TO ACCESS

Restrictions on access are often adopted by land managers at individual management units in a seemingly ad hoc manner. A national park might temporarily halt entry on busy weekends, or a national forest may suddenly close as a wildfire approaches. Yet as this Part explains, land managers do not have unfettered discretion to limit access. Rather, they are governed by a network of legal authorities that structures their decision making and cabins their discretion. So-called organic acts provide overarching direction to land managers in their respective agencies to manage public lands for conservation purposes or for multiple use. Other substantive statutes, such as the Endangered Species Act¹⁴² and Federal Lands Recreation Enhancement Act,¹⁴³ further constrain what agencies may do. Finally, procedural requirements in the National Environmental Policy Act¹⁴⁴ (“NEPA”) and internal agency regulations govern how agencies make decisions to limit visitor capacity, restrict uses, close off access, and otherwise manage the land. Ultimately, federal land management agencies enjoy fairly broad discretion to set recreational access policies within the bounds established by their governing authorities.

A. *Organic Statutes and General Statutes*

The Property Clause grants the federal government expansive authority over federal lands, including the authority to keep people out.¹⁴⁵ However, through most of the 1800s, the federal government did relatively little to regulate the use of federal lands for recreation, resource extraction, or other purposes.¹⁴⁶ That hands-off approach has since given way to a system of lightly regulated access.¹⁴⁷ On BLM lands, for example, “[t]he use, occupancy, or development of any portion of the public lands contrary to any regulation . . . is unlawful and prohibited.”¹⁴⁸ Entry onto public lands for recreation typically occurs under a

¹⁴² 16 U.S.C. §§ 1531-44.

¹⁴³ 16 U.S.C. §§ 6801-14.

¹⁴⁴ 42 U.S.C. §§ 4321-70.

¹⁴⁵ U.S. CONST. art. IV, § 3, cl. 2; *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (“[W]hile the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved, we have repeatedly observed that ‘[t]he power over the public land thus entrusted to Congress is without limitations.’” (quoting *United States v. San Francisco*, 310 U.S. 16, 29 (1940))); GEORGE C. COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 15:3 (2d ed. 2015) (noting “[s]ince the dawning of the Age of Conservation” courts and agencies shifted toward “regard[ing] any unauthorized use, occupancy, or development of the public lands as a trespass”).

¹⁴⁶ COGGINS & GLICKSMAN, *supra* note 145, at § 15:3 (“Congress tolerated the unpermitted use of federal lands for mining, grazing, logging, and other uses for most of the nineteenth century [A]cquiescence in those activities established ‘implied licenses’ in the trespassing beneficiaries to continue them.”).

¹⁴⁷ *See id.* (“Trespassers may be liable for the administrative costs incurred by the United States as a consequence of such trespass and the fair market rental value of the lands”).

¹⁴⁸ 43 U.S.C. § 1733(g).

revocable license.¹⁴⁹ The public has no right of access, but the BLM and Forest Service have traditionally recognized an implied license “allowing the public to use lands within the public domain for general recreational purposes without holding a written, formal permit, except as to activities which have been specifically regulated.”¹⁵⁰

The statutes governing how agencies manage access to federal lands include organic acts, the Endangered Species Act, and NEPA. A comparison of the laws and policies governing the NPS with those pertaining to the Forest Service illustrates the differences between the dominant-use and multiple-use paradigms.¹⁵¹

In public land law, an organic act is “a charter for a network of public lands.”¹⁵² An organic act establishes an agency’s management authority and the principles and standards that apply to a specific category of public lands.¹⁵³ The NPS Organic Act declares that the overarching purpose governing NPS lands is “to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”¹⁵⁴ This mandate applies to all units administered by the NPS, which include not just national parks, but also national recreation areas, national historic landmarks, and units having other designations.¹⁵⁵ Within this general mandate, the agency enjoys broad discretion.¹⁵⁶

The NPS mandate, however, does not explicitly resolve potential conflicts between its core objectives of conservation and enjoyment. National parks are potentially subject to a “tragedy of the commons,” where open access to limited

¹⁴⁹ *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1283 (9th Cir. 1980); COGGINS & GLICKSMAN, *supra* note 145, at § 15:4.

¹⁵⁰ *Curtis-Nevada Mines*, 611 F.2d at 1284.

¹⁵¹ The BLM is subject to a multiple-use mandate similar to that governing the Forest Service. *See* 43 U.S.C. §§ 1701(a)(8), 1712(c) (prescribing broad values and considerations to be employed by management agency); *see also* Keiter, *Emerging*, *supra* note 12, at 102-03 (“In 1976, Congress enacted the Federal Land Policy and Management Act (FLPMA), giving the BLM a new multiple use management standard that included recreation, wildlife, and wilderness, as well as new resource planning responsibilities.”).

¹⁵² *See* Fischman, *supra* note 29, at 503 (“This . . . specialized sense of ‘organic act’ derives from the same root as that of the word ‘organize.’”).

¹⁵³ *Id.* at 503-04 (noting lineage of organic acts in natural resource law, beginning with “1897 statute establishing uniform management and administration of forest reserves”); KLEIN ET AL., *supra* note 41, at 103 (describing organic acts’ guiding principles for agencies).

¹⁵⁴ 54 U.S.C. § 100101(a).

¹⁵⁵ 54 U.S.C. § 100101(b)(1)(A) (“[T]he National Park System, which began with establishment of Yellowstone National Park in 1872, has since grown to include superlative natural, historic, and recreation areas”); *see* Keiter, *Emerging*, *supra* note 12, at 115 (noting NPS’s 1960s “establish[ment of] different managerial standards governing” various categories, which was overridden by 1970 amendments to Organic Act).

¹⁵⁶ *See* Keiter, *Emerging*, *supra* note 12, at 115.

resources can ultimately destroy the resources and values visitors seek.¹⁵⁷ Recognizing this problem, NPS policy provides that “when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant.”¹⁵⁸ In addition, managers must ensure that recreational uses “do not cause unacceptable impacts on park resources or values.”¹⁵⁹ Consistent with these policies, courts also have held that the NPS Organic Act prioritizes conservation over visitor enjoyment.¹⁶⁰ At the same time, NPS policy urges that restrictions on recreation “be limited to the minimum necessary to protect park resources and values and promote visitor safety and enjoyment.”¹⁶¹

The Forest Service’s organic legislation requires the agency to administer national forest lands for multiple purposes: “outdoor recreation, range, timber, watershed, and wildlife and fish.”¹⁶² Although this mandate identifies recreation as one of the Forest Service’s primary objectives, the agency enjoys broad discretion over how it manages recreation and public access.¹⁶³ Indeed, the multiple-use mandate leaves the Forest Service even broader discretion than the NPS. Courts have held that the Forest Service is not required to promote or allow any particular use, including recreation, in any particular area.¹⁶⁴

In addition to setting out overarching system objectives, the organic statutes establish a decision-making framework that prescribes planning processes each agency must follow.¹⁶⁵ The agencies prepare a general planning document, akin

¹⁵⁷ Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1245 (1968) (noting “there is only one Yosemite Valley—whereas population seems to grow without limit,” and advising “we must soon cease to treat the parks as commons or they will be of no value to anyone”).

¹⁵⁸ NAT’L PARK SERV., MANAGEMENT POLICIES 2006, at 11, § 1.4.3.1 (2006) [hereinafter NPS MANAGEMENT POLICIES].

¹⁵⁹ *Id.* at 101, § 8.2.2.1.

¹⁶⁰ Keiter, *Emerging*, *supra* note 12, at 117 (citing, *inter alia*, Bicycle Trails Council of Marin, 82 F.3d 1445, 1453 (9th Cir. 1996) and Greater Yellowstone Coal. v. Kempthorne, 577 F. Supp. 2d 183, 192 (D.D.C. 2008)) (The Organic Act provides “resource conservation [has] priority over visitor enjoyment when park resources might be impaired,” even in event impairment is as narrow as mountain biking trails).

¹⁶¹ NPS MANAGEMENT POLICIES, *supra* note 158, at 100, § 8.2.

¹⁶² 16 U.S.C. § 528.

¹⁶³ Wyoming v. USDA, 661 F.3d 1209, 1235 (10th Cir. 2011) (upholding Forest Service’s Roadless Rule, noting organic act and Multiple-Use Sustained-Yield Act (“MUSYA”) gave “Forest Service broad discretion to regulate [Forest Service] land for a wide variety of purposes”); Perkins v. Bergland, 608 F.2d 803, 806-07 (9th Cir. 1979) (noting same acts’ direction to agency “can hardly be considered concrete . . . [r]ather, it is language which ‘breathe(s) discretion at every pore’” (quoting Strickland v. Morton, 519 F.2d 467, 469 (9th Cir. 1975))).

¹⁶⁴ Wyoming v. USDA, 661 F.3d at 1235 (noting MUSYA expanded Forest Service’s discretion even beyond that granted by Organic Act).

¹⁶⁵ Fischman, *supra* note 29, at 511 (noting organic acts’ comprehensive planning “provides a framework within which individual unit administrators may make management decisions and segregate particular uses to appropriate zones”).

to a general plan in zoning law, that sets out policies, goals, and standards to guide individual land-use decisions. For each national park, the NPS must develop a general management plan (“park plan”) that provides management prescriptions, including desired resource conditions and visitor experiences, for different parts of a park.¹⁶⁶ The park plan sets out broad policy determinations but does not include detailed site-specific decisions or analyses.¹⁶⁷ For each national forest, the Forest Service similarly must prepare a land and resource management plan (“forest plan”) that provides long-term direction for managing forest uses and resources.¹⁶⁸ Site-specific decisions authorizing on-the-ground actions must be consistent with the forest plan.¹⁶⁹

Further planning processes focus on managing visitor use. For each national park, a visitor use management plan sets out goals and objectives for managing visitor use, detailed management strategies, and implementation protocols.¹⁷⁰ Such a plan may identify visitor use issues and specify how particular activities, trails, and facilities will be managed.¹⁷¹ The Interagency Visitor Use Management Framework, developed jointly by the federal land management agencies, provides guidelines to facilitate the incorporation of visitor use management into agency planning processes.¹⁷²

In addition, the NPS Organic Act requires each park plan to identify and include commitments to implement visitor carrying capacities, reflecting the potential for unchecked public access to damage resources and undermine visitor experiences.¹⁷³ However, in many instances the NPS has ignored this requirement or mechanically estimated capacity based on existing facilities.¹⁷⁴

¹⁶⁶ 54 U.S.C. § 100502 (outlining requirement for plan to include (1) preservation measures, (2) indications of developments, (3) visitor capacities, and (4) potential boundary modifications).

¹⁶⁷ INTERAGENCY VISITOR USE MGMT. COUNCIL, VISITOR USE MANAGEMENT FRAMEWORK 71 (1st ed. 2016) [hereinafter VISITOR USE MANAGEMENT FRAMEWORK].

¹⁶⁸ 16 U.S.C. § 1604.

¹⁶⁹ 16 U.S.C. § 1604(i).

¹⁷⁰ VISITOR USE MANAGEMENT FRAMEWORK, *supra* note 167, at 72.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ 54 U.S.C. §§ 100502(3)-(4).

¹⁷⁴ See Press Release, Pub. Emps. for Env’t Resp., Park Service Shuns Planning Law Despite Obvious Need (Sept. 7, 2021), <https://peer.org/park-service-shuns-planning-law-despite-obvious-need/> [<https://perma.cc/AT7E-M9NF>] (“Without planning, the Park Service is like a rudderless tanker tossed about by forces it does not seek to understand, let alone chart . . .” (internal quotations omitted)); Marilyn Hof & David W. Lime, *Visitor Experience and Resource Protection Framework in the National Park System: Rationale, Current Status, and Future Direction*, in PROCEEDINGS-LIMITS OF ACCEPTABLE CHANGE AND RELATED PLANNING PROCESSES: PROGRESS AND FUTURE DIRECTIONS 29, 29 (1997) (noting park plans historically either “establish[ed] a facility capacity based on the sizes of existing [developments]” or “predict[ed], based on visitation projections, the point in time or visitation level at which facilities would be considered ‘full’ or ‘crowded,’” both without any consideration of impacts on park resources).

More recently, the federal government has developed a more comprehensive approach that assesses “the maximum amount and type of use [an] area can accommodate while still achieving desired conditions” and identifies steps to ensure use remains within that capacity.¹⁷⁵ Carrying capacity decisions must incorporate “the best available natural and social science information,” as well as other relevant considerations, and these decisions must be based on a “comprehensive administrative record.”¹⁷⁶ Applying this approach, Arches National Park adopted smaller parking lots, prohibitions on overflow parking, and day-use permit requirements in some areas.¹⁷⁷ Nevertheless, visitor carrying capacity requirements remain largely unadopted by park plans, many of which are out of date.¹⁷⁸

The Forest Service is not subject to an analogous visitor capacity mandate.¹⁷⁹ However, Forest Service planning regulations require forest plans to monitor visitor use at each national forest.¹⁸⁰ In addition, forest plans must provide for “[s]ustainable recreation; including recreation settings, opportunities, and access; and scenic character.”¹⁸¹ In wilderness areas within national forests, the mandate to preserve wilderness character while providing opportunities for solitude suggests an obligation to implement visitor capacities in certain circumstances.¹⁸² Accordingly, Forest Service policy calls for “limiting and distribution of visitor use according to periodic estimates of capacity” in wilderness areas.¹⁸³ Furthermore, in authorizing operations of outfitters and

¹⁷⁵ VISITOR USE MANAGEMENT FRAMEWORK, *supra* note 167, at 50. The Interagency Visitor Use Management Council’s Visitor Capacity Guidebook, developed in 2019, offers guidance to the NPS and other agencies in carrying out these tasks. *See generally* INTERAGENCY VISITOR USE MGMT. COUNCIL, VISITOR CAPACITY GUIDEBOOK (2019) [hereinafter VISITOR CAPACITY GUIDEBOOK].

¹⁷⁶ NPS MANAGEMENT POLICIES, *supra* note 158, at 100, § 8.2.1.

¹⁷⁷ MANNING & ANDERSON, *supra* note 67, at 73-75.

¹⁷⁸ Pub. Emps. for Env’t Resp., *supra* note 174; Press Release, Pub. Emps. for Env’t Resp., National Parks Punt on Overcrowding (July 11, 2016), <https://peer.org/national-parks-punt-on-overcrowding/> [<https://perma.cc/7MWQ-B8EY>] (reporting only 7 of 108 NPS units reviewed had established any carrying capacities).

¹⁷⁹ *See* DAVID COLE & THOMAS CARLSON, NUMERICAL VISITOR CAPACITY: A GUIDE TO ITS USE IN WILDERNESS I (2010) (“Forest Service wilderness management regulations and policy do not require the establishment of a numerical visitor capacity, as long as visitor use can be managed in such a manner that wilderness character is not impaired by excessive recreational use.”).

¹⁸⁰ 36 C.F.R. § 219.12(a)(5) (2024). The agency’s national program of visitor use monitoring estimates the volume and characteristics of recreation visitation in the national forests. 2020 NVUM, *supra* note 60, at 5.

¹⁸¹ 36 C.F.R. § 219.10(b)(1)(i) (2024). Sustainable recreation is defined in terms of “recreation settings and opportunities on the National Forest System that [are] ecologically, economically, and socially sustainable for present and future generations.” 36 C.F.R. § 219.19 (2024).

¹⁸² *See* COLE & CARLSON, *supra* note 179, at 12.

¹⁸³ FOREST SERV., FSM2300, FOREST SERVICE MANUAL 22 (2007).

guides, Forest Service policy requires a “resource capacity analysis” that estimates allowable amounts and types of use.¹⁸⁴ Thus, even in the absence of an explicit mandate, identifying and implementing visitor carrying capacities can be critical to fulfilling legal obligations and achieving desired conditions on Forest Service lands.¹⁸⁵

Beyond the organic statutes and their implementing regulations, generally applicable laws also shape federal land management and access policies. Two of the most notable statutes in this regard are the Endangered Species Act and NEPA.

Section 9 of the Endangered Species Act generally forbids the take—i.e., harming—of threatened and endangered species.¹⁸⁶ In addition, Section 7 of the statute requires federal agencies to ensure that their actions do not jeopardize threatened or endangered species or adversely modify such species’ critical habitat.¹⁸⁷ To accomplish this, federal agencies must participate in a consultation process to assess the potential effects of their actions on protected species.¹⁸⁸ Land management agencies frequently undertake actions affecting protected species or their habitats and thus must account for these effects in their public access policies. In various locations, land managers implement seasonal closures to protect threatened and endangered species during mating or nesting seasons.¹⁸⁹ At Cape Hatteras National Seashore, for example, the NPS restricts off-road vehicle use to protect nesting sites of protected birds and sea turtles.¹⁹⁰

NEPA requires federal agencies to prepare an environmental impact statement for major federal actions that significantly affect the quality of the human environment.¹⁹¹ Agencies may first prepare an environmental assessment

¹⁸⁴ FOREST SERV., FSH2709.11, FOREST SERVICE HANDBOOK 2 (2008); COLE & CARLSON, *supra* note 179, at 2 (discussing approaches taken by Forest Service in conducting visitor capacity and use management).

¹⁸⁵ VISITOR CAPACITY GUIDEBOOK, *supra* note 175, at 16 (discussing how managing visitor capacity is essential to maintaining desirable conditions on Forest Service land, including preservation of solitude).

¹⁸⁶ 16 U.S.C. § 1538.

¹⁸⁷ 16 U.S.C. § 1536(a)(2).

¹⁸⁸ 16 U.S.C. § 1536(a)-(c).

¹⁸⁹ Shelby Scott, *U.S. National Parks Begin Seasonal Closures To Protect Breeding Wildlife*, OUTSIDER (Mar. 6, 2022, 5:45 PM), <https://outsider.com/outdoors/us-national-parks-begin-seasonal-closures-protect-breeding-wildlife/> [https://perma.cc/D5Z5-4MSX] (reporting on NPS closures to protect breeding wildlife, such as peregrine falcons in Maine and harbor seals in California); NAT’L PARK SERV., 2022 GUIDE TO SEASONAL RAPTOR CLOSURES (2022), <https://www.nps.gov/zion/planyourvisit/upload/2022-Climbers-Guide-to-Seasonal-Raptor-Closures.pdf> [https://perma.cc/V844-MWQY] (describing seasonal climbing closures at Zion to protect raptors).

¹⁹⁰ Steven J. Dundas, Roger H. von Haefen & Carol Mansfield, *Recreation Costs of Endangered Species Protection: Evidence from Cape Hatteras National Seashore*, 33 MARINE RES. ECON. 1, 5-6 (2018) (discussing history of off-road vehicle use at Cape Hatteras and process by which NPS banned use in 2012).

¹⁹¹ 42 U.S.C. § 4332(C).

to evaluate whether environmental impacts will be significant.¹⁹² In the course of identifying and analyzing impacts, agencies must solicit and respond to public comments.¹⁹³ NEPA imposes no substantive requirements, however, and agencies are generally free to proceed with environmentally detrimental courses of action once they have fulfilled NEPA's procedural obligations.¹⁹⁴

Land management agencies prepare NEPA documentation when they issue general management plans and when they make site-specific decisions.¹⁹⁵ Moreover, NEPA compliance can serve as an important mechanism for considering public input and analyzing visitor management options as agencies make decisions regarding visitor access. For example, Glacier National Park prepared an environmental assessment to analyze options for responding to unprecedented visitation levels and congestion along the Going-to-the-Sun Road Corridor.¹⁹⁶ Based on this assessment, the park adopted a suite of measures in 2019 that included a parking permit system, enhanced public transportation access, and adaptive management strategies to be implemented at specified visitation levels.¹⁹⁷ In response to public comment, the NPS explained it was not ready to adopt a reservation system for entering the park but could consider that option if initial measures were unsuccessful in managing visitation.¹⁹⁸ The park subsequently responded to worsening congestion with a pilot program to require reservations for Going-to-the-Sun Road beginning in 2021 and later expanded the program to other sections of the park in 2023.¹⁹⁹

¹⁹² 42 U.S.C. § 4336(b)(2); 40 C.F.R. § 1501.5 (2024).

¹⁹³ 40 C.F.R. §§ 1503.1-1503.4 (2024) (authorizing public comment on environmental impact statements); 40 C.F.R. § 1501.5(e) (2024) (requiring federal agencies to involve public in environmental assessments).

