

# AMERICA'S (SECOND) BEST IDEA: A PROPOSAL FOR A MAJOR EXPANSION OF THE NATIONAL PARK SYSTEM

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## INTRODUCTION: THE NATIONAL PARKS ARE BEING “LOVED TO DEATH”

The national parks have long been celebrated as “America’s Best Idea.”<sup>1</sup> Since the establishment of Yellowstone as the nation’s—and the world’s—first national park in 1872,<sup>2</sup> the country has fallen in love with its national parks. They are the centerpieces of countless vacations, family photographs, and fond memories. They mean different things to different people, from a place to gather with family, a respite from city life, or a history lesson, to wilderness hiking and the joy of unrivaled solitude. “The national parks,” declared Wallace Stegner, “are the best idea we ever had. Absolutely American, absolutely democratic, they reflect us at our best rather than our worst.”<sup>3</sup>

Recently, another phrase has emerged to describe America’s national parks: “Loved to Death.”<sup>4</sup> Visitors have flocked to the parks in

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<sup>1</sup> Wallace Stegner, a novelist and environmentalist, is credited with coining the phrase “America’s Best Idea” in 1983 to describe the national parks. Daniel L. Dustin, Kelly S. Bricker, Matthew T. Brownlee & Keri A. Schwab, *The National Parks: America’s Best Idea?*, PARKS & RECREATION, Aug. 2016, <https://www.nrpa.org/parks-recreation-magazine/2016/august/the-national-parks-americas-best-idea/> [<https://perma.cc/55SB-D3ER>]. See also *The National Parks: America’s Best Idea* (PBS television broadcast 2009).

<sup>2</sup> *Birth of a National Park*, YELLOWSTONE NAT’L PARK NAT’L PARK SERV., <https://www.nps.gov/yell/learn/historyculture/yellowstoneestablishment.htm> [<https://perma.cc/8N8P-7QNN>] (Feb. 5, 2020).

<sup>3</sup> Dustin et al., *supra* note 1.

<sup>4</sup> See, e.g., Dayton Duncan, *Are We Loving Our National Parks to Death?*, N.Y. TIMES (Aug. 6, 2016), <https://www.nytimes.com/2016/08/07/opinion/sunday/are-we-loving-our-national-parks-to-death.html> [<https://perma.cc/9DER-BMNY>]; Pat Callaghan, *Sen. Angus King Says Our National Parks Are in Danger of Being ‘Loved to Death’*, NBC NEWS CTR. ME., <https://www.newscentermaine.com/article/sports/outdoors/king-says-our-national-parks-are-in-danger-of-being-loved-to-death-maine-national-parks-acadia-angus-king/97>

record numbers in recent years, and some parks are now known as much for their crowds as their wonders.<sup>5</sup> Pictures show tourists elbow-to-elbow at viewpoints, picnic areas overflowing, lines of cars waiting at entrance stations, and beautiful scenery obscured by throngs of visitors.<sup>6</sup> The national parks promise that their natural wonders and cultural histories will be preserved for this and future generations,<sup>7</sup> but the National Park Service (“NPS”) is unequipped to protect the parks from their own popularity.<sup>8</sup> To uphold the parks’ promise, the National Park Service needs more than just an increased budget and additional staff—the National Park System needs to be dramatically expanded on a scale not seen in decades so that the parks can continue to astound, comfort, challenge, and excite generations of visitors to come.

This Note will argue for a major expansion of the National Park Service and provide a framework for the implementation of such an expansion. Part I provides an overview of the National Park Service’s holdings and fundamental purpose and discusses how overcrowding negatively affects visitors, the resource,<sup>9</sup> and the NPS mission, and argues for a stricter enforcement of the “impairment standard.” Part II outlines the way in which Congress and the president can create national parks. Part III proposes a major expansion of the national parks—both the expansion of existing park units<sup>10</sup> and the creation of new ones—as the solution and discusses the legal, environmental, and social benefits of the proposal. Finally, Part IV discusses additional considerations for preserving the national parks, such as the provision of alternative transportation, the need for increased staffing, and the importance of

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<sup>5</sup> See, e.g., Bill Fink, *Escape Crowded National Parks at These 7 Alternate Destinations*, THE POINTS GUY (Apr. 24, 2022), <https://thepointsguy.com/guide/less-crowded-national-parks/> [https://perma.cc/K4VB-HX9Z].

<sup>6</sup> As with so much about our natural wonders, pictures do the most justice—see the *New York Times* photo essay, *How Crowded Are America’s National Parks? See for Yourself*, N.Y. TIMES (July 8, 2021), <https://www.nytimes.com/2021/07/08/travel/crowded-national-parks.html> [https://perma.cc/A8P5-TB2V].