¹⁹⁴ *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 558 (1978) (holding courts are not free to impose restrictions on agency procedure beyond procedural requirements imposed by statutes such as NEPA and APA); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (holding NEPA does not impose substantive duty on federal agencies to mitigate adverse environmental effects).

¹⁹⁵ KLEIN ET AL., *supra* note 41, at 121.

¹⁹⁶ NAT'L PARK SERV., GOING-TO-THE-SUN ROAD CORRIDOR MANAGEMENT PLAN ENVIRONMENTAL ASSESSMENT (2019) [hereinafter GOING-TO-THE-SUN ASSESSMENT].

¹⁹⁷ NAT'L PARK SERV., FINDING OF NO SIGNIFICANT IMPACT: GOING-TO-THE-SUN ROAD CORRIDOR MANAGEMENT PLAN/ENVIRONMENTAL ASSESSMENT 1-3 (2021) [hereinafter GOING-TO-THE-SUN PLAN] (discussing how NPS's management plan for Corridor did not have significant impact on Corridor or its wildlife); *see also* GOING-TO-THE-SUN ASSESSMENT, *supra* note 196, App. D (discussing threshold levels and adaptive management actions).

¹⁹⁸ GOING-TO-THE-SUN PLAN, *supra* note 197, at 51.

¹⁹⁹ Press Release, Nat'l Park Serv., Glacier National Park Announces Plans for 2023 Reservations (Dec. 16, 2022), <https://www.nps.gov/glac/learn/news/glacier-national-park-announces-plans-for-2023-reservations.htm> [https://perma.cc/T93R-S857]; Allison Pohle, *Glacier, Rocky Mountain, Arches National Parks Plan More Reservations*, WALL ST. J. (Dec. 16, 2022, 4:24 PM ET), <https://www.wsj.com/articles/national-parks-reservations-glacier-rocky-mountain-arches-11671214631>.

B. *Laws and Policies on Closure Orders*

A distinct body of agency regulations and policies governs closure orders or directives limiting use of public lands.

1. NPS

Under NPS regulations, park superintendents have the authority to “close all or a portion of a park area to all public use or to a specific use,” to designate areas for a specific use, and to impose conditions on a specific use.²⁰⁰ First, the park superintendent must find that “such action is necessary for the maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, aid to scientific research, implementation of management responsibilities, equitable allocation and use of facilities, or the avoidance of conflict among visitor use activities.”²⁰¹ The agency must then notify the public of adopted restrictions and closures through posted signs, newspaper publication, electronic media, or other appropriate means.²⁰² Except in an emergency, the NPS must justify any closure or restriction in writing.²⁰³ If a closure or a restriction “will result in a significant alteration in the public use pattern of the park, adversely affect the park’s natural, aesthetic, scenic or cultural values, require a long-term or significant modification in the resource management objectives of the unit, or is of a highly controversial nature,” the agency must proceed via rulemaking.²⁰⁴ In addition to these systemwide regulations, regulations specific to individual parks may provide further direction.²⁰⁵ In determining whether restrictions are appropriate, courts have generally recognized the NPS’s broad discretion to prohibit or limit recreational activities to preserve park resources.²⁰⁶

NPS Management Policies offer additional guidance for managing recreational use. The Policies make it clear that closure is one of several possible responses to heavy visitation. Other identified techniques for avoiding adverse impacts on park resources or visitor experiences include separating conflicting uses, “hardening” sites, modifying maintenance practices, instituting information and education programs, establishing permit and reservation

²⁰⁰ 36 C.F.R. § 1.5(a)(1) (2024).

²⁰¹ *Id.*

²⁰² 36 C.F.R. § 1.7 (2024).

²⁰³ 36 C.F.R. § 1.5(c) (2024).

²⁰⁴ 36 C.F.R. § 1.5(b) (2024).

²⁰⁵ *See, e.g.*, 36 C.F.R. § 7.33(b)(3) (2024) (authorizing temporary closure of trails and lake surfaces in Voyageurs National Park). Park-specific rules, including closure orders, are compiled in the Superintendent’s Compendium for each park. *See, e.g.*, NAT’L PARK SERV., SUPERINTENDENT’S COMPENDIUM: YELLOWSTONE NATIONAL PARK 5 (2023), <https://www.nps.gov/yell/learn/management/upload/Yellowstone-Superintendent-s-Compendium-Signed-December-14-2023.pdf> [<https://perma.cc/4UTN-K5TD>].

²⁰⁶ COGGINS & GLICKSMAN, *supra* note 145, § 23:3 (discussing NPS’s twin aims of preservation and recreation, and how various courts have interpreted directives balancing those aims).

systems, and restricting use.²⁰⁷ The Policies further advise that the adoption of such measures be based on available scientific research and data, and that any restrictions be no greater than necessary to achieve legitimate purposes.²⁰⁸

2. Forest Service

Forest Service lands, roads, and trails are generally open to the public.²⁰⁹ While special use authorization is required to engage in certain activities on Forest Service lands, no such authorization is needed for “noncommercial recreational activities such as camping, picnicking, hiking, fishing, boating, hunting, and horseback riding, or for noncommercial activities including the expression of views.”²¹⁰

The Forest Service has broad discretion over closure decisions.²¹¹ The Chief of the Forest Service, regional foresters, and supervisors of individual national forests may all issue orders closing or restricting areas, roads, and trails within national forests.²¹² Closures may be ordered for the protection of: threatened or endangered species; special biological communities; historical, archaeological, geological, or paleontological features; scientific experiments or investigations; public health or safety; property; and the privacy of tribal activities for traditional and cultural purposes.²¹³ Forest Service regulations do not require agency officials to prepare a supporting record or decision memo when issuing a closure order.²¹⁴ Nor do they require advance notice to the public or an opportunity for public comment.²¹⁵ With respect to motor vehicle use, although the designation of roads, trails, and areas for such use (or nonuse) is subject to public notice and comment, the Forest Service may issue emergency closure

²⁰⁷ NPS MANAGEMENT POLICIES, *supra* note 158, at 102, § 8.2.2.1 (listing various techniques park superintendents can utilize to minimize adverse impacts on both park resources and park visitors). Hardening refers to the development of features that enable a site to withstand more intense levels of visitation. ANDERSON ET AL., *supra* note 79, at 44 (“Site strengthening or hardening increases site durability so that previous levels and types of visitor use may be sustained, or visitor use can be increased and/or diversified.”).

²⁰⁸ NPS MANAGEMENT POLICIES, *supra* note 158, at 102, § 8.2.2.1.

²⁰⁹ 36 C.F.R. § 212.6(c) (2024).

²¹⁰ 36 C.F.R. § 251.50(c) (2024).

²¹¹ *Idaho Conservation League v. Guzman*, 766 F. Supp. 2d 1056, 1078 (D. Idaho 2011) (“[T]he Forest Service enjoys a great deal of discretion in deciding whether to close trails to motor vehicle use.”); *Pope & Talbot, Inc. v. Dep’t of Agric.*, 782 F. Supp. 1460, 1462, 1467 (D. Or. 1991) (holding decision not to close forest based on fire danger was discretionary decision plaintiff could not challenge under Federal Tort Claims Act).

²¹² 36 C.F.R. § 261.50 (2024).

²¹³ 36 C.F.R. § 261.53 (2024).

²¹⁴ *See* 36 C.F.R. § 220.6(a)(2), (d)(1) (2024) (stating Forest Service is not required to prepare supporting record for public analysis when closure order is issued under authority of 7 C.F.R. § 1(b)(3) or 36 C.F.R. § 220.6(d)-(e)).

²¹⁵ *See infra* note 229 and accompanying text.

orders regarding motor vehicle use without public participation “to provide short-term resource protection or to protect public health and safety.”²¹⁶

In addition to issuing closure orders, the Chief of the Forest Service and regional foresters may issue regulations prohibiting acts or omissions for certain purposes, including fire prevention or control, disease prevention or control, public safety, or “establishing reasonable rules of public conduct.”²¹⁷ For example, one such rule provides for closure of forest lands to protect the privacy of tribal activities for traditional and cultural purposes.²¹⁸ Another such rule prohibits operating motor vehicles on forest lands except on designated system roads and trails.²¹⁹ The Forest Service typically issues such rules through notice and comment rulemaking, but if notice and public participation are “impracticable, unnecessary, or contrary to the public interest,” it may issue interim regulations instead.²²⁰ Furthermore, before permanently or temporarily closing national forest lands specifically to hunting, fishing, or recreational shooting, the Forest Service must consult with state fish and wildlife agencies and provide the public with notice and an opportunity to comment.²²¹

The Forest Service Handbook (the “Handbook”) offers detailed guidance on the process for issuing orders to close or restrict the use of certain areas. It encourages agency personnel to prepare an assessment of need, enforcement plan, NEPA documentation, and civil rights impact analysis.²²² Each proposed order should be reviewed by law enforcement personnel and, if necessary, agency lawyers.²²³ The Handbook also prescribes a social impact analysis to consider potential impacts on nearby residents, forest users, adjacent

²¹⁶ See 36 C.F.R. § 212.52 (2024); see also *Guzman*, 766 F. Supp. 2d at 1077 (distinguishing “thoughtful, deliberate process” for appropriate travel plans from temporary, emergency closures).

²¹⁷ 36 C.F.R. § 261.70 (2024).

²¹⁸ 36 C.F.R. § 261.53 (2024). (“Closure to protect the privacy of tribal activities . . . must be requested by an Indian tribe; is subject to approval by the Forest Service; shall be temporary; and shall affect the smallest practicable area for the minimum period necessary for activities of the requesting Indian tribe.”).

²¹⁹ 36 C.F.R. § 261.13 (2024) (prohibiting operation of motor vehicles on Forest Service lands outside of designated roads and trails with exception of aircraft, watercraft, over-snow vehicles, and Forest Service vehicles); Travel Management; Designated Routes and Areas for Motor Vehicle Use, 70 Fed. Reg. 68264 (Nov. 9, 2005) (explaining final rule prohibiting use of motor vehicles on Forest Service land, as well as Forest Service’s response to public comments).

²²⁰ 36 C.F.R. § 261.70(c)-(d) (2024).

²²¹ 16 U.S.C. § 7913. BLM must also follow these procedures for lands under its jurisdiction. *Id.*

²²² U.S. FOREST SERV., FSH5309.11, LAW ENFORCEMENT HANDBOOK 17-19 (2021) [hereinafter LAW ENFORCEMENT HANDBOOK] (summarizing requirements for drafting orders that can withstand legal challenge).

²²³ *Id.* at 18.

landowners, minorities, women, and others.²²⁴ In theory, these procedures could generate a reasonable amount of information about the effects of restrictions and closures on visitors, including any disparate impacts on minorities and socioeconomically disadvantaged groups.

In practice, however, minimal information is generated. The Forest Service regards a civil rights impact analysis for environmental or natural resources actions to be part of its social impact analysis package, which is in turn considered a component of its NEPA analysis.²²⁵ Yet Forest Service regulations categorically exclude from NEPA analysis orders that close or limit access “to provide short-term resource protection or to protect public health and safety.”²²⁶ As the Handbook explains, such orders typically involve “routine administrative, maintenance, and other actions which normally do not individually or cumulatively have a significant effect” on the environment.²²⁷ The Handbook further notes: “Normally routine orders are not policy actions with civil rights implications . . .”²²⁸ In short, the Forest Service typically invokes a categorical exclusion in issuing closure orders and subjects them to no notice and comment, and minimal environmental, social, and civil rights impact analyses.²²⁹

This point is illustrated by a closure order issued by the Forest Service’s Pacific Northwest Region at the start of the COVID-19 pandemic. The order closed developed recreation sites on fourteen national forest units to protect

²²⁴ U.S. FOREST SERV., FSH1909.17, ECONOMIC AND SOCIAL ANALYSIS HANDBOOK 3 (1985).

²²⁵ U.S. FOREST SERV., FSH1709.11, CIVIL RIGHTS HANDBOOK 9 (1994).

²²⁶ See 36 C.F.R. § 220.6(d)(1) (2024). Under NEPA, “[a] categorical exclusion (CE) is a class of actions that a Federal agency has determined . . . do not individually or cumulatively have a significant effect on the human environment and for which, therefore, neither an environmental assessment nor an environmental impact statement is normally required.” *Categorical Exclusions*, NEPA.GOV, <https://ceq.doe.gov/nepa-practice/categorical-exclusions.html> [<https://perma.cc/72UA-36AS>] (last visited Feb. 16, 2024); 42 U.S.C. § 4336e(1); see also 40 C.F.R. § 1501.4 (2024) (“For efficiency, agencies shall identify in their agency NEPA procedures . . . categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.”).

²²⁷ LAW ENFORCEMENT HANDBOOK, *supra* note 222, at 16, § 32.23 (deeming such orders categorically excluded under NEPA).

²²⁸ *Id.* at 17, § 32.24.

²²⁹ See, e.g., BLUE MOUNTAIN INTERAGENCY DISPATCH CTR., *Updated Closure for South Fork Burnt River Area—Replaces 2017-0616-Whitman-007*, BLUE MOUNTAIN FIRE INFO. (Oct. 3, 2017), <https://bluemountainfireinfo.blogspot.com/2017/10/updated-closure-for-south-fork-burnt.html> [<https://perma.cc/9DY8-M47P>] (explaining temporary public safety closure for flooding conditions does not require completion of civil rights impact analysis). Use of a categorical exclusion is typically not subject to advance public notice and comment. Council on Env. Quality, Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 77 Fed. Reg. 75628, 75636 (Dec. 6, 2010) (noting “[m]ost Federal agencies do not routinely notify the public when they use a categorical exclusion”).

“public health and safety and prevent the spread of COVID-19.”²³⁰ The agency explained that it was following recommendations from the Centers for Disease Control and local health authorities and aligning its policies with state executive orders closing state and local parks.²³¹ The agency further asserted that the order was categorically excluded from further NEPA documentation.²³² In a brief civil rights impact analysis, the agency also noted that because “[t]he area closure applies to all members of the public,” it “does not impose any unreasonable adverse impacts on the civil rights of any individuals.”²³³ Similarly, in the wake of wildfires and potential fires, the agency deemed orders closing portions of various national forests in preparation for these fires to be categorically excluded from further NEPA documentation and found no civil rights impacts.²³⁴

C. Law on Recreation Fees

Recreation fees, which require users to pay for access or use, generate revenue that can be used to maintain and improve recreation sites.²³⁵ However, fees may impose a barrier to access to public lands, disproportionately impact lower-income visitors and rural residents, and promote commercial development.²³⁶

²³⁰ FOREST SERV.: PACIFIC NORTHWEST REGION, ORDER NO. 06-00-00-20-01 ENFORCEMENT PLAN (Mar. 30, 2020).

²³¹ *Id.*

²³² Memorandum from Glenn P. Casamassa, Regional Forester, Rationale for Developed Recreation Site Closures on the Rogue River-Siskiyou, Fremont-Winema, Umpqua, Willamette, Olympic, Mt. Baker-Snoqualmie, Okanogan-Wenatchee, Colville, Deschutes, Ochoco & Crooked River Grassland, Umatilla, Siuslaw, Wallowa-Whitman and the Columbia River Gorge National Scenic Area 1 (Mar. 27, 2020).

²³³ FOREST SERV.: PACIFIC NORTHWEST REGION, ORDER NO. 06-00-00-20-01 CIVIL RIGHTS IMPACTS ANALYSIS (Mar. 30, 2020).

²³⁴ *See, e.g.*, Memorandum from Randy Moore, Regional Forester Pacific Southwest Region, Re: Regional Order No. 20-10, at 1-2 (Sept. 9, 2020) (invoking NEPA categorical exclusion in closing all national forests in California for week because of potential fire hazards); FOREST SERV., ORDER NO. 03-06-05-22-004, GILA NATIONAL FOREST STAGE II FIRE RESTRICTIONS 3 (May 23, 2022) (concluding “no one group is expected to be displaced or experience a disproportionate burden”); Memorandum from Barry Imler, Forest Supervisor, Documentation of Civil Rights Impact Analysis (CRIA) and National Environmental Policy Act (NEPA) Compliance for Title 36 Code of Federal Regulations (CFR) Subpart A and B Prohibition–National Forest Area and Road Closure #06-02-21-07 (July 27, 2021) (concluding order is categorically excluded because it is “short-duration order to protect public health and safety”); Memorandum from Randy Moore, Regional Forester Pacific Southwest Region, Re: Regional Order No. 20-07 (Sept. 7, 2020) (“This action falls within the category identified in 36 CFR 220.6(d)(1)—prohibitions to provide short-term resource protection or to protect public health and safety—and does not require documentation in a decision memo, decision notice, or record of decision.”).

²³⁵ CAROL HARDY VINCENT, CONG. RSCH. INST., RECREATION FEES UNDER THE FEDERAL LANDS RECREATION ENHANCEMENT ACT 4 (2010) (noting agencies’ broad discretion to use collected revenues to benefit visitors, including through “facility maintenance, repair, and enhancement”).

²³⁶ Zou, *supra* note 111, at 2110.

The Federal Lands Recreation Enhancement Act (“FLREA”) governs the authority of federal land management agencies to collect fees.²³⁷ Recreation fees “shall be commensurate with the benefits and services provided to the visitor.”²³⁸ In setting fees, agencies shall consider the aggregate effect of fees on recreation users and providers, comparable fees charged elsewhere, public policy or management objectives, and other appropriate factors.²³⁹ The FLREA provides that at least sixty percent of fee revenue must be retained for local use at the unit where it is collected and makes the remaining revenue available for use elsewhere within the agency.²⁴⁰ Through the FLREA, Congress sought to standardize fees, avoid charging for use of nondeveloped areas, and incorporate public input into the fee-setting process.²⁴¹

The FLREA allows entrance fees to be charged at National Park System and National Wildlife Refuge System units but not at other federal lands and waters.²⁴² The Forest Service and BLM may not charge fees for parking, picnicking, using overlooks or scenic pullouts, or passing through federal recreational lands and waters without using facilities or services.²⁴³ However, these agencies may charge a “standard amenity recreation fee” at any area “that provides significant opportunities for outdoor recreation,” “has substantial Federal investments,” and contains specified amenities, as long as “fees can be efficiently collected.”²⁴⁴ These agencies may also charge an “expanded amenity recreation fee” for the use of developed campgrounds, boat launches, cabin rentals, and other specified facilities and services.²⁴⁵

Before establishing a new recreation-fee area, each agency must provide notice in the Federal Register and an opportunity for public involvement.²⁴⁶ In addition, each agency must give notice of any new recreation fee or any change

²³⁷ 16 U.S.C. §§ 6801-14.

²³⁸ 16 U.S.C. § 6802(b)(1).

²³⁹ 16 U.S.C. § 6802(b).

²⁴⁰ 16 U.S.C. § 6806(c). The FLREA was originally enacted with a sunset date of December 8, 2014. Congress has repeatedly extended the authority, now until October 1, 2024. CAROL HARDY VINCENT, IF10151, CONG. RSCH. SERV., FEDERAL LANDS RECREATION ENHANCEMENT ACT: OVERVIEW AND ISSUES 1 (2023).

²⁴¹ VINCENT, *supra* note 235, at 2 (“In enacting the FLREA, Congress sought to . . . standardize the types of recreation fees across agencies . . . alleviate concerns that past fees had been charged for non-developed areas . . . [and] enhance public involvement in determining fee sites and setting fees.”).

²⁴² 16 U.S.C. § 6802(e).

²⁴³ 16 U.S.C. § 6802(d)(1).

²⁴⁴ 16 U.S.C. § 6802(f). Such a fee may also be charged at a National Conservation Area, a National Volcanic Monument, and a “destination visitor or interpretive center that provides a broad range of interpretive services, programs, and media.” *Id.*

²⁴⁵ 16 U.S.C. § 6802(g)(2). Concessionaires are not governed by the FLREA’s fee restrictions. Steven J. Kirschner, *Can’t See the Forest for the Fees: An Examination of Recreation Fee and Concession Policies on the National Forests*, 14 WYO. L. REV. 513, 532 (2014).

²⁴⁶ 16 U.S.C. § 6803(b)-(c).

to an existing fee in local newspapers and publications.²⁴⁷ A Recreation Resource Advisory Committee having “a balanced and broad representation from the recreation community” makes recommendations to the agencies regarding fees and their implementation.²⁴⁸

Overall, entrance and recreation fees are charged rather sparingly by federal land management agencies. Although the FLREA broadly authorizes the NPS and FWS to charge entrance fees, less than half of the units within each agency do so.²⁴⁹ Even at sites that charge entrance fees, free public access is typically available several days each year.²⁵⁰ Only a small fraction of developed recreation sites administered by the Forest Service and BLM collect fees, and most of the sites that do collect fees provide overnight services, such as campsites.²⁵¹

D. *Laws Governing State-Owned Land*

State-owned lands not devoted to resource extraction are subject to a wide range of management regimes. State wilderness areas and state natural areas emphasize preservation but may allow low-impact recreational activities.²⁵² State wildlife management areas typically focus on maximizing game production but may also advance conservation objectives.²⁵³ State parks generally concentrate on promoting recreation, especially activities “aimed at attracting tourism and revenue.”²⁵⁴

A brief examination of the legal authorities governing the California state park system offers a sense of the network of laws that may govern state park management. California’s system hosts over 80 million visitors each year and consists of 280 units totaling over 1.6 million acres.²⁵⁵ The system’s declared

²⁴⁷ 16 U.S.C. § 6803(b).

²⁴⁸ 16 U.S.C. § 6803(d)(5)(D).

²⁴⁹ 2021 FLREA REPORT, *supra* note 64, at 7 tbl.1. Fee amounts charged by specific NPS units depend on the particular designation of each unit. *Presentation on Federal Lands Enhancement Act (FLREA) Entrance Fees*, NPS: NAT’L PARK SYS. ADVISORY BD., https://www.nps.gov/subjects/policy/upload/FLREA_NPS_Advisory_Board_2020.pdf [<https://perma.cc/GU3R-AFN2>] (last visited Feb. 16, 2024) (subdividing parks into four categories for rate purposes).

²⁵⁰ 2021 FLREA REPORT, *supra* note 60, at 7 tbl.2 (listing fee-free days at FLREA sites in 2020).

²⁵¹ *Id.* at 7 tbl.1 (noting 3,879 out of Forest Service’s nearly 30,000 recreation sites, and approximately 425 out of BLM’s nearly 3,700 sites, collect FLREA fees).

²⁵² Davis, *supra* note 127, at 318-19 (explaining that where access is allowed to state wilderness areas, it is generally for “only the most benign uses such as hiking, birdwatching, photography, or research”).

²⁵³ *Id.* at 319-21 (noting diversity of missions in state agency mission statements and varying motivations behind priorities).

²⁵⁴ *Id.* at 333 (“The dominant thrust and purpose of many state park systems, then, is to promote recreational activities, both passive and active, aimed at attracting tourism and revenue.”).

²⁵⁵ STRATEGIC PLANNING & RECREATION SERVICES DIVISION, CALIFORNIA STATE PARKS, STATISTICAL REPORT 2018/19 FISCAL YEAR 5, 8 (2019).

mission “is to provide for the health, inspiration, and education of the people of California by helping to preserve the state’s extraordinary biological diversity, protecting its most valued natural and cultural resources, and creating opportunities for high-quality outdoor recreation.”²⁵⁶ Accordingly, the California Department of Parks & Recreation administers the land under its jurisdiction “for the use and enjoyment of the public.”²⁵⁷ Furthermore, the agency shall “conserve[] the scenery, natural and historic resources, and wildlife in the individual units of the system for the enjoyment of future generations,” a phrase that echoes the NPS’s mission.²⁵⁸ Various recreational uses, including hunting, fishing, swimming, and camping, may be allowed if such “multiple use . . . would not threaten the safety and welfare of other state recreation area users.”²⁵⁹ Park attendance may be limited to carrying capacity.²⁶⁰ In addition to the statutory provisions directed toward the California Department of Parks & Recreation, general state laws such as the California Environmental Quality Act²⁶¹ (the state’s analogue to NEPA) and the California Endangered Species Act²⁶² also govern state park management.

III. ANALYSIS & IMPLICATIONS

The growing limits on access to public lands raise serious concerns. First, increasingly widespread restrictions put at risk the practical benefits public lands offer in terms of public health, personal and cultural identity, and social unity. Second, limits on access may have disparate impacts on economically disadvantaged persons and other groups of potential users. Third, land managers often institute closures and other restrictions with minimal process and transparency, depriving users of input into decisions that reduce public access.

This Part explores these concerns, first by considering why the public should have access to public lands to begin with. Access to public lands generates concrete benefits for physical and mental health as well as more abstract benefits to cultural identity and national unity. The discussion then turns to the concept of a right of access to nature, which a handful of countries have acknowledged on private lands. Although a right of access to nature is unlikely to be legally recognized in the United States, the existence of this concept underscores the importance of public land access to both individual and societal well-being. Further, in light of the importance of such access, inequities resulting from closures and restrictions also demand attention. Figuring out how to maintain equitable public access while protecting natural resources poses complex challenges for public land managers.

²⁵⁶ CAL. PUB. RES. CODE § 5019.91 (West 2023).

²⁵⁷ CAL. PUB. RES. CODE § 5003 (West 2023).

²⁵⁸ CAL. PUB. RES. CODE § 5001.2 (West 2023).

²⁵⁹ CAL. PUB. RES. CODE § 5003.1 (West 2023).

²⁶⁰ CAL. PUB. RES. CODE § 5001.96 (West 2023).

²⁶¹ CAL. PUB. RES. CODE §§ 21000-21189.70.10 (West 2023).

²⁶² CAL. FISH & GAME CODE §§ 2050-2089.25 (West 2023).

A. *Reasons for Access*

What are public lands for? Historically, public lands have hosted multiple uses—ranching, logging, mining, energy production, wildlife, and recreation—and witnessed frequent conflicts between them. Today, these conflicts continue even as some extractive uses have declined.²⁶³ Nonetheless, recreation encompassing a wide range of activities has come to dominate public lands: hiking, camping, birdwatching, skiing, climbing, fishing, hunting, mountain biking, off-roading, boating, and so on. Although many of these activities could also take place on private land, public lands typically offer unique opportunities to experience the outdoors and are often more affordable and accessible to a wider range of people.²⁶⁴

1. The Preservationist Vision

One justification offered for broad access to public lands is the notion that the public lands belong to everyone.²⁶⁵ Upon closer examination, however, this justification is unsatisfying. Some public lands may properly be closed to public use because they serve public purposes other than recreation—such as biodiversity protection, timber production, or national defense. Furthermore, the public lands belong to the American public in the sense that the government, representing the public, owns the public lands.²⁶⁶ But this is not to say that individuals or the public at large hold a fee simple ownership interest. The federal government essentially functions as a trustee charged with managing federal lands for the benefit of the public.²⁶⁷ In managing public lands, the government does not seek to maximize its own benefit, but neither does it allow the public free rein. Although courts have declined to apply public trust doctrine

²⁶³ LESHY, *supra* note 9, at 598-99.

²⁶⁴ See Keiter, *Emerging*, *supra* note 12, at 159 (“The public lands still present an unparalleled recreation mecca open to the general public with minimal cost and oversight.”).

²⁶⁵ STEVEN DAVIS, IN DEFENSE OF PUBLIC LANDS: THE CASE AGAINST PRIVATIZATION AND TRANSFER 148 (2018) (suggesting that actualizing notion that public lands belong to everyone would fulfill “fundamentally democratic egalitarianism”).

²⁶⁶ Cf. Kevin Michael DeLuca, *Salvaging Wilderness from the Tomb of History: A Response to The National Parks: America’s Best Idea*, 4 ENV’T COMM’N 484, 490 (2010) (criticizing argument “national parks are physical embodiments of American democracy since they are by and for the people”).

²⁶⁷ KLEIN ET AL., *supra* note 41, at 39-40 (suggesting “[a]lmost all public lands fall squarely” within notion of legal trust, in which “small number of officials hold legal title to the property for the benefit of a much larger group—the people of the state, nation, or planet”).

to the federal government,²⁶⁸ a trustee's fiduciary duties of loyalty and prudence should still serve as guiding principles in managing federal lands.²⁶⁹

These principles, applied to access policies, necessitate consideration of the benefits provided by public lands. While all major land management agencies face the issue of access, much of the relevant literature addresses access in the context of national parks. As explained above, the NPS's mission is twofold: to provide for the use and enjoyment of the parks, and to preserve them unimpaired for the enjoyment of future generations.²⁷⁰ The former clearly assumes public access. While preservation takes priority over use when the two aims conflict, the NPS has an obligation to promote public access to the extent feasible—though perhaps at reduced levels and subject to restrictions.

Preservationist approaches to public land management, drawing on the writings of naturalist John Muir, landscape architect Frederick Law Olmsted, and Transcendentalist thinkers, initially focused on aesthetics and assumed an idealized version of nature.²⁷¹ Even so, such approaches did not equate preservation to the exclusion of humans from nature. Land managers could preserve public lands in their “natural” state while still offering limited access for the public to enjoy a respite from the demands and busyness of everyday life.²⁷² In contrast to the more structured and stimulating forms of entertainment available in the marketplace, raw nature could facilitate a quieter, slower-paced experience that inspires visitors and fosters personal growth.²⁷³ This view

²⁶⁸ Richard M. Frank, *The Public Trust Doctrine: Assessing Its Recent Past & Charting Its Future*, 45 U.C. DAVIS L. REV. 665, 680-81 (2012) (“A handful of lower federal courts decisions appear to apply the public trust to federal lands. More recent cases, however, have refused to apply the public trust doctrine to federal lands and officials.”).

²⁶⁹ See SUSAN GARY, GEORGE GLEASON BOGERT, GEORGE TAYLOR BOGERT & AMY MORRIS HESS, *BOGERT'S THE LAW OF TRUSTS & TRUSTEES* § 541 (2022) (outlining duties of trustees, including “overall duty to administer the trust as a prudent person would” and exercising “reasonable care, skill, and caution in doing so”).

²⁷⁰ See *supra* note 154 and accompanying text.

²⁷¹ See RANDALL K. WILSON, *AMERICA'S PUBLIC LANDS: FROM YELLOWSTONE TO SMOKEY BEAR AND BEYOND* 44 (2d ed. 2020) (stating although Romantics supported “preservation of nature for its own sake” and Transcendentalists “flipp[ed] the Euro-American notion of an immoral wilderness on its head,” it was writers such as John Burroughs and John Muir who “took up the preservationist cause that these ideas gained a following large enough to constitute a potent national political force”); Sarah E. Light, *National Parks, Incorporated*, 169 U. PA. L. REV. 33, 44-45 (2020) (noting preservationist approach, embodied by John Muir and Frederick Law Olmstead, was influenced by Romantic and Transcendentalist aesthetics values only found in natural settings); Robert B. Keiter, *Public Lands and Law Reform: Putting Theory, Policy, and Practice in Perspective*, 2005 UTAH L. REV. 1127, 1169 [hereinafter Keiter, *Public Lands*] (noting initial reason for preserving national parks was aesthetic, namely to prevent natural wonders from falling into private hands).

²⁷² JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS, REFLECTIONS ON THE NATIONAL PARKS* 21 (1980).

²⁷³ Sally K. Fairfax, *The Essential Legacy of a Sustaining Civilization: Professor Sax on the National Parks*, 25 ECOLOGY L.Q. 385, 388-90 (1998) (suggesting raw nature can give

reflected a Romantic-era appreciation of “emotion, spontaneity, intuition, and individual freedom over the cold economic rationality of modern urban life.”²⁷⁴ Such benefits, the preservationist rationale emphasized, would remain available only with adequate protection of raw nature.²⁷⁵

Critics sometimes attack preservationist conceptions of the parks as self-serving, narrow, and elitist.²⁷⁶ Indeed, national parks were often established for the benefit of upper-class Whites.²⁷⁷ Today, the prospect of reserving public lands for the contemplative activities of a select few is rightly viewed as outdated and inconsistent with the general public’s use and enjoyment of public lands.²⁷⁸ The beauty and grandeur of the public lands should be available for all Americans to experience, and a contemporary approach to preservation can promote this objective.²⁷⁹ This approach incorporates insights from ecological science and envisions broad public access, all the while continuing to resist extractive uses of the environment.²⁸⁰ So construed, preservation protects public lands and their distinctive qualities for the general public, ultimately enabling iconic national parks and other public lands to “expose all visitors to nature in a way that inspires wonder, awe and respect.”²⁸¹

public enjoyment by providing contrast from “mass recreation experiences”); *see also* DAVIS, *supra* note 265, at 146 (discussing potential for public lands and other public institutions to mold better citizens); SAX, *supra* note 272, at 21 (contending that being in nature “exercise[s] and educate[s] the contemplative faculty”).

²⁷⁴ WILSON, *supra* note 271, at 44.

²⁷⁵ Holly Doremus, *Nature, Knowledge and Profit: The Yellowstone Bioprospecting Controversy and the Core Purposes of America’s National Parks*, 26 *ECOLOGY L.Q.* 401, 448 (1999) (“Quite appropriately, the Park Service now emphasizes nature in all its dynamic glory, rather than simply static scenery, in the parks. It recognizes that nature, relatively undisturbed by the modern human world, is the outstanding feature of the large natural parks.”).

²⁷⁶ Dale A. Oesterle, *Public Land: How Much Is Enough?*, 23 *ECOLOGY L.Q.* 521, 546, 549 (1996) (arguing advocates for solitude and spirituality of raw nature are requesting private subsidy and that these activities do not “‘elevate’ a person’s internal moral sense”); Fairfax, *supra* note 273, at 391 (“Sax is urging public investment in recreation experiences on the grounds that they teach important things to ordinary citizens, while acknowledging that they will be utilized primarily by those best positioned to provide for their own recreation needs.”).

²⁷⁷ DeLuca, *supra* note 266, at 490 (“[W]ilderness is an idea with particular resonance among upper-class white people and the parks were often created for them at the expense of other people.”).

²⁷⁸ A. Dan Tarlock, *For Whom the National Parks?*, 34 *STAN. L. REV.* 255, 259-61 (1981) (explaining reflective recreational experience envisioned by preservationists would necessitate rationing).

²⁷⁹ Light, *supra* note 271, at 56 (“For Muir, the virtue of publicness of the park was twofold: first, to provide spaces for all people to interact with majesty and awe, which would bring them out of their ordinary lives; and second, to provide this majesty to those who were of average means and not wealthy . . .”).

²⁸⁰ Keiter, *Public Lands*, *supra* note 271, at 1170-71 (“These proposals mark a dramatic evolution in preservation policy—one that is giving ecological science a major new role in defining resource priorities and management strategies on the public domain.”).

²⁸¹ Doremus, *supra* note 275, at 448.

2. Health Benefits

Access to public lands is of immense value to physical and mental health. While not all public lands offer unique landscapes or awe-inspiring grandeur, access to less spectacular lands is just as beneficial to an individual's health. Even local parks, in addition to being utilized to provide essential services (such as during the COVID-19 pandemic), inherently provide such health benefits. In all these lands, people can connect with nature and rediscover their essential links to, and dependence on, the surrounding natural environment.²⁸²

Access to nature generates significant public health benefits. It facilitates physical activity and thereby promotes physical and mental health.²⁸³ Being in nature also can reduce stress and restore people's adaptive resources.²⁸⁴ Among children, researchers have found positive correlations between children's access to nature and cognitive functioning, motor coordination, academic performance, self-discipline, social skills, emotional well-being, mental health, and reduced behavioral problems.²⁸⁵ Adults gain similar benefits from access to nature, including "lower levels of mortality and illness, higher levels of outdoor physical activity, restoration from stress, a greater sense of well-being, and greater social

²⁸² See William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in UNCOMMON GROUND: RETHINKING THE HUMAN PLACE IN NATURE 69, 89 (William Cronon ed., 1995) ("[W]ildness (as opposed to wilderness) can be found anywhere: in the seemingly tame fields and woodlots of Massachusetts, in the cracks of a Manhattan sidewalk, even in the cells of our own bodies."); Doremus, *supra* note 275, at 448 ("[I]f the parks perform their functions well, visitors will leave with a new or renewed understanding of the value of nature not only in the parks but in their own daily lives.").

²⁸³ Terry Hartig, Richard Mitchell, Sjerp de Vries & Howard Frumkin, *Nature and Health*, 35 ANN. REV. PUB. HEALTH 207, 214 (2014) (finding physical activity promotes physical and mental health across all ages and access to outdoors influences how physically active someone is).

²⁸⁴ See *id.* at 216-17.

²⁸⁵ Susan Strife & Liam Downey, *Childhood Development and Access to Nature: A New Direction for Environmental Inequality Research*, 22 ORG. & ENV'T 99, 105-08 (2009); Diana Younan et al., *Environmental Determinants of Aggression in Adolescents: Role of Urban Neighborhood Greenspace*, 55 J. AM. ACAD. CHILD & ADOLESC. PSYCHIATRY 591, 597 (2016) ("Although considered a small change at the individual level, [the] observed decrease in aggressive behaviors associated with increasing neighborhood greenspace can translate to a significant public health impact when viewed at the population level."); Yijun Zhang, Suzanne Mavoa, Jinfeng Zhao, Deborah Raphael & Melody Smith, *The Association Between Green Space and Adolescents' Mental Well-Being: A Systematic Review*, INT'L J. ENV'T RSCH. & PUB. HEALTH (Sept. 11, 2020), <https://www.mdpi.com/1660-4601/17/18/6640> (reviewing literature on link between green space and adolescent mental health); Nate Seltenrich, *Just What the Doctor Ordered: Using Parks to Improve Children's Health*, ENV'T HEALTH PERSPS., Oct. 2015, at A254, A255 ("[F]or kids in particular, being in or near green spaces has been found to be associated with better test scores, improved self-discipline and cognition, and reduced behavioral problems and symptoms of attention-deficit/hyperactivity disorder (ADHD).").

capital.”²⁸⁶ During the COVID-19 pandemic, access to nature was especially important in reducing stress and coping with isolation and physical restrictions.²⁸⁷

Health professionals increasingly recognize the fundamental role of nature in promoting physical and mental health. In Park Prescription (“ParkRx”) programs, health or social service providers write prescriptions encouraging patients or clients with diabetes, heart disease, and other chronic conditions to spend time in nature.²⁸⁸ These programs often involve partnerships with community health agencies and organizations to stage events, address participants’ concerns about safety, and inform the public about outdoor benefits and opportunities.²⁸⁹ A growing number of universities have developed similar

²⁸⁶ See *Improving Health and Wellness Through Access to Nature*, AM. PUB. HEALTH ASS’N (Nov. 5, 2013), <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/08/09/18/improving-health-and-wellness-through-access-to-nature> [<https://perma.cc/8T7Y-TX38>]; Hartig et al., *supra* note 283, at 211-18 (noting contact with nature improves people’s health by improving air quality, physical activity, social cohesion, and stress reduction); Mathew P. White et al., *Spending At Least 120 Minutes a Week in Nature Is Associated with Good Health and Wellbeing*, 9 SCI. REPS. 1, 5-6 (2019) (finding individuals who spent over 120 minutes in nature per week had “consistently higher levels of both health and well-being than those who reported no exposure”); Matt P. Stevenson, Theresa Schilhab & Peter Bentsen, *Attention Restoration Theory II: A Systematic Review to Clarify Attention Processes Affected by Exposure to Natural Environments*, 21 J. TOXICOLOGY & ENV’T HEALTH, PART B 227, 231 (2018) (“According to ART, the mental fatigue that is associated with a depleted capacity to direct attention may be overcome by spending time in environments rich in natural stimuli.”); Heather Ohly et al., *Attention Restoration Theory: A Systematic Review of the Attention Restoration Potential of Exposure to Natural Environments*, 19 J. TOXICOLOGY & ENV’T HEALTH PART B 305, 305-06 (2016) (describing how urban lifestyle’s demands on directed attention leads to attention fatigue, which can be remediated by spending time in natural environments).

²⁸⁷ William L. Rice, Jaclyn R. Rushing, Jennifer B. Thomsen & Peter Whitney, *Exclusionary Effects of Campsite Allocation Through Reservations in U.S. National Parks: Evidence from Mobile Device Location Data*, J. PARK & RECREATION ADMIN., Winter 2022, at 45, 47 (2022) (noting demand for campsites and campgrounds accelerated at onset of COVID-19 pandemic); Slater et al., *infra* note 392, at 1 (noting despite green space closures during COVID-19 pandemic, pandemic highlighted increased need for such space in “limiting the damage caused by the coronavirus disease”).