<sup>7</sup> *About Us: Our Mission*, NAT’L PARK SERV., <https://www.nps.gov/aboutus/index.htm> [https://perma.cc/4PNK-5NP3] (Aug. 19, 2022).

<sup>8</sup> Cf. Duncan, *supra* note 4; Callaghan, *supra* note 4.

<sup>9</sup> The term “resource” refers to the natural, cultural, and other materials preserved in a park (e.g., historical resources, wildlife resources).

<sup>10</sup> The phrase “park unit” refers to any area managed by the National Park Service. Large national parks, small historic sites, and every other type of park are all NPS units. For more discussion on NPS units and unit designations, see *infra* Section I.A.2.

pre-emptive management—all of which can help create a more equitable and sustainable National Park System for the future.

## I. THE PARKS AND THE PROBLEM

The National Park Service is one of four major federal land management agencies, all of which together manage 606.5 million acres of federal land, with the majority located in the western United States.<sup>11</sup> The three other agencies are the Bureau of Land Management (“BLM”) (managing 244.4 million acres), the U.S. Fish and Wildlife Service (“USFWS”) (managing 89.2 million acres), and the Forest Service (managing 192.9 million acres).<sup>12</sup> The Department of the Interior (“DOI”) oversees the NPS, BLM, and USFWS; the Forest Service is part of the Department of Agriculture.<sup>13</sup> The amount of land owned by the federal government is constantly in flux—between 1990 and 2018, federal land holdings decreased overall, while NPS, USFWS, and Forest Service holdings increased.<sup>14</sup> While an average visitor may not notice the difference between an area managed by National Park Service versus BLM, the distinct responsibilities of the different land management agencies critically impact the way that the land is managed.<sup>15</sup>

The National Park Service’s founding legislation mandates that the agencies prevent impairment of park resources and values.<sup>16</sup> While providing for the use and enjoyment of the land is critical, it is a secondary part of the NPS mandate when it conflicts with preservation.<sup>17</sup>

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<sup>11</sup> In total, “the federal government owns and manages roughly 640 million acres of land in the United States, or roughly 28% of the 2.27 billion total land acres.” CONG. RSCH. SERV., R42346, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1 (2020) [hereinafter CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP], <https://sgp.fas.org/crs/misc/R42346.pdf> [<https://perma.cc/QJL6-Z33T>].

<sup>12</sup> *Id.* Of the remaining acreage not operated by these four agencies, the Department of Defense (“DOD”) administers an additional 8.8 million acres, with “[m]any other agencies administer[ing] the remaining federal acreage.” *Id.* at Summary.

<sup>13</sup> *Id.* at Summary.

<sup>14</sup> The decline was primarily “due to BLM land disposals in Alaska and reductions in DOD ownership in favor of other legal arrangements,” and in total 31.5 million acres of land left federal control, nearly 5% of its total holdings. *Id.*

<sup>15</sup> *See id.* at 3–6.

<sup>16</sup> *See NPS Organic Act*, DOJ, <https://www.justice.gov/enrd/nps-organic-act#:~:text=The%20Organic%20Act%20established%20the,while%20protecting%20them%20from%20im>pairment [<https://perma.cc/R94A-7XG7>] (May 12, 2015).

<sup>17</sup> *See infra* Section I.A.3.

Additionally, the National Park Service's own Management Policies, while acknowledging the discretion that its personnel have in determining what qualifies as impairment, direct that a number of "unacceptable impacts" that fall below the level of impairment but are nonetheless prohibited.<sup>18</sup> This impairment standard must be more strictly construed and enforced. The extreme visitation and overcrowding seen at a number of parks rises to the level of unacceptable impact and perhaps to impairment as well. It negatively impacts both the visitor experience and the park itself.

A. *The National Parks*

1. A Brief History of the NPS

In the late nineteenth century, concerns began to arise that the push to settle and develop the American West would destroy both "scenic treasures" and resources that would be needed in the future, and as a result a "preservation and conservation movement evolved to ensure that certain lands and resources were left untouched or reserved<sup>19</sup> for future use."<sup>20</sup> This emerging land ethic led to the establishment of Yellowstone as America's (and the world's) first national park in 1872.<sup>21</sup>

Another surge in conservation came in the early twentieth century with concerns over the looting and destruction of historic Native American sites, which culminated in the protection of the Mesa Verde,

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<sup>18</sup> NPS, MANAGEMENT POLICIES 2006, at 12 (2006) [hereinafter MANAGEMENT POLICIES 2006].

<sup>19</sup> Often, these "reserved" lands were intended to be disposed of to state or private ownership for development, and not until 1976 did "Congress expressly declare[] that the remaining public domain lands generally would remain in federal ownership." CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP, *supra* note 11, at 3.