²⁸⁸ *About*, PARKRX, <https://www.parkrx.org/about> [<https://perma.cc/7YEA-TSDF>] (last visited Feb. 16, 2024); INST. AT THE GOLDEN GATE, HEALTHY PARKS HEALTHY PEOPLE: *SAN FRANCISCO* 1, 9, <https://www.parkrx.org/sites/default/files/resources/HPHP%20Guide%20for%20Health%20Care%20Providers.pdf> [<https://perma.cc/WXY7-BL2P>] (last visited Feb. 16, 2024) (giving recommendations for how to incorporate physical activity into patients’ lives); Seltenrich, *supra* note 285, at A255-A258 (detailing many state programs for encouraging physical activity). South Dakota medical professionals can write a prescription for patients to visit any South Dakota state park for free. *Call to Action: Park Rx*, HEALTHYSD.GOV, <https://healthysd.gov/park-rx-prescribe-a-day-in-the-park/> [<https://perma.cc/69U5-6RU2>] (last visited Feb. 16, 2024).

²⁸⁹ DONALD A. RAKOW & GREGORY T. EELLS, *NATURE RX: IMPROVING COLLEGE-STUDENT MENTAL HEALTH* 32-35 (2019) (detailing initiatives physicians have taken in different states

programs on their campuses.²⁹⁰ Other countries have also adopted nature-based programs aimed at improving health.²⁹¹ For example, Canadian health care providers can even prescribe annual national park passes to patients for a wide range of conditions.²⁹²

3. Identity and Symbolic Meanings

Access to public lands also has less tangible yet equally important benefits for individuals and for society as a whole. The concept of recreation itself connotes individual autonomy and freedom.²⁹³ Moreover, history has imbued public lands in this country with specific meanings. For many, access to public land is foundational to national and cultural identity.²⁹⁴ The significance of public land in forging a sense of identity is especially great in Native American sacred sites, national battlefields, and other specific locations or landscapes. Often, the meaning of public land hinges on individual perspectives. Depending on the viewer, for example, the vast, open spaces of the West may represent freedom and opportunity, sacred ground, or a painful past.²⁹⁵ Historical and cultural contexts strongly influence whether being in specific places of nature triggers excitement and joy—or fear, anxiety, and feelings of exclusion.²⁹⁶

Public lands, in other words, have important relational value. As explained above, access to public lands is of instrumental value, as such access promotes personal development and generates significant physical and mental health

to engage patients in physical activity, such as “Walk with a Doc” in Ohio and “Docs in the Parks” in Maryland).

²⁹⁰ *Id.* at 36-68.

²⁹¹ Douglas Broom, *Health: What Are Green Prescriptions and Which Countries Offer Them?*, WORLD ECON. F. (Feb. 21, 2022), <https://www.weforum.org/agenda/2022/02/green-prescriptions-health-wellbeing/> [<https://perma.cc/G32U-B4NL>]; *see, e.g.*, Defra Press Office, *Environment Secretary Sets Out His Vision for Our Environmental Recovery*, GOV.UK: DEFRA IN THE MEDIA (July 20, 2020), <https://deframedia.blog.gov.uk/2020/07/20/environment-secretary-sets-out-his-vision-for-our-environmental-recovery> [<https://perma.cc/G6RU-KSLS>] (announcing United Kingdom’s “green prescribing” program to improve mental health).

²⁹² Tik Root, *Doctors in Canada Can Now Prescribe National Park Passes to Patients*, WASH. POST (Feb. 7, 2022, 7:07 PM EST), <https://www.washingtonpost.com/climate-solutions/2022/02/07/national-park-prescriptions-mental-health>.

²⁹³ Robert C. Lucas, *The Role of Regulations in Recreation Management*, 9 W. WILDLANDS 6, 6 (1983) (“Recreation is . . . a particular type of human experience that results from self-rewarding physical or mental engagements, based on personal free choice during non-obligated time. This definition stresses internal control and free choice for personal reasons that vary as much as people do.”).

²⁹⁴ DAVIS, *supra* note 265, at 145 (“[P]ublic lands have, over the centuries, come to be a central element of our identity as a nation and a people.”).

²⁹⁵ Krakoff, *supra* note 34, at 239-40, 254 (describing “narrative of loss” reflected in public land policies and boundaries).

²⁹⁶ YOUNG, *supra* note 34, at 299-301 (arguing discussion of biological need for outdoor recreation displaces significant cultural and political history, which triggers feelings of anxiety rather than assuaging them in some).

benefits.²⁹⁷ Relational values, as distinguished from instrumental values, derive from or are mediated by relationships between people and nature.²⁹⁸ The relational values fostered by public lands include: contributing to an individual's personal identity or a people's cultural identity, connecting with other people through being in nature together, and caring for the land and ecosystems as a moral principle.²⁹⁹ When a Native American tribe carries out a cultural ceremony at a sacred site on federal land, or when families and friends meet up at a public park, public lands advance relational values.

Relational values are challenging to quantify and easy to overlook.³⁰⁰ Yet they are fundamental to personal choices and policy preferences with respect to protecting nature.³⁰¹ “[C]onnections to communities and to specific places”—more so than instrumental values—“are one of the most common reasons why people choose to conserve nature.”³⁰² In other words, people frequently care about a place because they camped there as a child, learned to fish there, or simply fell in love with that place. Although access to public land may

²⁹⁷ See Kai M. A. Chan et al., *Why Protect Nature? Rethinking Values and the Environment*, 113 PNAS 1462, 1462 (2016) (describing instrumental value in terms of “protecting nature for humans’ sake”).

²⁹⁸ *Id.*

²⁹⁹ *Id.* at 1462 fig.1.

³⁰⁰ See Christopher Schulz & Julia Martin-Ortega, *Quantifying Relational Values—Why Not?*, 35 CURRENT OP. IN ENV'T SUSTAINABILITY 15, 15 (2018) (noting underrepresentation of quantitative approaches in literature on relational values); Alta de Vos, Joana Carlos Bezerra & Dirk Roux, *Relational Values About Nature in Protected Areas*, 35 CURRENT OP. ENV'T SUSTAINABILITY 89, 89 (2018) (“Since relational values are embedded in cultural values, and cultural values are often not substitutable, a relational value lens takes explicit account of ethics . . .”); Chan et al., *supra* note 297, at 1463 (“Whereas intrinsic and instrumental values are often presented as stark alternatives, many important concerns may be better understood as relationships with both aspects.”).

³⁰¹ de Vos et al., *supra* note 300, at 89 (“Relational values, which are determined by relationships with nature and the responsibility towards people . . . are expressed through elements like individual identity, stewardship, social responsibility, social cohesion, social relations, cultural identity and social identity.”); Chan et al., *supra* note 297, at 1462 (noting few people make choices based only on intrinsic or instrumental values, but also consider relational values such as “appropriateness of how they relate with nature and with others”).

³⁰² Bradley J. Cardinale, *Should We Protect Nature for Its Own Sake? For Its Economic Value? Because It Makes Us Happy? Yes*, CONVERSATION (Dec. 5, 2022, 3:01 PM EST), <https://theconversation.com/should-we-protect-nature-for-its-own-sake-for-its-economic-value-because-it-makes-us-happy-yes-180302> [<https://perma.cc/UX6Q-MZK8>]; see also Sarah C. Klain, Paige Olmsted, Kai M. A. Chan & Terre Satterfield, *Relational Values Resonate Broadly and Differently Than Intrinsic or Instrumental Values, or the New Ecological Paradigm*, PLOS ONE (Aug. 30, 2017), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0183962> [<https://perma.cc/LZH3-GZBE>] (“Reducing the importance of nature to only intrinsic or instrumental and monetized value is also not reflective of the largely intuitive ways that people make decisions, understand the world and decide what is right.”).

sometimes be necessary to promote relational values, preservation alone may also further them.³⁰³

Public lands, though possessing a range of social and cultural meanings, can foster unity amid diversity. Frederick Law Olmsted, the designer of Central Park, appreciated the democratizing potential of public parks as places where people from all walks of life could mingle.³⁰⁴ Similarly, Theodore Roosevelt recognized that public lands could serve as a unifying political force and civic commons unsegregated by class.³⁰⁵ Parks, especially in cities, are an important “space for the performance of democracy”—a place where citizens can exchange viewpoints and ideas and exercise rights of free assembly and expression.³⁰⁶ First Amendment doctrine treats public parks as a quintessential traditional public forum where expressive activity receives maximum protection.³⁰⁷ Granted, some public lands are unlikely to function as practical spaces for democratic practice, and interactions between members of the public will not necessarily be free of conflict.³⁰⁸ Nonetheless, in both urban and nonurban settings, public spaces enable interactions between people with different views and of diverse social, economic, and ethnic backgrounds.³⁰⁹ In a world of siloed media and online echo chambers, public lands remain a critical locus for such interactions.

The fact that Americans of all stripes recognize the importance of access to nature hints at public lands’ potential to promote political unity. Large majorities of different demographic groups agree that access to parks and recreational

³⁰³ Klain et al., *supra* note 302, at 5 tbl.1 (listing relational value statements used in survey).

³⁰⁴ LESHY, *supra* note 9, at 46; *see also* Sarah L. Thomas, *When Equity Almost Mattered: Outdoor Recreation, Land Acquisition, and Mid-Twentieth-Century Conservation Politics*, 50 NAT. RES. J. 501, 503 (2010) (describing belief that parks and outdoor recreation could counter ills of urbanization “and build a democratic character”).

³⁰⁵ Light, *supra* note 271, at 61 (noting, according to Roosevelt, public lands served civic nation-building by acting as “public statement of common purpose ‘transcending faction’ which could ‘unite a divided polity’”); Jedediah Purdy, *The Politics of Nature: Climate Change, Environmental Law, and Democracy*, 119 YALE L.J. 1122, 1157-58 (2010) (noting Roosevelt wanted to create settings where Americans could interact across class and other divisions).

³⁰⁶ *See* Sarah Schindler, *The “Publicization” of Private Space*, 103 IOWA L. REV. 1093, 1102-03 (2018).

³⁰⁷ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (holding streets and parks are public forums where government’s ability to prohibit communicative activity is sharply circumscribed).

³⁰⁸ JOHN R. PARKINSON, *DEMOCRACY AND PUBLIC SPACE: THE PHYSICAL SITES OF DEMOCRATIC PERFORMANCE 182-83* (2012) (noting conflicts arising among users of public parks).

³⁰⁹ Schindler, *supra* note 306, at 1101-02 (“By encountering and engaging with [people outside our typical social circles] in public space, people open themselves up to ‘unprogrammed’ discussions and ‘diverse viewpoints.’”).

opportunities is an important factor in deciding where to live.³¹⁰ Democrats and Republicans alike express strong support for conservation, health and wellness, and equity as guiding principles for park management.³¹¹ Regardless of party control, Congress has provided consistent support for recreation and conservation on public lands.³¹² Appreciation of the benefits of outdoor recreation inspired Congress to create the Land and Water Conservation Fund in 1964, which channels earnings from offshore oil and gas leases to the acquisition and development of outdoor recreation areas.³¹³ In 2020, overwhelming majorities in the House and Senate acted to permanently reauthorize and fund this program.³¹⁴ Furthermore, volunteer efforts on public lands reflect widespread support for, and a collective commitment to, public lands.³¹⁵ At a time of intense political polarization, public lands “provide one of the few tangible symbols of national unity.”³¹⁶ Their preservation and continued existence are of immense communal value to Americans, including those who have not physically visited them.³¹⁷

While important, the unifying nature and potential of public lands should not be overstated. Extractive users, recreational users, policymakers, and members of the public have long held stark differences of opinion regarding appropriate uses of public lands. Such differences of opinion also exist even among recreational users. Conflicts between low-impact users and high-impact users are increasingly common.³¹⁸ Low-impact users contend that high-impact users damage natural resources and degrade their experience, while high-impact users

³¹⁰ NAT'L RECREATION AND PARKS ASS'N, 2022 ENGAGEMENT WITH PARKS REPORT 5-7 (2022) (reporting on percentages of people who found “Access to High-Quality Park and Recreation Opportunities is Important When Choosing Where to Live” across broad range of demographic groups).

³¹¹ See *id.* at 17-18 (reporting 94% of Democrats and 88% of Republicans found parks and recreation important local government service).

³¹² John Leshy, *America's Public Lands: A Sketch of Their Political History and Future Challenges*, 62 NAT. RES. J. 341, 351-55 (2022) (recounting strong congressional, executive, and public support for public land protections over last four decades).

³¹³ See Thomas, *supra* note 304, at 507-08.

³¹⁴ See John D. Dingell, Jr. Conservation, Management, and Recreation Act, Pub. L. No. 116-9, § 3001, 133 Stat. 580, 754-55 (2019) (reauthorizing Land and Water Conservation Fund permanently); Great American Outdoors Act, Pub. L. No. 116-152, § 3, 134 Stat. 682, 686 (2020) (providing permanent funding for Land and Water Conservation Fund).

³¹⁵ See DAVIS, *supra* note 265, at 147 (detailing “explosive growth in the last several decades of volunteerism on our public lands”).

³¹⁶ WILSON, *supra* note 271, at xiv.

³¹⁷ See Light, *supra* note 271, at 52 (“[I]t is their open access to all—their collectiveness that reinforces their value to the nation.”); Joseph L. Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481, 486-87 (1983) (discussing benefits that may arise even without visiting a place “from the commitment of Americans to preserve wilderness as a community value”).

³¹⁸ See Laitos & Reiss, *supra* note 52, at 1098-1104 (outlining growing conflicts between preservationists, high impact, nonmotorized recreationists, and motorized recreationists).

respond that public lands should be open to everyone.³¹⁹ Even among low-impact uses, elevated levels of such use can damage resources, lead to user conflict, and undermine public lands' function as a refuge to appreciate nature or escape the pressures of urban life.³²⁰ Moreover, interactions on public lands between people of diverse backgrounds and views do not inexorably yield unity. Nonetheless, having to share the public lands can teach people to get along—or at least put up with each other—and respect the lands as a shared resource.³²¹ In doing so, visitors to public lands may discover common interests and perspectives.

B. *Potential Bases for a Right of Access to Nature*

A handful of countries have recognized access to nature as a right, a fact that reflects the importance of access. This Section considers the substance of such a right and the possible bases for recognizing an access right in the United States. The popular notion that public lands belong to all Americans,³²² as well as adverse public reactions to park closures during government shutdowns, “underscore[] how much people ha[ve] come to view recreational access to public nature as a right.”³²³ However, as a legal matter, a general right of access does not exist and is unlikely to gain legal protection.

1. Environmental Human Rights

A right of access to public lands could be part of a more general right to nature or to a healthy environment. Many national constitutions articulate a right to a healthy environment, leading some commentators to characterize environmental

³¹⁹ See *id.* at 1101-04; Jay D. Wexler, *Parks as Gyms? Recreational Paradigms and Public Health in the National Parks*, 30 AM. J.L. & MED. 155, 169 (2004) (“One of the most pervasive conflicts regarding proper national park management concerns what types of recreational activities managers ought to condone and promote within park boundaries.”).

³²⁰ See Wexler, *supra* note 319, at 181-84 (outlining potential drawbacks of “fitness paradigm” of park use).

³²¹ Jason Mark, *In Public Lands Is the Preservation of the Republic*, SIERRA (June 24, 2020), <https://www.sierraclub.org/sierra/2020-4-july-august/feature/public-lands-preservation-republic> [<https://perma.cc/2ARW-8TTX>] (arguing shared respect and support for parks can bridge political divides).

³²² Press Release, White House, Presidential Memorandum—Promoting Diversity and Inclusion in Our National Parks, National Forests, and Other Public Lands and Waters (Jan. 12, 2017), <https://obamawhitehouse.archives.gov/the-press-office/2017/01/12/presidential-memorandum-promoting-diversity-and-inclusion-our-national> (“As a powerful sign of our democratic ideals, these lands belong to all Americans—rich and poor, urban and rural, young and old, from all backgrounds, genders, cultures, religious viewpoints, and walks of life.”).

³²³ YOUNG, *supra* note 34, at 292. Discussing the growing popularity of camping in the 1940s, historian Phoebe Young observes that “Americans came to understand camping as a right of citizenship, demonstrated on the one hand by stated expectations of access and services as well as a sense of ownership and belonging, and on the other by protests for equal access.” *Id.* at 189.

human rights as a “fledgling global norm.”³²⁴ Several U.S. state constitutions also expressly protect environmental rights.³²⁵ Reflecting the growing acknowledgment of such rights, the U.N. General Assembly approved a resolution in 2022 “recogniz[ing] the right to a clean, healthy and sustainable environment as a human right.”³²⁶

However, the content of a right to a healthy environment varies by jurisdiction and is often described in general terms. One commentator describes environmental human rights as “rights to (the fair distribution of, or fair access to) natural resources and/or rights to (the fair distribution of, or fair protection against) nature-related burdens.”³²⁷ A more detailed formulation characterizes the right as “a bundle of substantive and procedural rights” that “includes clean air, safe and sufficient water, healthy and sustainably produced food, non-toxic environments[,] . . . healthy ecosystems and biodiversity, . . . a safe climate[,] . . . access to environmental information, public participation in environmental decision making, and access to justice.”³²⁸ Finally, the U.N. resolution states that the right “is related to other rights and existing international law” and asserts that its promotion “requires the full implementation of the

³²⁴ Kerri Woods, *The Rights of Humans as Ecologically Embedded Beings*, in ENVIRONMENTAL HUMAN RIGHTS: A POLITICAL THEORY PERSPECTIVE 17, 27 (Markku Oksanen et al. eds., 2018); see also John H. Knox, *Constructing the Human Right to a Healthy Environment*, 16 ANN. REV. L. & SOC. SCI. 79, 82-86 (2020) (discussing development of environmental human rights law, including recognition of right to healthy environment in constitutional provisions).

³²⁵ See PA. CONST. art. 1, § 27 (“The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment.”); MONT. CONST. art. II, § 3 (declaring “right to a clean and healthful environment”); N.Y. CONST. art. I, § 19 (recognizing “right to clean air and water, and a healthful environment”); ILL. CONST. art. XI, § 2 (“Each person has the right to a healthful environment [and] may enforce this right against any party”); HAW. CONST. art. XI, § 9 (“Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality”); MASS. CONST. art. XCVII (affirming “right to clean air and water, freedom from excessive and unnecessary noise, and the natural, scenic, historic, and esthetic qualities of their environment; and the protection of the people in their right to the conservation, development and utilization of . . . natural resources”).

³²⁶ G.A. Res. 76/300, at 3 (July 28, 2022).

³²⁷ Marcel Wissenburg, *The Foundation of Rights to Nature*, in ENVIRONMENTAL HUMAN RIGHTS: A POLITICAL THEORY PERSPECTIVE 66, 66 (Markku Oksanen et al. eds., 2018).

³²⁸ David R. Boyd, *The Human Right to a Healthy Environment: Protecting Life on Earth*, PATHWAY TO 2022 DECLARATION, <https://www.pathway2022declaration.org/article/the-human-right-to-a-healthy-environment-protecting-life-on-earth/> [<https://perma.cc/ANP8-EDNK>] (last visited Feb. 16, 2024); see also ASH KALRA, ASSEMBLY BILL 30 ACCESS TO NATURE ACT FOR CALIFORNIANS FACT SHEET 1 (2021) (“Access to nature may include physical access to amenities such as parks, beaches, regional open spaces, and wilderness areas, but may also include access to the co-benefits of nature, such as clean air, clean water, and other benefits of a healthy environment.”).

multilateral environmental agreements under the principles of international environmental law.”³²⁹

2. No Explicit Right to Nature

The foregoing conceptions of environmental rights do not explicitly encompass a right to access public lands or a right to nature. However, a 2012 resolution of the World Conservation Congress of the International Union for Conservation of Nature endorsed a “child’s right to nature and a healthy environment,” including an “inherent right to connect with nature in a meaningful way . . . and to enjoy, maintain and strengthen this connection through the direct and ongoing experience of nature.”³³⁰ This resolution further called for incorporating a child’s right to nature within a United Nations instrument.³³¹

In California, proposed legislation sought to establish “that access to nature and access to the benefits of nature is a human right and that every human has the right to safe and affordable outdoor access.”³³² However, the enacted version of the bill no longer references a “human right.”³³³ Instead, it seeks to “[e]nsure that all Californians have equitable opportunities to safe and affordable access to nature and access to the benefits of nature.”³³⁴ The statute establishes policies directing state agencies to “[m]aximize public access to public lands . . . in a sustainable manner,” especially for communities of color, indigenous communities, and economically disadvantaged communities.³³⁵ While the statute is consistent with state, federal, and international efforts to expand outdoor access, it does not take a rights-based approach.³³⁶

Litigants in the United States have occasionally urged federal courts to recognize a right to nature, but to no avail. The plaintiffs in *Animal Legal Defense Fund v. United States*³³⁷ alleged “a fundamental ‘right to wilderness’ premised on social contract theory and the rights of liberty, privacy, and

³²⁹ G.A. Res. 76/300, at 3 (July 28, 2022).

³³⁰ Int’l Union for Conservation of Nature Res. 101-EN (Sept. 2012), https://portals.iucn.org/library/sites/library/files/resrecfiles/WCC_2012_RES_101_EN.pdf [<https://perma.cc/ZY3K-BZLC>].

³³¹ *Id.*

³³² Assemb. B. 30, 2021-2022 Leg., Reg. Sess. § 12804.6(a)(1) (Cal. 2020), <https://legiscan.com/CA/text/AB30/id/2344269>.

³³³ 2022 Cal. Stat. 939 (codified at CAL. PUB. RES. CODE §§ 1000-03 (West 2023)).

³³⁴ CAL. PUB. RES. CODE § 1002(a)(1) (West 2023).

³³⁵ CAL. PUB. RES. CODE § 1002(a)(2) (West 2023).

³³⁶ Ongoing efforts in this regard include the America the Beautiful initiative (also known as the 30X30 initiative), which sets out a goal of conserving at least thirty percent of U.S. lands and waters by 2030, and an analogous United Nations agreement to protect thirty percent of the Earth’s lands and oceans by 2030. Press Release, White House, Biden-Harris Administration Outlines “America the Beautiful” Initiative (May 6, 2021); Catrin Einhorn, *Nations Approve U.N. Pact Aiming to Protect Nature*, N.Y. TIMES, Dec. 20, 2022, at A10.

³³⁷ 404 F. Supp. 3d 1294 (D. Or. 2019).

autonomy, which they argue[d] equate to a fundamental ‘right to be let alone.’”³³⁸ The district court flatly rejected these arguments, explaining that the asserted right to wilderness “lacks foundation in this ‘Nation’s history, legal traditions, and practices’ and is unlike other fundamental rights the Supreme Court has enumerated.”³³⁹ Since that 2019 decision, the Supreme Court has cut back on rights previously recognized under the Due Process Clause, declaring in *Dobbs v. Jackson Women’s Health Organization*³⁴⁰ that the Clause guarantees a right not mentioned in the Constitution only if the right itself is “‘deeply rooted in this Nation’s history and tradition’ and ‘implicit in the concept of ordered liberty.’”³⁴¹ This language signals the present futility of grounding any right to nature in the U.S. Constitution.³⁴²

3. Access Rights on Private Lands

Access to nature can occur on private land as well as on public land. Recreational use of private land may require the consent of multiple landowners, and high transaction costs and strategic holdouts may hinder agreements to allow access.³⁴³ In response, some academics have argued for a public right to access nature on private lands.³⁴⁴ Such a right, they contend, would promote distributive justice by transferring wealth from private landowners to the public and would foster efficiency by enabling access that would otherwise be difficult to obtain.³⁴⁵

However, the right to exclude others from private property is deeply rooted in U.S. law and culture.³⁴⁶ Generally, the public may not access private land

³³⁸ *Id.* at 1301.

³³⁹ *Id.* at 1302 (quoting *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997)).

³⁴⁰ 142 S. Ct. 2228 (2022).

³⁴¹ *Id.* at 2242 (quoting *Washington*, 521 U.S. at 721) (overruling *Roe v. Wade*).

³⁴² *See id.* But see Ariel Strauss, *An Enduring American Heritage: A Substantive Due Process Right to Public Wild Lands*, 51 ENV’T L. REP. 10026, 10029-34 (2021) (contending “wild lands were fundamental to our scheme of ordered liberty” and “protection of wild lands is deeply rooted in American history and tradition”).

³⁴³ *See* Jonathan Klick & Gideon Parchomovsky, *The Value of the Right To Exclude: An Empirical Assessment*, 165 U. PA. L. REV. 917, 938-39 (2017) (“[D]ispersion of veto rights among multiple rights-holders often leads to underutilization of assets. It can also block the development of projects that involve complementarities among different assets.”).

³⁴⁴ *See id.* at 939 (summarizing these arguments).

³⁴⁵ *See id.*

³⁴⁶ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (“The power to exclude has traditionally been considered one of the most treasured strands in an owner’s bundle of property rights.”); Thomas W. Merrill, *Property and the Right To Exclude*, 77 NEB. L. REV. 730, 730 (1998) (“[T]he right to exclude others is more than just ‘one of the most essential’ constituents of property—it is the *sine qua non*.”); Klick & Parchomovsky, *supra* note 343, at 918-19 (“In one of the most famous sentences in the history of property law, William Blackstone described property as ‘that sole and despotic dominion which one

without a landowner's permission.³⁴⁷ Any access to private lands—when it exists—typically originates through grants of a license or easement rather than through legally protected rights.³⁴⁸ Absent landowner permission, a prescriptive easement can arise if a person—or the public at large—uses the land in an open and notorious way under a claim of right for a continuous and uninterrupted period.³⁴⁹

The state of Maine does have a unique open-land tradition that allows the public to use private land for hiking, fishing, hunting, and other recreational purposes.³⁵⁰ Maine is a heavily forested state with relatively little public land.³⁵¹ Its open-land tradition originates in the “Great Ponds Law,” a Massachusetts colonial-era enactment that Maine law absorbed.³⁵² Under the Great Ponds doctrine, the public has a right to cross through unimproved private lands to access ponds over ten acres.³⁵³ Even in the absence of large ponds, state policy also encourages landowners to allow public recreational access.³⁵⁴ Such access

man claims and exercises over the external things of the world, total exclusion of the right of any other individual in the universe.”).

³⁴⁷ 87 C.J.S. Trespass § 1 (2022) (defining trespass); § 47 (defining consent as defense to trespass).

³⁴⁸ *Id.* § 43 (outlining license and easement as defenses to trespass). A license is a personal, revocable, and nontransferable privilege to use the owner's land for a specific purpose, whereas an easement is a nonpossessory, transferable, and potentially irrevocable interest in land. 28A C.J.S. Easements § 8 (2022) (describing differences between license and easement).

³⁴⁹ 28A C.J.S. Easements § 23 (2022).

³⁵⁰ James M. Acheson, *Public Access to Privately Owned Land in Maine*, 15 ME. POL'Y REV. 18, 19 (2006) (“[T]he public uses large amounts of privately owned land as if it were a common property resource owned by everyone. People hunt on land owned by others, run their snowmobiles and ATVs on it, and use the land for activities such as bird watching and cross country skiing.”). Vermont's constitution recognizes a right to hunt, fish, and trap on open private land, subject to a landowner's right to exclude others through posting. VT. CONST. ch. II, § 67 (“The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not inclosed”); VT. STAT. ANN. tit. 10, § 5201 (2023) (describing notice requirements necessary to rebut presumption of openness); *Private Land and Public Access*, AGENCY OF NAT. RES.: VT. FISH & WILDLIFE DEP'T, <https://vtfishandwildlife.com/learn-more/landowner-resources/private-land-and-public-access> [<https://perma.cc/Z4WK-B7E8>] (last visited Feb. 16, 2024) (providing resources to landowners on their land and visitation rights).

³⁵¹ See Acheson, *supra* note 350, at 19 (noting Maine leads country with 90% forest cover, and 90% of land privately held).

³⁵² See *id.* at 21.

³⁵³ *Id.* at 21-22 (discussing Maine Supreme Judicial Court holding that “state holds them in trust for the public and the public has a right to fish, and fowl and cut ice upon them”).

³⁵⁴ *Id.* at 22.

is not by right, however, and trespassing on posted land is subject to criminal prosecution.³⁵⁵

In contrast to the United States, some countries that lack an extensive public land base do recognize a right of access to nature on private lands. Scandinavian countries have long held the public has a right “to roam on land owned by another.”³⁵⁶ This right, which is explicitly grounded in the Swedish and Finnish constitutions³⁵⁷ and codified in Norwegian law,³⁵⁸ obligates visitors to treat the land with care and avoid land surrounding the home.³⁵⁹ Switzerland and Austria have codified public access to privately owned forests and mountain lands, reflecting traditions of outdoor recreation.³⁶⁰ In addition, some common law jurisdictions have established a right of access via statute. In 2003, Scotland enacted a law formally recognizing its longstanding custom of recreational public access to private land as a right.³⁶¹ In 2000, England adopted the Countryside and Rights of Way Act, which established a limited public right to access 4 million acres of designated private property throughout the country.³⁶² This right has been described as a restored version of “historic commoner rights”

³⁵⁵ *Id.* (“There is a criminal statute in Maine that prohibits trespassing on posted land. Small landowners can post their property, and if the posting meets standards prescribed in law, they can have trespassers prosecuted . . .”).

³⁵⁶ Heidi Gorovitz Robertson, *Public Access to Private Land for Walking: Environmental and Individual Responsibility as Rationale for Limiting the Right to Exclude*, 23 *Geo. Int’l Env’t L. Rev.* 211, 211, 215 (2011) (describing Scandinavian, and especially Swedish, legal rights of public access to private lands).

³⁵⁷ REGERINGSFORMEN [RF] [CONSTITUTION] 2:15 (Swed.) (“Everyone shall have access to the natural environment in accordance with the right of public access . . .”); SUOMEN PERUSTUSLAKI [CONSTITUTION] Oct. 15, 2018, ch. 2, § 9 (Fin.) (“Finnish citizens and foreigners legally resident in Finland have the right to freely move within the country and to choose their place of residence.”); Robertson, *supra* note 356, at 216, 236 (explaining Swedish and Finnish Constitutions’ land access rights).

³⁵⁸ *Friluftsløven*, No.16, § 1 (1957) (Norway) (“The purpose of this Act is to . . . safeguard the public right of access to and passage through the countryside and the right to spend time there . . .”); Robertson, *supra* note 356, at 232 (explaining Norway’s Outdoor Recreation Act provisions and history of its passage).

³⁵⁹ Robertson, *supra* note 356, at 217, 219, 233, 236 (outlining basic limitations on public use of private land under Swedish, Finnish, and Norwegian law).

³⁶⁰ *Id.* at 255-58 (describing Swiss and Austrian codes governing rights and restrictions for recreational public use of private lands).

³⁶¹ *Id.* at 247-48 (“[T]he Scottish Act [of 2003] created a right to be on land for responsible recreational, educational, and certain other purposes, and a right to cross land. Prior to the Act, such actions could be taken only by implied consent of the landowner.”).

³⁶² Countryside and Rights of Way Act 2000, c. 37, § 2 (UK), <https://www.legislation.gov.uk/ukpga/2000/37/section/2> [<https://perma.cc/7PA4-ESC8>] (“Any person is entitled by virtue of this subsection to enter and remain on any access land for the purposes of open-air recreation . . .”); Robertson, *supra* note 356, at 240-42 (outlining access limits and liability limitations for private lands under Countryside and Rights of Way Act).

to royal forests for gathering wood and other specified purposes.³⁶³ To protect landowner privacy and the land itself, however, the Act limits visitors' activities to those with minimal impacts.³⁶⁴

4. Public Trust

Public trust doctrine may also support a right of access to nature under limited circumstances. Generally speaking, public trust doctrine protects public rights in trust resources by constraining state and local governments' management of those resources.³⁶⁵ Under the common law, the doctrine applied only to tidal and navigable waters and the lands underlying those waters.³⁶⁶ A few states have extended public trust doctrine to other resources such as public parks.³⁶⁷ California applies the doctrine to nonnavigable tributaries and groundwater when actions affecting these resources ultimately impact navigable waters.³⁶⁸

³⁶³ GRAHAM LITMAN, MATT HULSE & CALVIN SANDBORN, UNIV. VICTORIA ENV'T L. CLINIC, ENHANCING PUBLIC ACCESS TO PRIVATELY OWNED WILD LANDS 12 (2016), <http://www.elc.uvic.ca/wordpress/wp-content/uploads/2016/06/EnhancingPublicAccess-2016-01-03.pdf> [<https://perma.cc/GL8S-XZLR>] ("The [Countryside and Rights of Way Act] may be seen as partially restoring the historic commoner rights lost during the ancient enclosure period when the commons system ended.").

³⁶⁴ Robertson, *supra* note 356, at 242, 246 (listing limitations on high-impact recreation under Act); Klick & Parchomovsky, *supra* note 343, at 942 (noting limitations on right to roam).

³⁶⁵ Albert C. Lin, *Public Trust and Public Nuisance: Common Law Peas in a Pod?*, 45 U.C. DAVIS L. REV. 1075, 1091-92 (2012) (recounting limitations and affirmative obligations placed on state governments under public trust doctrine).

³⁶⁶ Kenneth A. Manaster & Daniel P. Selmi, 1 STATE ENV'T L. § 4.10 (2022); *see also* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 707-08 (2006) (noting expansion of doctrine's application to other resources).

³⁶⁷ Erin Ryan, Holly Curry & Hayes Rule, *Environmental Rights for the 21st Century: A Comprehensive Analysis of the Public Trust Doctrine and Rights of Nature Movement*, 42 CARDOZO L. REV. 2447, 2467-69 (2021) (providing examples of states expanding public trust doctrine to cover novel resources like wildlife and public beaches); Hope Babcock, *Is Using the Public Trust Doctrine to Protect Public Parkland from Visual Pollution Unjustifiable Doctrinal Creep?*, 42 ECOLOGY L.Q. 1, 20, 20 n.110 (2015) ("[M]any states have now applied the public trust doctrine to parklands.").

³⁶⁸ *Nat'l Audubon Soc'y v. Super. Ct.*, 658 P.2d 709, 727 (Cal. 1983) (affirming state supervisory control over tidelands and lakeshores under public trust doctrine); *Env't L. Found. v. State Water Res. Control Bd.*, 237 Cal. Rptr. 3d 393, 402-04 (Ct. App. 2018) ("The fact the tributaries themselves were not navigable did not dissuade the Supreme Court from concluding the public trust doctrine protects the navigable water (Mono Lake) from harm by diversion of nonnavigable tributaries."); *see also* *Adobe Whitewater Club of N.M. v. N.M. State Game Comm'n*, 519 P.3d 46, 53-54 (N.M. 2022) (explaining public easement for fishing applies to all state waters, including nonnavigable waters).

Hawaii's public trust doctrine applies to all public natural resources, not just waterways, and explicitly protects ecological values and recreational use.³⁶⁹

Public trust doctrine supports a public right of access to waterways for public trust uses.³⁷⁰ Those uses, which historically included fishing, commerce, and navigation, also encompass recreational use in some jurisdictions.³⁷¹ In California, for example, public trust protects public access to waters and tidelands for "commerce, navigation, fishing, recreation, or for the purpose of preserving the property in its natural state."³⁷² New Jersey courts have even recognized a right of access to certain upland beach areas (above the high-water mark) for recreational purposes.³⁷³

Nonetheless, public trust doctrine fails to support a general right of access to public lands. The doctrine does not apply to federal lands and thus imposes no obligations on Congress or federal land managers in their oversight of federal public lands.³⁷⁴ In most states, the doctrine applies only to waterways, tidelands, and associated beaches.³⁷⁵ In some jurisdictions, public trust doctrine applies to the relatively small proportion of state-owned lands set aside as state or local parks.³⁷⁶ In that context, courts have applied the doctrine to prevent park resources from being transferred or devoted to other purposes, and not to directly safeguard a public right of access.³⁷⁷

³⁶⁹ HAW. CONST. art. XI, § 1 ("All public natural resources are held in trust by the State for the benefit of the people."); HAW. REV. STAT. § 174C-2(c) (2023) (mandating balance between maximizing beneficial use of public waters and promoting wildlife conservation, protection of customary Hawaiian rights, and "maintenance of proper ecological balance and scenic beauty").

³⁷⁰ Frank, *supra* note 268, at 674 (comparing New Jersey's expansive public shoreline access with more limited approaches in New Hampshire and Maine).

³⁷¹ Stephen D. Osborne, Jennifer Randle & Michael Gambrell, *Laws Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis*, 33 ENV'T L. 399, 411 (2003) ("Traditional trust uses are fishing, commerce, and navigation. Various jurisdictions, however, have expanded the doctrine to include habitat conservation, aesthetic value preservation, and recreation."); Ryan et al., *supra* note 367, at 2470-71 (identifying expansions of public trust uses in several states).

³⁷² *California v. Super. Ct. (Lyon)*, 625 P.2d 239, 248 (Cal. 1981).

³⁷³ *Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355, 365-66 (N.J. 1984) (setting out framework for application of public trust doctrine to privately owned upland beaches); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc.*, 879 A.2d 112, 124-25 (N.J. 2005) (concluding public trust doctrine required privately owned upland beach to be open to general public at reasonable fee).

³⁷⁴ Frank, *supra* note 268, at 680-81 ("At least one quite recent decision concludes that the public trust doctrine does not impose independently-enforceable mandates upon federal agencies and officials with respect to their administration of natural resource obligations.").

³⁷⁵ See Klass, *supra* note 366, at 707-08 (listing state efforts to expand doctrine while noting most retain doctrine's "historic domain of ensuring public access to navigable water").

³⁷⁶ See *id.* (noting expansion of public trust doctrine to cover parklands, as well as other public resources in certain jurisdictions).

³⁷⁷ Babcock, *supra* note 367, at 20 n.110 (cataloging numerous court decisions applying public trust doctrine to prevent or limit conversion of parklands to other uses).

5. Right to Fish

Finally, the public's ability to access waterways has also arisen in the context of fishing, which may be specifically protected by right. Several state constitutions guarantee a distinct right to fish apart from public trust rights.³⁷⁸ Montana law, for example, prohibits private landowners from interfering with the public's right to recreational use of the State's surface waters, regardless of streambed ownership.³⁷⁹ This right rests on public trust doctrine, as well as a state constitutional provision defining the surface waters within the state as "property of the state for the use of its people."³⁸⁰ The California constitution expressly recognizes a right to fish on state public lands and requires the reservation of public fishing rights when state-owned lands are sold.³⁸¹ California's right to fish ostensibly authorizes anglers to cross private land or access private land above the high-water mark to fish, if the private land was acquired from the state after 1910.³⁸²

As the preceding discussion demonstrates, various laws and legal doctrines recognize the importance of access to nature. While access to nature is generally not guaranteed by right in the United States, it is a fundamental interest warranting serious consideration by public land managers.

C. *Inequities in Access*

Notwithstanding their democratizing potential, public lands have a long history of exclusion and inequality, including inequities in access. Prominent examples include the exclusion of Black Americans from public facilities and the removal of Native Americans from their homelands.³⁸³ Inequities have also

³⁷⁸ Francis Coats & Karrigan Bork, *California's Constitutional Right to Fish*, 51 ENV'T L. 1085, 1092 (2021) (citing constitutional provisions in California, Hawaii, Rhode Island, and Vermont).

³⁷⁹ *Montana Coal. for Stream Access, Inc. v. Curran*, 210 Mont. 38, 52, 682 P.2d 163, 170 (1984) ("Streambed ownership by a private party is irrelevant The Constitution and the public trust doctrine do not permit a private party to interfere with the public's right to recreational use of the surface of the State's waters.").

³⁸⁰ *Id.* at 52.

³⁸¹ CAL. CONST. art. I, § 25 ("The people shall have the right to fish upon and from the public lands of the State and in the waters thereof . . . and no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon").

³⁸² Coats & Bork, *supra* note 378, at 1113, 1142 (identifying key features of reservation of right to fish on private land but noting limitation to lands purchased from state after 1910). However, this right has been underenforced by the state's agencies and courts. *Id.* at 1093.

³⁸³ See *supra* notes 33-38 and accompanying text; Krakoff, *supra* note 34, at 215 ("Forest reserves, national parks, and national monuments were designated on tribal lands, and indigenous people were driven out by the project of conservation just as they were by the forces of privatization and extraction.").

been more subtle. Upper- and middle-class Whites dominated the early conservation movement, and their biases were reflected in recreational facilities and in access opportunities.³⁸⁴ In New York City, Central Park was established in part to affirm racial and class boundaries and “create a safe recreation space for middle and upper-class White families.”³⁸⁵ Similarly, leading supporters of the first national parks saw them as sanctuaries not only from crowded cities but also from the poor and people of color who lived there.³⁸⁶ Subsequent park acquisition and development further neglected or reinforced socioeconomic, racial, and gender inequalities in access to open space and outdoor recreation.³⁸⁷ Even campgrounds did not escape these biases, as campsite designs “mirrored [suburban] White spaces” and reservation requirements echoed notions of property ownership.³⁸⁸

Current patterns of public land use continue to reflect these inequities. Approximately 75% of national and state park visitors—and over ninety percent of national forest and national wildlife refuge users—are White, compared to 60% of the general population.³⁸⁹ Similarly, campers tend to be disproportionately affluent and White.³⁹⁰ Unequal access to nature is a general phenomenon not limited to federal lands: communities of color and low-income

³⁸⁴ Dorceta E. Taylor, *American Environmentalism: The Role of Race, Class and Gender in Shaping Activism 1820-1995*, 5 RACE, GENDER & CLASS 16, 30-31, 39-40 (1997) (describing gender, race, and class biases in conservation efforts to preserve Yosemite Valley in 1910s and following Rachel Carson’s publication of *Silent Spring* in 1962); CAROLYN FINNEY, BLACK FACES, WHITE SPACES: REIMAGINING THE RELATIONSHIP OF AFRICAN AMERICANS TO THE GREAT OUTDOORS 25 (2014) (“Historically, African Americans have not been well represented in the major environmental organizations in the United States.”).

³⁸⁵ Lee, *supra* note 36, at 1189.

³⁸⁶ *Id.* at 1191-92 (“White preservationists, intellectuals, and political leaders viewed nature as an antidote to urban problems and . . . envisioned creating national parks as a means by which to maintain White supremacy.”).

³⁸⁷ Thomas, *supra* note 304, at 511, 514-16 (discussing failure of Land and Water Conservation Fund to target acquisitions benefitting underprivileged communities lacking open-space access).

³⁸⁸ Rice et al., *supra* note 287, at 47; YOUNG, *supra* note 34, at 191 (noting “close connections between camp design and suburban prototype”).

³⁸⁹ Marsha Mercer, *State Parks Take Creative Steps To Attract More Visitors of Color*, WASH. POST, July 5, 2022, at E1 (“Officials estimate that 3 in 4 visitors to America’s state and national parks are White, well above their population rate of 60 percent.”); 2020 NVUM, *supra* note 60, at 14 (estimating that 95% of national forest visitors in 2016-20 survey identified as White); NATALIE R. SEXTON ET AL., U.S. GEOLOGICAL SURV., NATIONAL WILDLIFE REFUGE VISITOR SURVEY RESULTS: 2010/2011, at 12 (2011), <https://pubs.usgs.gov/ds/685/DS685.pdf> [<https://perma.cc/HQ68-TZ8J>] (reporting 96% of visitors to national wildlife refuge areas between July 2010 and November 2011 identified as White).

³⁹⁰ Rice et al., *supra* note 287, at 47.

communities are far more likely to live in nature-deprived areas.³⁹¹ Making matters worse, the pandemic exacerbated disparities in urban park use by socially vulnerable and low-income communities.³⁹²

Many structural inequalities contribute to these disproportionate rates of visitation. Urban and low-income populations may have to overcome long distances and a lack of affordable transit options to access public lands.³⁹³ However, geographic proximity alone does not explain the disparities. One study of national forest users, for example, found that “forests that are in areas with the greatest level of racial diversity are less likely to equitably serve their local communities.”³⁹⁴ Minority and low-income communities face practical and emotional barriers to nature access. Practical barriers to nature access include a lack of time, money, health, and transportation.³⁹⁵ Emotional barriers include bias, fear, and patterns of exclusion that generate a “feeling of not belonging” on public lands.³⁹⁶ Black Americans visit public lands at much lower rates than other racial groups not only because of socioeconomic factors, but also because of concerns regarding the safety of traveling in rural places that are predominantly White and characterized by a history of racism or

³⁹¹ JENNY ROWLAND-SHEA, SAHIR DOSHI, SHANNA EDBERG & ROBERT FANGER, CTR. FOR AM. PROGRESS, *THE NATURE GAP: CONFRONTING RACIAL AND ECONOMIC DISPARITIES IN THE DESTRUCTION AND PROTECTION OF NATURE IN AMERICA* 5 fig.1, 6 fig.2 (2020) (defining community as nature deprived “if their census tract has a higher proportion of natural area lost to human activities than the state-level median”).

³⁹² Lincoln R. Larson et al., *Urban Park Use During the COVID-19 Pandemic: Are Socially Vulnerable Communities Disproportionately Impacted?*, FRONTIERS IN SUSTAINABLE CITIES (Sept. 29, 2021), <https://www.frontiersin.org/articles/10.3389/frsc.2021.710243/full> [<https://perma.cc/C9WC-6N5C>] (“[T]he COVID-19 pandemic appeared to exacerbate pre-existing disparities in park use . . .”); Slater et al., *supra* note 89, at 2 (concluding COVID-19 shelter-in-place orders and physical distancing requirements disproportionately impact urban and minority communities’ use of parks).

³⁹³ See NAT’L RECREATION AND PARK ASS’N, *supra* note 310, at 4 (“[T]he equivalent of more than 86 million people in the United States [] do not have walkable access to a park or other recreation facility.”); CAL. ST. PARKS, CALIFORNIA’S VISION FOR PARK EQUITY 2000-2020: TRANSFORMING PARK ACCESS WITH DATA AND TECHNOLOGY (2020), https://www.parksforcalifornia.org/park_equity [<https://perma.cc/9U9D-SVCU>] (detailing California State Parks’ efforts to identify needs for local parks and to improve park access in underserved communities).

³⁹⁴ David Flores, Gennaro Falco, Nina S. Roberts & Francisco P. Valenzuela III, *Recreation Equity: Is the Forest Service Serving Its Diverse Publics?*, 116 J. FORESTRY 266, 270 (2018).

³⁹⁵ Karen Bradshaw & Caitlin Doak, *Making Recreation on Public Lands More Accessible*, 97 NOTRE DAME L. REV. REFLECTION 35, 42 (2022) (“Practical barriers to recreation access include the absence of . . . leisure time; discretionary income; good health; and affordable, reliable, and convenient transportation.”).

³⁹⁶ *Id.* at 43.

discrimination.³⁹⁷ Latinos sometimes express similar concerns about safety, discrimination, and cultural differences when traveling to or visiting public lands.³⁹⁸

Limitations on access can exacerbate existing inequities. During the initial months of Yosemite's day use reservation program, for example, many Spanish-speaking visitors who were unaware of reservation requirements came to the park and were turned away.³⁹⁹ Moreover, online reservation systems for popular campsites are not equally accessible to all populations. Navigating these systems typically requires high-speed internet, an ability to plan far in advance, flexibility of work schedules to make reservations at set times, and institutional knowledge regarding the reservation process.⁴⁰⁰ These factors generally disadvantage lower income and non-White populations in reserving high-demand campsites.⁴⁰¹ The use of subscription-based notification services, such as Campnab, to monitor campsite availability may make things even worse.⁴⁰² These services monitor websites for cancellations and notify users when campsites become available.⁴⁰³ The fees charged by these services further disadvantage low-income and neophyte campers in obtaining campsites.

³⁹⁷ FINNEY, *supra* note 384, at 8-9 (highlighting empirical studies demonstrating Black Americans' apprehension about visiting outdoor recreation areas); Reyna Askew & Margaret A. Walls, *Diversity in the Great Outdoors: Is Everyone Welcome in America's Parks and Public Lands?*, RES. (May 24, 2019), <https://www.resources.org/common-resources/diversity-in-the-great-outdoors-is-everyone-welcome-in-americas-parks-and-public-lands> (noting "Discrimination and White Racial Frames" and "Historical Trauma and Concerns of Physical Safety," among others, as barriers to minority enjoyment of public lands).

³⁹⁸ David Flores & Karmon Kuhn, *Latino Outdoors: Using Storytelling and Social Media to Increase Diversity on Public Lands*, 36 J. PARK & RECREATION ADMIN. 47, 49 (2018) (noting barriers to Latino participation in recreation on public lands and varying cultural narratives about public lands).

³⁹⁹ *Lessons from the Field: Overcrowding in National Parks: Hearing Before the Subcomm. on Oversight and Investigation, Comm. On Nat. Res.*, 117th Cong. (2022) (testimony of Frank Dean).

⁴⁰⁰ Rice et al., *supra* note 287, at 47-48, 58.

⁴⁰¹ *Id.* at 48 ("Although reservation systems are based on equality, obtaining campsites through online systems such as Recreation.gov may be associated with various constraining factors that could cater to higher socioeconomic groups which are often White." (citations omitted)).

⁴⁰² *Id.* at 58 (discussing impact of subscription-based notification systems); Peterschmidt, *supra* note 110 ("Compared to people camping at first-come first-serve campsites in the same parks, the people who successfully use the reservation systems are wealthier, better-educated, and more likely to be white.").

⁴⁰³ Allison Pohle, *Tips for Snagging Top Campsites—Even if Sold Out*, WALL ST. J., July 13, 2023, at A11 (describing use and operating system of service monitor websites); *Frequently Asked Questions*, CAMPNAB, <https://campnab.com/faq#whats-all-this-nabbing-about> [<https://perma.cc/KH43-L5AC>] (last visited Feb. 16, 2024) (stating history and purpose of Campnab, and its use for monitoring websites).

Equitable access to nature is important as a matter of fairness and distributive justice. It is also important because future land conservation and management efforts will require political and financial support from a diverse population.⁴⁰⁴ Land management agencies have recognized since their founding that access to public lands builds public support; today, in an increasingly diverse nation, such access should be made widely available in an equitable manner.

D. *Transparency and Public Participation*

Federal land managers have broad authority to protect public resources by restricting public access or, when necessary, closing off areas altogether. In exercising that authority, they should act transparently and with due respect for the public's interest in access. Decisions about access to public lands involve not only technical matters normally left to agency experts, but also value-based judgments about conflicting uses and acceptable impacts.⁴⁰⁵ Moreover, public input can inform decision makers on public needs or expectations and occur in a collaborative process aimed at resolving conflicts between users.⁴⁰⁶

If land managers restrict access by issuing a rule, they must allow for public notice and comment unless doing so is "impracticable, unnecessary, or contrary to the public interest."⁴⁰⁷ However, land management agencies more often institute closures or restrictions by issuing administrative orders rather than rules. These orders are typically issued under NEPA categorical exclusions and without advance notice or public comment.⁴⁰⁸

For many emergency closures, minimal process and public input make sense. An endangered species' movement to a location may necessitate prompt access restrictions to prevent human disturbance. Likewise, a wildfire may warrant immediate closures to protect the public and facilitate firefighting efforts. However, as climate change becomes more severe, emergency conditions will become more common and prevalent. California and other parts of the western United States are already experiencing more widespread and explosive fires, as

⁴⁰⁴ Flores et al., *supra* note 394, at 266 ("[L]and managers are concerned that within the next 20 years, public lands will experience less political and financial support, disconnected urban audiences . . .").

⁴⁰⁵ Keiter, *Public Lands*, *supra* note 271, at 1175 ("[M]ost controversial resource allocation decisions involve conflicts over values and interests as much as technical disagreements over scientific data.").

⁴⁰⁶ Keiter, *Emerging*, *supra* note 12, at 151 (stating community groups have impacted public land matters, such as BLM managers joining with local government officials and mountain bike enthusiasts to establish Sand Flats Recreation Management Area in Utah's Moab area); Keiter, *Public Lands*, *supra* note 271, at 1178 ("Civic republicanism posits that government decisions made through open, local deliberative processes will tend inherently to accentuate public rather than private interests, and thus result in more public-spirited and better-accepted policies.").

⁴⁰⁷ 5 U.S.C. § 553; *see also supra* text accompanying notes 204, 217-19 (discussing circumstances under which NPS and Forest Service issue rules).

⁴⁰⁸ *See supra* text accompanying notes 225-29.

well as a longer fire season that can extend from spring into late fall.⁴⁰⁹ Across the United States, flash flooding from increasingly intense precipitation events may lead to more frequent closures as well.⁴¹⁰

Agency responses to COVID-19 demonstrate the possibility of unnecessarily extended emergency closures without public input. As early as April 2020, weeks after the institution of widespread shutdowns, experts observed that being outdoors was relatively safe with respect to COVID-19 transmission, as long as people maintained social distancing.⁴¹¹ While most public lands remained open, the NPS generally followed federal CDC and state guidelines on closures.⁴¹² As a result, public lands in some states remained closed into summer 2020, even as evidence mounted regarding the safety of outdoor recreation.⁴¹³ White Sands National Park and Death Valley National Park, for example, did not reopen until late June 2020.⁴¹⁴ Popular trails in the Columbia River Gorge, administered by the Forest Service and state officials, remained closed until August 2020.⁴¹⁵

⁴⁰⁹ Chunyu Dong et al., *The Season for Large Fires in Southern California Is Projected To Lengthen in a Changing Climate*, NATURE: COMMUN. EARTH & ENV'T (Feb. 17, 2022), <https://www.nature.com/articles/s43247-022-00344-6> [<https://perma.cc/K7YM-PNAL>].

⁴¹⁰ Matthew Cappucci, *Study Finds Climate Change Is Bringing More Intense Rains to U.S.*, WASH. POST (Oct. 11, 2022, 12:41 PM EDT), <https://www.washingtonpost.com/climate-environment/2022/10/11/rain-increasing-climate-change-us/> (“With the planet continuing to warm, a continued increase in rainfall intensity can be expected. That spells concern over whether existing infrastructure can handle the downpours of the future.”).

⁴¹¹ Tufekci, *supra* note 90 (“The outdoors, exercise, sunshine, and fresh air are all good for people’s immune systems and health, and not so great for viruses.”); Andy Kubis, *It’s Safe To Go Outside, But Follow Expert Guidelines*, WBUR (Mar. 25, 2020), <https://www.wbur.org/hereandnow/2020/03/24/safety-outdoors-coronavirus> [<https://perma.cc/66TH-VACS>] (“Going outside is actually probably one of the safest things that you can do The likelihood of you having an exposure when someone wasn’t directly in front of you coughing or sneezing is very, very minimal.” (internal quotations omitted)); Mike Moffitt, *China Study Suggests Outdoor Transmission of COVID-19 May Be Rare*, SFGATE (Apr. 28, 2020, 8:01 AM), <https://www.sfgate.com/science/article/China-study-suggests-outdoor-transmission-of-15229649.php> [<https://perma.cc/R7KQ-Y5F5>] (citing research finding 1 case out of 7,324 identified COVID-19 transmission outdoors).

⁴¹² Abraham J. Miller-Rushing et al., *COVID-19 Pandemic Impacts on Conservation Research, Management, and Public Engagement in US National Parks*, BIOLOGICAL CONSERVATION, May 2021, at 1, 1, <https://www.sciencedirect.com/science/article/pii/S0006320721000902> (stating NPS followed federal CDC and state guidelines for pandemic-related closure procedures).

⁴¹³ *Id.*

⁴¹⁴ *White Sands National Park Partially Reopens*, KRQE (June 30, 2020, 8:28 AM MDT), <https://www.krqe.com/health/coronavirus-new-mexico/white-sands-natl-park-partially-reopens/> [<https://perma.cc/4J3L-KCQZ>]; *Death Valley National Park Continues a Phased Reopening*, NAT’L PARK SERV. (June 26, 2020), <https://www.nps.gov/deva/learn/news/phased-reopening.htm> [<https://perma.cc/YJ3W-3SXF>].

⁴¹⁵ Zach Urness, *Multnomah Falls, Other Columbia Gorge Trails Reopen After Extended COVID-19 Closures*, REG.-GUARD (Aug. 11, 2020, 3:27 PM PT), <https://www.registerguard.com/story/news/2020/08/11/multnomah-falls-other-columbia->

Pilot programs to manage visitation have also shortchanged transparency and opportunities for public input. For example, Yosemite National Park adopted mandatory visitor reservations as a “temporary” measure to protect public health during the COVID-19 pandemic in June 2020.⁴¹⁶ The park continued to require reservations for the next two summers as well, with minor modifications, despite the reduced intensity of the pandemic. Meanwhile, its characterization of the reservation requirement shifted: what began as a “temporary” emergency response to the pandemic became a “pilot” program “designed to spread visitation out and reduce chronic congestion.”⁴¹⁷ Only in December 2022, after announcing that it would not require reservations in 2023, did the park initiate a public comment period as part of preparing a long-term visitor access management plan.⁴¹⁸

IV. LOOKING FORWARD

Ideally, public land management agencies would be able to protect resources and maintain the quality of the public-lands experience while also accommodating rising visitation. Numerical capacity restrictions are just one of various options agencies have for reconciling resource protection with visitor access.⁴¹⁹ Nonetheless, visitation limits will be necessary in some instances, and managers will increasingly have to decide how to allocate public access.

As an initial matter, agencies engaged in visitation management have broad discretion to provide public notice and comment and should do so when reasonably feasible. Public participation in public land management and access decisions is inherently valuable as a matter of democratic governance, allows agencies to incorporate public concerns and feedback into management

gorge-trails-reopen-after-extended-covid-19-closures/113014340/ [https://perma.cc/T8V6-ZJVQ].

⁴¹⁶ Press Release, Nat’l Park Serv., Yosemite National Park Continues a Phased Reopening on Thursday, June 11, 2020 (June 8, 2020), <https://www.nps.gov/yose/learn/news/yosemite-national-park-continues-a-phased-reopening-on-thursday-june-11-2020.htm> [https://perma.cc/4AKY-X6TK].

⁴¹⁷ Press Release, Nat’l Park Serv., Yosemite National Park Seeks Public Input for Visitor Access Planning (Dec. 9, 2022), <https://www.nps.gov/yose/learn/news/yosemite-national-park-seeks-public-input-for-visitor-access-planning.htm> [https://perma.cc/P6T4-QZL7] (“Yosemite National Park has piloted reservation systems for the last three summers.”); Press Release, Nat’l Park Serv., Yosemite National Park Launches Temporary Peak Hours Reservation System May 20 (Feb. 16, 2022), <https://www.nps.gov/yose/learn/news/yosemite-national-park-launches-temporary-peak-hours-reservation-system-may-20.htm> [https://perma.cc/3VS5-9XSV] (announcing Yosemite’s reservation system); Bradybaugh, *supra* note 66, at 2-3 (describing timed-entry reservation systems as pilot projects).

⁴¹⁸ Press Release, Nat’l Park Serv., Yosemite National Park Seeks Public Input for Visitor Access Planning (Dec. 9, 2022), <https://www.nps.gov/yose/learn/news/yosemite-national-park-seeks-public-input-for-visitor-access-planning.htm> [https://perma.cc/P6T4-QZL7] (announcing eight week public commenting period, ending February 2023).

⁴¹⁹ COLE & CARLSON, *supra* note 179, at 1 (“[D]eriving capacities is only one of many visitor use management tools.”).

decisions, and promotes greater acceptance of those decisions.⁴²⁰ Emergency closures should not be used to circumvent public discussion or analysis of environmental and social impacts. Indeed, land management agencies should consider undertaking these discussions and analyses ahead of time for foreseeable and recurring emergencies such as wildfires.

Furthermore, land managers must carry out their legal obligations to manage recreation and visitor use. Professor Robert Keiter has suggested legislation that would require land management agencies to prepare recreation management plans and strategies.⁴²¹ Such a requirement would focus agencies' attention on the issue, but it should be noted that these agencies *already* have a duty to account for and manage recreation under existing mandates. Unfortunately, land management agencies have ignored or fallen behind on many of their current planning obligations. Forest plans, which are supposed to be updated at least every fifteen years, often have not been revised in decades.⁴²² Similarly, many NPS units have outdated park plans or no such plans at all.⁴²³ Granted, these agencies have limited resources and a long list of things to do.⁴²⁴ Yet the threat to public resources posed by rising visitation demands that visitor-use management take priority. Establishing and implementing visitor carrying capacities is explicitly required under the NPS Organic Act and implicitly necessary for other agencies to fulfill their legal mandates.⁴²⁵ Congress must provide agencies with the resources needed to carry out this often neglected but essential task, and agencies should focus their analyses on achieving desired

⁴²⁰ Cf. ALBERT C. LIN, PROMETHEUS REIMAGINED: TECHNOLOGY, ENVIRONMENT, AND LAW IN THE TWENTY-FIRST CENTURY 20 (2013) (discussing rationales for public participation).

⁴²¹ See Keiter, *Emerging*, *supra* note 12, at 154-55 (proposing "Public Lands Outdoor Recreation Act" that would "instruct the federal agencies to undertake comprehensive, landscape-scale planning efforts for recreation" and "enumerate factors for the agencies to consider when making recreation planning and management decisions").

⁴²² John Seebach & Blake Busse, *Forest Service Should Update Old Management Plans to Reflect Modern Science*, PEW (July 12, 2021), <https://www.pewtrusts.org/en/research-and-analysis/articles/2021/07/12/forest-service-should-update-old-management-plans-to-reflect-modern-science> [<https://perma.cc/5Q6A-2AZJ>]; National Forest System Land Management Planning, 77 Fed. Reg. 21162, 21164 (Apr. 9, 2012) (noting in 2012 most forest plans were developed between 1983 and 1993 and 68 of 127 forest plans were past due for revision).

⁴²³ Jeremy P. Jacobs, *Point Reyes Suit Could Trigger Flood of Litigation*, E&E NEWS: GREENWIRE (Aug. 29, 2016, 1:12 PM EDT), <https://www.eenews.net/articles/point-reyes-suit-could-trigger-flood-of-litigation/> (citing report finding 51 of 108 NPS units "either had an outdated GMP or lacked one entirely").

⁴²⁴ See Michael Doyle, *Watchdog Alerts Interior to Money Management Challenges*, E&E NEWS (Nov. 14, 2022, 4:12 PM EST), <https://subscriber.politicopro.com/article/eenews/2022/11/14/watchdog-alerts-interior-to-money-management-challenges-00066782?source=email> (discussing \$31 billion in deferred maintenance at Department of Interior).

⁴²⁵ 54 U.S.C. § 100502(3).

ecological and social conditions rather than on implementing quantitative caps based on existing infrastructure.⁴²⁶

A. *Tools To Accommodate More Visitors*

One obvious way to accommodate high demand for recreation access is to expand supply or capacity for such access. While the adage that “they’re not making any more land” has a ring of truth,⁴²⁷ governments have several options for expanding recreational opportunities on public lands. These options include acquiring land, expanding accessibility of existing public lands, and increasing visitor capacity of such lands. These options dovetail with the ongoing 30X30 campaign, which seeks to conserve at least 30% of U.S. land and water by 2030 to protect air and water quality, promote biodiversity, counter climate change, and provide opportunities to experience the outdoors.⁴²⁸

1. Land Acquisition

Obviously, governments can acquire land and open it to the public. Federal, state, and local governments are already pursuing this option through the Land and Water Conservation Fund (“LWCF”) and other programs.⁴²⁹ The 2020 Great American Outdoors Act directs \$900 million each year from energy development on public lands into the LWCF for public land acquisition.⁴³⁰ At least forty percent of LWCF funds must be spent on federal land acquisition, and at least forty percent must be funneled to the states to create parks and recreational infrastructure.⁴³¹ At the local level, the Outdoor Recreation Legacy Partnership program, administered by the NPS and financed by the LWCF,

⁴²⁶ Stephen F. McCool & David W. Lime, *Tourism Carrying Capacity: Tempting Fantasy or Useful Reality?*, 9 J. SUSTAINABLE TOURISM 372, 373, 376-77 (2001) (stating Congress’s role to support agencies and agencies’ goals).

⁴²⁷ The phrase is commonly attributed to Mark Twain. See *Mark Twain*, GOODREADS, <https://www.goodreads.com/quotes/597766-buy-land-they-re-not-making-it-anymore> [<https://perma.cc/B3X8-PT2Y>] (last visited Feb. 16, 2024).

⁴²⁸ NAT’L CLIMATE TASK FORCE, CONSERVING AND RESTORING AMERICA THE BEAUTIFUL 6 (2021). The campaign’s areas of focus include “increas[ing] access for outdoor recreation” and “creat[ing] more parks and safe outdoor opportunities in nature-deprived communities.” *Id.* at 18-21.

⁴²⁹ See CAROL HARDY VINCENT, LAURA COMAY, KATIE HOOVER & ERIN WARD, CONG. RSCH. SERV., RL34273, FEDERAL LAND OWNERSHIP: ACQUISITION AND DISPOSAL AUTHORITIES 4-8 (2022) (discussing statutes relevant to each agency).

⁴³⁰ Great American Outdoors Act, Pub. L. No. 116-152, 134 Stat. 682 (2020); Emma Dumain, *Trump Signs Great American Outdoors Act; GOP Takes Credit*, E&E NEWS: GREENWIRE (Aug. 4, 2020, 1:23 PM), <https://www.eenews.net/articles/trump-signs-great-american-outdoors-act-gop-takes-credit/> (stating program’s funding of \$900 million). There undoubtedly are suitable candidates for acquisition. Private lands are being developed at a rapid rate, are largely unprotected, and make up the vast majority of landholdings outside of the western United States. RYAN RICHARDS & MATT LEE-ASHLEY, THE RACE FOR NATURE 1-5 (2020) (reviewing efforts and funding for existing conservation easement programs).

⁴³¹ 54 U.S.C. § 200304.

provides grants to economically disadvantaged urban communities to acquire, develop, or renovate parks and other outdoor recreation spaces.⁴³² Many states also have their own land acquisition programs. For example, under one such program, the state of Florida has acquired more than 2.6 million acres since 1991.⁴³³

Acquisition may occur through gifts, bequests, land exchanges, and purchases.⁴³⁴ The government also may acquire land via eminent domain, but federal land management agencies rarely exercise such authority.⁴³⁵ Ultimately, high costs and limited resources are likely to temper the role of land acquisition in the expansion of public access to nature.⁴³⁶ Moreover, land acquisition may do little to relieve overcrowding at popular recreation sites that are valued for their unique features and landscapes.

As mentioned previously, property-rights traditions and takings-law protections make it unlikely that states will recognize a public right of access on private land.⁴³⁷ Nevertheless, states can encourage landowners to grant access voluntarily. To allay legal concerns, states might shield landowners from tort liability.⁴³⁸ States also can build on existing programs to promote conservation easements, which landowners may place on their land to advance natural, scenic, recreational, and environmental purposes.⁴³⁹ Washington's King County, for

⁴³² *Outdoor Recreation Legacy Partnership Grants Program*, NAT'L PARK SERV., <https://www.nps.gov/subjects/lwcf/outdoor-recreation-legacy-partnership-grants-program.htm> [<https://perma.cc/LSD9-LGZZ>] (last updated Jan. 3, 2024) (describing purpose and details of Outdoor Recreation Legacy Partnership Grants Program).

⁴³³ *Florida Forever Frequently Asked Questions*, FLA. DEPT. OF ENV'T PROT., <https://floridadep.gov/lands/environmental-services/content/florida-forever-frequently-asked-questions> [<https://perma.cc/F7LW-8VLF>] (last updated Jan. 31, 2024, 3:08 PM).

⁴³⁴ See Kellen Zale, *Inholdings*, 46 HARV. ENV'T L. REV. 439, 480 (2022) (listing three primary methods for federal government to acquire fee estate in inholdings: voluntary purchase and sale, federal land exchange process, and eminent domain). The various statutes governing the federal land management agencies give the BLM the broadest land acquisition authority and the NPS the narrowest authority. VINCENT ET AL., *supra* note 429, at 4-8.

⁴³⁵ VINCENT ET AL., *supra* note 429, at 4; Zale, *supra* note 434, at 484-85.

⁴³⁶ See Zale, *supra* note 434, at 493 (explaining, in context of acquiring private inholdings, that "even a fully funded LWCF is unlikely to be able to provide enough funds for all desired acquisitions"); see also J. Dave Aiken, *The 30X30 Program: A Federal Land Grab?*, UNIV. OF NEB.-LINCOLN (June 22, 2022), <https://agecon.unl.edu/30x30-program-federal-land-grab> [<https://perma.cc/WS2Q-CCHZ>] (estimating 400 million acres of land would need to be conserved to reach 30X30 goal, as only 12% of U.S. lands are in highly protected status).

⁴³⁷ See *supra* Section III.B.3; cf. Klick & Parchomovsky, *supra* note 343, at 961 (arguing decline in property values from passage of right-to-roam statute in England and Wales suggests Takings Clause would require substantial compensation to landowners if similar right were established in United States).

⁴³⁸ See, e.g., VT. STAT. ANN. tit. 12, § 5791 (stating owner has no greater duty of care to person who enters private land for recreational use than owner would have to trespasser).

⁴³⁹ Jessica Owley, *The Enforceability of Exacted Conservation Easements*, 36 VT. L. REV. 261, 264-65 (2011) ("Many states with conservation-easement statutes modeled their

example, adopted a public benefit rating system for reducing property tax assessments based on a parcel's public accessibility and the presence of trail linkages, scenic characteristics, and other open-space resources.⁴⁴⁰ Whether many landowners would be willing to permit recreation on their land—and not just conservation—is unclear, however. Growing conflicts between recreationists and landowners over public fishing access on or adjacent to private property raise doubts about the potential of such initiatives.⁴⁴¹

2. Expanded Accessibility

Another option for expanding outdoor recreation opportunities is to make existing public land more accessible. Millions of acres of federal and state lands are technically open to public recreation but practically inaccessible because they are surrounded by private land.⁴⁴² Occasionally, LWCF funding is used to

legislation on the Uniform Conservation Easement Act (UCEA), which the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved in 1981.”). For example, the Agricultural Conservation Easement Program provides assistance to establish conservation easements on agricultural lands and wetlands, see 16 U.S.C. §§ 3865-3865d, the Healthy Forests Reserve Program funds easement acquisition on private forest land, see 16 U.S.C. §§ 6571-6578; and the Voluntary Public Access and Habitat Incentive Program offers federal grants for state and tribal programs that encourage private landowners to allow public access to land for wildlife-dependent recreation, see 7 C.F.R. Pt. 1455 (2024). Some states also offer tax credits for donating conservation easements. See Alex Brown, *Private Lands Are the Next Battleground in State Conservation Policy*, STATELINE (Apr. 26, 2022, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/04/26/private-lands-are-the-next-battleground-in-state-conservation-policy> [https://perma.cc/3RBR-TXAB]; *Income Tax Incentives for Land Conservation*, LAND TRUST ALL. RES. CTR. (Sept. 27, 2022), <https://landtrustalliance.org/resources/learn/explore/income-tax-incentives-for-land-conservation#content> [https://perma.cc/S58C-DJL9] (“14 states and territories offer some form of tax credit for conservation easement donations.”).

⁴⁴⁰ KING CNTY. DEP'T OF NAT. RES. & PARKS, PUBLIC BENEFIT RATING SYSTEM: RESOURCE INFORMATION 1-2 (2011) (describing purpose, method, and function of King County's Public Benefit Rating System).

⁴⁴¹ Ben Ryder Howe, *Does This Fisherman Have the Right To Be in a Billionaire's Backyard?*, N.Y. TIMES (Sept. 2, 2022), <https://www.nytimes.com/2022/09/01/business/colorado-rivers-fishing-lawsuit.html> (describing conflicts between fisherman and wealthy landowners and ensuing lawsuits).

⁴⁴² THEODORE ROOSEVELT CONSERVATION P'SHIP, OFF LIMITS, BUT WITHIN REACH: UNLOCKING THE WEST'S INACCESSIBLE PUBLIC LANDS 2-3 (2018) [hereinafter ROOSEVELT CONSERVATION, OFF LIMITS], <https://www.trcp.org/wp-content/uploads/2019/02/TRCP-on-X-Landlocked-Report-8-26-2018.pdf> [https://perma.cc/LK4E-NFTS]; Zale, *supra* note 434, at 466-67 (“The near-exclusive access that owners of such inholdings gain to surrounding public lands comes at a cost to the public, which effectively loses access to a portion of the public lands.”). These “landlocked” holdings include public parcels that fall within a checkerboard pattern of land ownership where state trespass law prohibits “corner-crossing” between public parcels. ROOSEVELT CONSERVATION, OFF LIMITS, *supra*, at 2.

make acquisitions that offer access to these lands.⁴⁴³ Land exchanges and easements under cooperative agreements can also provide access.⁴⁴⁴

Redesignation of existing public lands can boost their visibility while reducing conflicts between inconsistent uses, thereby improving their overall accessibility.⁴⁴⁵ Congress has the authority to redesignate existing public lands as national parks, conservation areas, wildernesses, and recreation areas.⁴⁴⁶ Additionally, the President may proclaim national monuments on federal lands to protect objects of historic or scientific interest.⁴⁴⁷ Such actions do not directly increase accessibility. However, they usually bolster public interest and thus visitation, which can lead to an infusion of financial support that increases accessibility.⁴⁴⁸ Moreover, these designations typically rule out future resource

⁴⁴³ ROOSEVELT CONSERVATION, OFF LIMITS, *supra* note 442, at 9.

⁴⁴⁴ THEODORE ROOSEVELT CONSERVATION P'SHIP, THE SOUTH'S LANDLOCKED PUBLIC LANDS: UNTAPPED HUNTING AND FISHING OPPORTUNITIES IN FLORIDA, NORTH CAROLINA, ARKANSAS, AND TENNESSEE (2020), https://www.trcp.org/wp-content/uploads/2020/10/Final_TRCP_South_Report_Booklet.pdf [<https://perma.cc/GX4D-U2CF>] (identifying cooperative agreements with private landholders like easements as solution to accessing landlocked public lands); NATIONAL CLIMATE TASK FORCE, *supra* note 428, at 20 (discussing need for federal land agencies to expand voluntary programs that unlock access to millions of landlocked acres of public land). *But see* John W. Sheridan, *The Legal Landscape of America's Landlocked Property*, 37 UCLA J. ENV'T L. & POL'Y 229, 251 (2019) (noting land exchanges between private parties and government to address landlocked public lands are relatively rare).

⁴⁴⁵ Keiter, *Emerging*, *supra* note 12, at 155-56 (outlining how redesignation of lands reduces existing conflicts between incompatible recreational uses and is consistent with need for diverse opportunities).

⁴⁴⁶ COGGINS ET AL., *supra* note 6, at 28.

⁴⁴⁷ Antiquities Act, 54 U.S.C. §§ 320301-03 ("The President may . . . declare . . . historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments.").

⁴⁴⁸ *See* Sarah A. Cline, Stephan Weiler & Ayse Aydin, *The Value of a Name: Estimating the Economic Impact of Public Land Designation*, 48 SOC. SCI. J. 681, 683-85 (2011) (summarizing studies finding increased visitation when public lands receive more protective designation); Cody Phillips, *Monuments in Name Only: The Delay Between Designation and Protection of National Monuments*, 32 COLO. NAT. RES. ENERGY & ENV'T L. REV. 399, 408 (2021) ("[T]he act of designating a national monument immediately increases visitation . . ."); Stephan Weiler & Andrew Seidl, *What's in a Name? Extracting Econometric Drivers To Assess the Impact of National Park Designation*, 44 J. REG'L SCI. 245, 247 (2004) (finding increased visitation from conversion of national monuments to national parks); *see also* Richard J. Ansson, Jr., *Our National Parks—Overcrowded, Underfunded, and Besieged with a Myriad of Vexing Problems: How Can We Best Fund Our Imperiled National Park System?*, 14 J. LAND USE & ENV'T L. 1, 19-21 (1998) (noting congressional appropriations for park construction projects); Margaret Walls, Patrick Lee & Matthew Ashenfarb, *National Monuments and Economic Growth in the American West*, SCI. ADVANCES, Mar. 2020, at 1, 1, <https://www.science.org/doi/pdf/10.1126/sciadv.aay8523> (finding correlation between monument designation and business activity in surrounding areas).

extraction that could conflict with recreational use.⁴⁴⁹ For example, designation of wilderness areas precludes commercial activity and motorized recreation on those lands and may entail further restrictions to preserve wilderness values.⁴⁵⁰

Furthermore, temporary designation of recreation areas on public lands can relieve overcrowding during peak periods.⁴⁵¹ For example, to accommodate surging visitation at established Sno-Parks during the COVID-19 pandemic, Washington State Parks temporarily opened other state park areas for snow play activities.⁴⁵²

3. Increased Capacity

Other strategies to boost visitor capacity at existing recreation areas aim to alleviate congestion, redistribute visitors, or reduce visitor impacts. Such strategies may modify types of use, timing or location of use, visitor behavior, and visitor attitudes and expectations.⁴⁵³ Specific measures, for example, include: expanded bicycle and pedestrian paths, trails, and facilities; roadway and parking improvements; shuttle bus systems; and other changes in infrastructure.⁴⁵⁴ Outreach programs, signs, surge pricing, and predictive technologies can encourage visitors to come at less busy times or seasons, avoid congested areas, or consider less crowded alternatives.⁴⁵⁵ Land managers can also steer visitors toward areas that can bear higher levels of use.⁴⁵⁶ Furthermore, education efforts can teach visitors to minimize wildlife harassment and harmful

⁴⁴⁹ CAROL HARDY VINCENT, CONGR. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 8 (2022) (“Monument designation can limit or prohibit land uses, such as development or recreation.”).

⁴⁵⁰ *Id.* at 8-9 (discussing restrictions on commercial timbering and prohibitions on motorized and mechanized vehicles off-road).

⁴⁵¹ Roy Baharad & Gideon Parchomovsky, Essay, *Rationing Access*, 76 VAND. L. REV. 215, 245 (2023) (discussing “mirror sites” method for handling visitor congestion).

⁴⁵² Gregory Scruggs, *Spurred by Overcrowding, Washington State Parks Creates 3 Temporary New Sno-Parks Near Seattle*, SEATTLE TIMES (Feb. 5, 2021, 6:59 PM), <https://www.seattletimes.com/life/outdoors/spurred-by-overcrowding-washington-state-parks-creates-3-temporary-new-sno-parks-near-seattle/>.

⁴⁵³ VISITOR CAPACITY GUIDEBOOK, *supra* note 175, at 45 (listing management strategies to implement visitor capacity strategies).

⁴⁵⁴ KEITER, TO CONSERVE UNIMPAIRED, *supra* note 22, at 61-62 (“[Yellowstone has] addressed the overcrowding problem indirectly, limiting parking and camping spaces, deploying shuttle buses, trying to entice visitors elsewhere, and even relocating facilities outside the park.”); MANAGING CONGESTION, *supra* note 73, at 6-12, 50-51, 64-86 (analyzing changes in infrastructure and road and bicycle ways to alleviate congestion).

⁴⁵⁵ See MANAGING CONGESTION, *supra* note 73, at 34-35, 88-98 (analyzing cost and effectiveness of visitor timing, dynamic signage, intelligent transportation systems, and congestion information); Abby L. Timmons, *Too Much of a Good Thing: Overcrowding at America’s National Parks*, 94 NOTRE DAME L. REV. 985, 988, 1002, 1012 (2018) (noting NPS “toyed with” idea of surge pricing); Kwak-Hefferan, *supra* note 93 (discussing eight possible solutions to ease overcrowding, including visits to less traveled alternatives).

⁴⁵⁶ MANNING & ANDERSON, *supra* note 67, at 22.

impacts on resources.⁴⁵⁷ The effectiveness of these strategies may depend on voluntary compliance or monitoring and enforcement efforts.⁴⁵⁸

The federal agencies' Visitor Capacity Guidebook advises that agencies consider effectiveness, demand on administrative resources, and potential unintended consequences when choosing among management options.⁴⁵⁹ In general, strategies for expanding opportunities to experience nature should focus on boosting access within or near urban areas and places where visitors need not travel long distances.⁴⁶⁰ Such a focus will benefit more diverse populations and offer greater overall opportunities.⁴⁶¹

B. *Allocating Access*

Expanding the general supply of available lands or suggesting alternative destinations to the recreating public is unlikely to have much impact on visitation at one-of-a-kind destinations people are determined to visit, such as Zion or Yosemite. Even lesser-known places may still experience overcrowding because of physical constraints on space, trails, or parking. In such circumstances, capacity limits or other access restrictions may be necessary to preserve the quality of visitor experiences, protect wildlife and fragile resources, or maintain a wilderness setting. Limiting access can effectively—and at relatively low cost—prevent damage resulting from different types of overuse.⁴⁶² Access restrictions also can be adjusted in response to changing circumstances or new information.⁴⁶³ Although such restrictions may be controversial, public land managers will sometimes have to limit access and decide how to allocate it.⁴⁶⁴

⁴⁵⁷ KEITER, TO CONSERVE UNIMPAIRED, *supra* note 22, at 61-62 (“The obvious antidote to mass tourism is better management and more education.”); Sarah L. Thomas & Sarah E. Reed, *Entrenched Ties Between Outdoor Recreation and Conservation Pose Challenges for Sustainable Land Management*, ENV'T RSCH. LETTERS, Nov. 2019, at 1, 6, <https://iopscience.iop.org/article/10.1088/1748-9326/ab4f52/pdf> (listing visitor education on impact of their activities as frequent management strategy).

⁴⁵⁸ Thomas & Reed, *supra* note 457, at 6 (noting limiting factors of management strategies such as visitor compliance, staff availability, and funding).

⁴⁵⁹ VISITOR CAPACITY GUIDEBOOK, *supra* note 175, at 47.

⁴⁶⁰ ROWLAND-SHEA ET AL., *supra* note 386, at 18 (“Governments at all levels should create and enhance public lands in accessible places. So called front-country areas offer close-to-home natural settings and outdoor recreation experiences . . .”).

⁴⁶¹ See Sarah J. Morath, *A Park for Everyone: The National Park Service in Urban America*, 56 NAT. RES. J. 1, 11-12 (2016) (discussing how engaging multicultural, urban populations will maintain relevance of National Park Service, and ensure same communities receive benefits parks can bring).

⁴⁶² Baharad & Parchomovsky, *supra* note 451, at 222-23, 251-52 (“Cost-effectiveness is likely to be access rationing’s most significant advantage over use regulation and other solutions.”).

⁴⁶³ *Id.* at 253-54.

⁴⁶⁴ Stephen F. McCool, *Limiting Recreational Use in Wilderness: Research Issues and Management Challenges*, in APPRAISING THEIR EFFECTIVENESS, USDA FOREST SERVICE

Setting capacity is a challenging task. Rather than connoting a single fixed number, visitor capacity may vary according to management practices and available facilities.⁴⁶⁵ Ultimately, capacity determinations involve both technical assessments and value judgments. These determinations reflect—or should reflect—scientific analyses of impacts on wildlife, land, and other resources; visitor perceptions of nature experience and crowding; and value judgments regarding acceptability of impacts and uncertainties regarding impacts.⁴⁶⁶

1. Criteria

Once land managers set visitor capacity, they must allocate that capacity among potential users.⁴⁶⁷ Rationing and allocation are unlikely to be received enthusiastically, but any chosen system of allocation should be at least somewhat acceptable to the public. Managers should evaluate acceptable options for allocating capacity with respect to criteria of efficiency, effectiveness, fairness, simplicity, and freedom.⁴⁶⁸

- Efficiency refers to maximizing social welfare by distributing benefits to those who value them most.⁴⁶⁹ Inefficient allocation occurs when “there is a mismatch between the preferences of recreationists for particular settings and the settings they are actually allowed to visit.”⁴⁷⁰
- Effectiveness considers an allocational scheme’s ability to achieve management goals of limiting harmful impacts and protecting desired recreational experiences while facilitating appropriate levels of

PROCEEDINGS RMRS-P-20 at 49, 52 (2001) (considering restrictive policies’ fundamental downsides like scarcity of access against their distinctive and effective benefits like improved changes to “biophysical and experiential quality”); *see also* MANNING & ANDERSON, *supra* note 67, at 35 (describing rationing of use as “management practice of last resort”).

⁴⁶⁵ MANNING & ANDERSON, *supra* note 67, at 7 (“[I]t was suggested that carrying capacity might vary according to the amount and type of management.”).

⁴⁶⁶ *Id.* at 7 (discussing threefold framework of capacity limit concerns: resources, experiences, and management); Robert E. Manning, *How Much Is Too Much? Carrying Capacity of National Parks and Protected Areas*, in MONITORING AND MANAGEMENT OF VISITOR FLOWS IN RECREATIONAL AND PROTECTED AREAS CONFERENCE PROCEEDINGS 306, 307 (2002), <http://npshistory.com/publications/social-science/how-much.pdf> [<https://perma.cc/Y3TA-NJDD>] (analyzing variables such as environmental impact and social benefit in relationship between visitor use and crowding). In determining carrying capacity, the NPS follows the Visitor Experience and Resource Protection framework, which includes steps to involve the public, analyze park resources and existing use, and identify and allocate zones of use to specific locations. *Id.* at 309.

⁴⁶⁷ VISITOR CAPACITY GUIDEBOOK, *supra* note 175, at 39.

⁴⁶⁸ *See* Bo Shelby, Doug Whittaker & Mark Danley, *Idealism Versus Pragmatism in User Evaluations of Allocation Systems*, 11 LEISURE SCIS. 61, 61-62 (1989) (incorporating equality, equity, need, and efficiency through distributive justice theory to address allocation).

⁴⁶⁹ MANNING & ANDERSON, *supra* note 67, at 38.

⁴⁷⁰ McCool, *supra* note 464, at 50.

access.⁴⁷¹ Allocational schemes that rely on increased fees to curb visitation may be less effective than schemes imposing a hard cap on visitation.

- Fairness is reflected in the common notion that public land belongs to all Americans. Fairness in allocating access has multiple possible interpretations: equal opportunity to obtain access; allocation based on time, money, or effort invested; allocation according to need; or allocation to rectify historical wrongs.⁴⁷²
- Simplicity alludes to the administrative costs and complexity of an allocational system. A simple system is transparent, user-friendly, and not unreasonably expensive or burdensome to the agency and the public.
- Finally, freedom is an important yet underappreciated recreational value.⁴⁷³ Freedom encompasses the choice, flexibility in actions, spontaneity of behavior, and self-determination that are fundamental to outdoor recreation.⁴⁷⁴ Notably, the Wilderness Act's stated objective of providing "opportunities for . . . a primitive and unconfined type of recreation" recognizes the importance of freedom and spontaneity.⁴⁷⁵ While recreation on public lands necessarily involves some limits on autonomy,⁴⁷⁶ constraints such as visitation caps and reservation requirements undermine the flexibility and spontaneity many users value.

2. Ways to Allocate Access

Basic mechanisms for allocating access include pricing, reservations, lotteries, queuing, and merit systems.⁴⁷⁷ Combinations of these systems can promote multiple objectives. For example, allocating some access by reservation

⁴⁷¹ *Id.* at 53 ("Effectiveness concerns whether a given management activity meets a longer term aim . . .").

⁴⁷² See Shelby et al., *supra* note 468, at 62 (describing "fair" as containing elements of equity, need, and efficiency); see also Flores et al., *supra* note 394, at 266-67 (highlighting inequities in recreational space with respect to communities of color, indigenous peoples, and other minority groups).

⁴⁷³ Bradybaugh, *supra* note 66 ("[I]t's important to note that freedom is central to outdoor recreation and in many ways national parks are emblematic of the larger freedoms we enjoy as Americans.").

⁴⁷⁴ Stanley Parker, *Change, Flexibility, Spontaneity, and Self-Determination in Leisure*, 60 SOC. FORCES 323, 323-24 (1981) (describing these themes in meaning and experience of leisure); MANNING & ANDERSON, *supra* note 67, at 23 ("Regulations designed to control visitor behavior can be seen as antithetical to the very nature of recreation.").

⁴⁷⁵ See 16 U.S.C. § 1131(c).

⁴⁷⁶ Parker, *supra* note 474, at 330 ("Without some degree of social organization of nonwork opportunities . . . that organization[s] exist[] to provide, leisure is impossible.").

⁴⁷⁷ Shelby, *supra* note 468, at 62.

and the rest by queuing allows some users to plan ahead while also providing access opportunities to those unable to make advance plans.⁴⁷⁸

a. *Pricing*

Pricing allocates resources according to individuals' willingness—and ability—to pay.⁴⁷⁹ Pricing promotes efficiency by ensuring that user benefit is no less than the amount paid.⁴⁸⁰ In addition, pricing can be administered transparently and has a relatively minor impact on spontaneity if visitors can simply show up and pay the applicable entrance fee. The effects of pricing schemes may vary with fee structure: daily fees tend to shorten visits, whereas annual fees may increase frequency or length of visitation.⁴⁸¹ Unfortunately, price-based allocation fosters inequitable access and disregards potential users' needs.⁴⁸² Congestion pricing schemes, in which higher prices are charged during periods of greater demand, can disperse use and ameliorate equity concerns by nudging price-sensitive visitors to visit at less busy times.⁴⁸³ Income-based pricing could also address equity concerns.⁴⁸⁴

Commercial theme parks have aggressively used pricing tools, including regular price hikes, congestion pricing, and priority access fees, to allocate capacity—and boost profits.⁴⁸⁵ However, the use of fees to allocate access to public lands is at odds with agencies' traditional approaches of allowing access at little or no charge.⁴⁸⁶ Public land management agencies have been reluctant to raise fees sufficiently to effectively limit visitation.⁴⁸⁷ Fees sufficiently high to reduce overcrowding would have a disparate impact on low-income visitors.⁴⁸⁸ Moreover, because pricing's effectiveness in limiting visitation depends on elasticity of demand, politically feasible pricing schemes would do

⁴⁷⁸ See MANNING & ANDERSON, *supra* note 67, at 38.

⁴⁷⁹ Shelby, *supra* note 468, at 63.

⁴⁸⁰ See *id.* at 63 (describing pricing as maximizing efficiency as function of supply demand market forces).

⁴⁸¹ COLE ET AL., *supra* note 82, at 21 (identifying differing effects of daily or annual access).

⁴⁸² Shelby, *supra* note 468, at 63.

⁴⁸³ Kwak-Hefferan, *supra* note 93 (recommending reducing fees during less desirable seasons, rather than raising fees during busy seasons, to make access more equitable).

⁴⁸⁴ Baharad & Parchomovsky, *supra* note 451, at 255 (“[T]he equity challenge of access fees may be assuaged via the deployment of a pricing mechanism that is sensitive to this challenge—for example, income based fees.”).

⁴⁸⁵ Robbie Whelan & Jacob Passy, *Disney’s Magical New Pricing Formula*, WALL ST. J., Aug. 27, 2022, at B1 (detailing Disney’s strategy shift from maximizing number of visitors to maximizing how much money each visitor spends).

⁴⁸⁶ MANNING & ANDERSON, *supra* note 67, at 40-41 (describing problems associated with pricing models).

⁴⁸⁷ ANDERSON ET AL., *supra* note 79, at 12 (detailing tactics used by land management agencies to manage visitors).

⁴⁸⁸ COLE ET AL., *supra* note 82, at 21 (urging reasonable balance between increased price deterrence effect and prohibitive pricing for low-income visitors).

little to reduce use at the most popular national parks and other places that experience the greatest overcrowding, particularly at the most popular times to visit.⁴⁸⁹

b. *Reservations*

In theory, reservation systems allow potential participants equal chances to gain access.⁴⁹⁰ These systems appear to be fair, can be administered at a moderate cost, and are generally acceptable to users.⁴⁹¹ However, reservation requirements “put[] a premium on planning ahead and thus discourage[] spontaneity,” and they can be inefficient if reservation holders fail to show up.⁴⁹² Further, potential visitors who are unaware of reservation requirements experience disappointment and inconvenience if they are turned away.⁴⁹³ In addition, local residents may oppose reservation requirements because they foreclose unplanned visits and reduce tourism revenue.⁴⁹⁴ Some of these concerns can be addressed by modifying reservation systems. For example, land managers can accommodate spontaneous visits by distributing unused or held-back permits to walk-ins.⁴⁹⁵ They can also set aside blocks of reservations to advance equity goals.⁴⁹⁶

In high-demand contexts, reservation requirements for recreational access can lead to user frustration. In Yosemite, for example, campground reservations must be made five months in advance and regularly fill up within minutes of becoming available.⁴⁹⁷ Would-be campers complain that the reservation system unfairly disadvantages those who have slow computers or internet connections or lack computer savvy.⁴⁹⁸ Prospective visitors to Glacier National Park have experienced similar frustration when attempting to reserve entry tickets for Going-to-the-Sun Road.⁴⁹⁹ Recreation.gov, the main online platform for federal

⁴⁸⁹ MANNING & ANDERSON, *supra* note 67, at 41.

⁴⁹⁰ Shelby, *supra* note 468, at 63.

⁴⁹¹ *Id.* (explaining how reservation systems maintain equality between visitors); ANDERSON ET AL., *supra* note 79, at 57 (evaluating costs to both visitors and management).

⁴⁹² Shelby, *supra* note 468, at 63.

⁴⁹³ MANAGING CONGESTION, *supra* note 73, at 41 (analyzing pros and cons of visitor reservation systems).

⁴⁹⁴ *Id.*

⁴⁹⁵ Kwak-Hefferan, *supra* note 93.

⁴⁹⁶ Shelby, *supra* note 468, at 63.

⁴⁹⁷ Eve Chen, *Yosemite National Park Is Testing Out a Lottery System To Reserve Campsites: How To Apply*, USA TODAY (Jan. 26, 2022, 1:12 PM ET), <https://www.usatoday.com/story/travel/experience/america/national-parks/2022/01/25/yosemite-park-campground-reservation/6635348001/> [<https://perma.cc/6BF3-4X2E>].

⁴⁹⁸ *Id.*

⁴⁹⁹ Tristan Scott, *Demand Outweighs Availability as Glacier Park Debuts Ticketed Entry*, FLATHEAD BEACON (May 6, 2021), <https://flatheadbeacon.com/2021/05/06/demand-outweighs-availability-as-glacier-park-debuts-ticketed-entry/> [<https://perma.cc/23TU->

entry and campsite reservations, is frequently criticized for lacking available sites to reserve and having confusing booking windows.⁵⁰⁰

c. *Lotteries*

Lottery programs, like reservation systems, typically require advance planning by visitors.⁵⁰¹ Simple lotteries offer applicants equal odds of obtaining access. However, simple lotteries are relatively inefficient and potentially unfair because they do not account for an applicant's depth of interest.⁵⁰² Alternatively, dynamic lotteries can improve efficiency and equity, but at the expense of simplicity as dynamic lotteries require additional administrative support.⁵⁰³ Dynamic lotteries award preference points to boost the probability that previously unsuccessful applicants or other specified categories of applicants will obtain a permit.⁵⁰⁴ River-rafting opportunities as well as big game hunting permits are often allocated through dynamic lotteries.⁵⁰⁵ In addition, preference-point lotteries may allocate permits directly to applicants with the greatest number of preference points, offering a more fair distribution of recreational opportunities over the long term.⁵⁰⁶

Lotteries require significant administrative resources and are typically only used in situations involving extensive demand.⁵⁰⁷ In response to complaints about the difficulty of obtaining camping reservations, Yosemite National Park is currently piloting a lottery program that allows chosen lottery applicants to reserve campsites in one campground before the sites are made generally

4YBK] (reporting potential visitors' complaints about insufficient reservation spots and speed of reservation depletion).

⁵⁰⁰ Lauren Sloss, *National Park Booking App Leaves Users Feeling Lost in the Woods*, N.Y. TIMES (Aug. 1, 2022), <https://www.nytimes.com/2022/07/29/travel/nps-recreation-gov.html> (criticizing Recreation.gov's persistent lack of reservation opportunities and confusing layout).

⁵⁰¹ Shelby, *supra* note 468, at 63.

⁵⁰² MANNING & ANDERSON, *supra* note 67, at 37 tbl.4.

⁵⁰³ Shelby, *supra* note 468, at 63 (explaining different types of lottery systems).

⁵⁰⁴ *Id.*; Carson Reeling, Valentin Verdier & Frank Lupi., *Valuing Goods Allocated via Dynamic Lottery*, J. ASS'N ENV'T & RES. ECON. 721, 722 (2020) (examining dynamic lotteries' unique advantages).

⁵⁰⁵ Reeling et al., *supra* note 504, at 722 n.1 (noting dynamic lotteries for hunting black bears in Michigan; elk in Colorado, Michigan, and Montana; deer in California and Montana; and alligators in Louisiana); *see, e.g.*, NAT'L PARK SERV., GRAND CANYON NAT'L PARK RIVER PERMITS OFF., RIVER AND WEIGHTED LOTTERY FREQUENTLY ASKED QUESTIONS 5 (2018), https://www.nps.gov/grca/planyourvisit/upload/River_and_Weighted_Lottery_FAQs.pdf [<https://perma.cc/2NEV-GG9D>] (explaining how weighted lotteries give more points to individuals who have not won recently).

⁵⁰⁶ Reelin et al., *supra* note 504, at 722.

⁵⁰⁷ VISITOR CAPACITY GUIDEBOOK, *supra* note 175, at 47.

available through the traditional reservation system.⁵⁰⁸ This hybrid approach ameliorates the disadvantages faced by those with slow internet connections but still could leave many applicants frustrated.

d. *Queuing*

A first-come/first-served approach, or queuing, allocates resources according to individuals' willingness to spend time in line.⁵⁰⁹ Queuing is relatively efficient in the sense that willingness to wait likely reflects the value of access to applicants.⁵¹⁰ Despite the burdens imposed on users, the NPS has historically favored queuing because of its simplicity and apparent equity.⁵¹¹ However, queuing tends to disfavor nonlocals, who may be reluctant to spend time and money to wait in line without a guarantee of ultimately entering the park.⁵¹² Furthermore, equity concerns may arise if some people pay others to wait in line for them or "save" spots for others.

Queues that do not require applicants to wait in person are less burdensome. Such queues can be inefficient, however, if applicants can simply put their name on a list without investing time or other resources. Furthermore, these types of queues may lead to unacceptably long wait times: for example, the waitlist for Grand Canyon rafting opportunities accumulated twenty years' worth of applicants before the NPS replaced it with a dynamic lottery.⁵¹³

e. *Merit Systems*

Finally, merit systems "distribute a commodity on the basis of some skill, knowledge, or past behavior."⁵¹⁴ These systems promote efficiency if chosen applicants value the allocated experience more highly than unsuccessful applicants. However, merit systems have the inequitable effect of disadvantaging those lacking experience and prior opportunities.⁵¹⁵ To address

⁵⁰⁸ *North Pines Campground Early Access Lottery*, NAT'L PARK SERV., <https://www.nps.gov/yose/planyourvisit/lottery-pilot.htm> (last updated Nov. 17, 2023) [<https://perma.cc/MRN8-F2R8>] (detailing mechanics of Yosemite's early access lottery); Chen, *supra* note 497 (stating successful applicants will be given time window to schedule their reservations without competition).

⁵⁰⁹ VISITOR CAPACITY GUIDEBOOK, *supra* note 175, at 46 (describing queuing as preferred method of resource allocation in areas with simple application process or mainly local users); Shelby, *supra* note 468, at 63 (explaining queuing as trading time for commodity or chance to purchase tickets).

⁵¹⁰ MANNING & ANDERSON, *supra* note 67, at 35, 38.

⁵¹¹ See Tarlock, *supra* note 278, at 264.

⁵¹² Shelby, *supra* note 468, at 63 (describing how remoteness of certain parks may disadvantage faraway visitors as they may be reluctant to spend time or money to queue in line when failure is possible).

⁵¹³ NAT'L PARK SERV., COLORADO RIVER MANAGEMENT PLAN RECORD OF DECISION 19 (2006).

⁵¹⁴ Shelby, *supra* note 468, at 63.

⁵¹⁵ See *id.*

such equity concerns, a modified merit system might allow applicants to earn access by performing a modest amount of work. Nonetheless, land managers are unlikely to adopt merit systems because they can involve relatively high administrative costs.⁵¹⁶

No single system of allocation fits all circumstances. Public land managers faced with allocation decisions should evaluate how available options—or combinations of options—promote efficiency, effectiveness, fairness, simplicity, freedom, and other relevant factors. Basic allocation mechanisms can be modified to further some of these objectives but will not enable land managers to avoid difficult decisions to ration access to public lands.

CONCLUSION

Rising visitation levels and overcrowding on public lands reflect enthusiasm and appreciation for public lands and their various benefits. However, the resulting impacts on natural resources and the outdoor experience necessitate measures to accommodate, disperse, and better manage visitation. We can no longer pretend that all public lands can be open freely to all members of the public. Public land managers have broad discretion to implement appropriate measures—and legal obligations to manage visitor use through mandatory planning processes, visitor carrying capacity, and overarching conservation and sustainability mandates. At the same time, public land managers should remain mindful that access to public lands is essential to individual and societal well-being and should resort to closures and access restrictions only after determining that less restrictive measures will not adequately achieve legitimate management purposes.

⁵¹⁶ See COLE ET AL., *supra* note 82, at 20 (detailing how merit system requires additional employee training and enforcement costs).