<sup>20</sup> *Id.* at 2.

<sup>21</sup> See *Quick History of the National Park Service*, NPS, <https://www.nps.gov/articles/quick-nps-history.htm> [<https://perma.cc/6X5D-3FKS>] (Aug. 24, 2022). Hot Springs National Park in Arkansas is sometimes cited as being the oldest unit in the National Park System. *History & Culture*, NPS: HOT SPRINGS NAT'L PARK ARK., <https://www.nps.gov/hosp/learn/historyculture/index.htm> [<https://perma.cc/K3UE-L59U>] (Sept. 30, 2022). It was the first to receive federal protection when the hot springs were established as a reservation to protect the hot springs so they could continue to be used by the public (although congressional failure to provide any practical way of protecting the springs led to their continued development). *Id.* However, it was not designated as a national park until 1921, and Yellowstone is widely acknowledged as the first national park. See *id.*

Colorado, cliff dwellings.<sup>22</sup> Mesa Verde was protected as a national park by Congress in 1906, the same year that the Antiquities Act was passed.<sup>23</sup> President Theodore Roosevelt, famous for his conservation ethic, used the Act to protect eighteen sites as national monuments during his presidency, including the Petrified Forest in Arizona and the unrivaled Grand Canyon.<sup>24</sup>

In 1916, when the National Park Service was established, over thirty national parks had already been created.<sup>25</sup> In 1933, a number of military sites and battlefields preserved by the War Department and national monuments managed by the Forest Service were transferred to the National Park Service, which helped to create the modern National Park System as an entity that preserves historical, scenic, and scientific areas.<sup>26</sup> Then, the “Reorganization of 1933”<sup>27</sup> expanded the National Park Service to a truly national entity—until then, the only eastern park had been Acadia in Maine.<sup>28</sup> As the twentieth century progressed, the National Park Service developed from an agency that had to deploy army troops to enforce anti-poaching laws in Yellowstone,<sup>29</sup> to an agency with 20,000 employees and an annual budget of nearly three billion dollars.<sup>30</sup>

Today, the National Park Service manages many of the country's most iconic and cherished natural wonders and cultural landmarks, from the Grand Canyon and Yellowstone in the west to the National Mall in Washington, D.C.<sup>31</sup> The National Park Service also preserves cultural and archaeological sites such as at Mesa Verde National Park, home to

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<sup>22</sup> Barry Mackintosh, *The National Park Service: A Brief History*, NAT'L PARK SERV. HIST. ELIBRARY (Oct. 30, 2015), [http://npshistory.com/publications/brief\\_history/index.htm](http://npshistory.com/publications/brief_history/index.htm) [<https://perma.cc/C3YA-58GG>].

<sup>23</sup> For further discussion of the Antiquities Act and how it is used to designate national monuments, see *infra* Section II.B.

<sup>24</sup> Mackintosh, *supra* note 22.

<sup>25</sup> Prior to the establishment of NPS, these parks were generally under the control of the Secretary of the Interior but protected from poaching and logging by the U.S. Army. See *Quick History of the National Park Service*, *supra* note 21; CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP, *supra* note 11, at 2–3.

<sup>26</sup> *Quick History of the National Park Service*, *supra* note 21.

<sup>27</sup> *National Park System Timeline (Annotated)*, NAT'L PARK SERV. HIST. ELIBRARY (Oct. 30, 2015), <http://npshistory.com/publications/timeline/index.htm> [<https://perma.cc/DQ9E-4A3V>].

<sup>28</sup> See Mackintosh, *supra* note 22.

<sup>29</sup> See *id.*

<sup>30</sup> See *About Us: Frequently Asked Questions*, NPS, <https://www.nps.gov/aboutus/faqs.htm> [<https://perma.cc/GLM5-MR3A>] (Feb. 25, 2022).

<sup>31</sup> *About Us: National Park System*, NPS, <https://www.nps.gov/aboutus/national-park-system.htm> [<https://perma.cc/J8R9-75Y2>] (Oct. 19, 2022).

the striking cliff dwellings of the Ancestral Pueblo in New Mexico,<sup>32</sup> the infamous Confederate prison camp at Andersonville National Historic Site in Georgia,<sup>33</sup> and the Selma to Montgomery National Historic Trail in Alabama, which commemorates the 1965 Voting Rights March.<sup>34</sup> Someone looking to experience wilderness and biological diversity has many parks to choose from, including Alaska's wild and remote Gates of the Arctic National Park (the largest national park)<sup>35</sup> and Kobuk Valley National Park,<sup>36</sup> or the most biologically diverse (and most visited) park in the system: Great Smoky Mountains National Park in North Carolina and Tennessee.<sup>37</sup> A visitor can learn about the landmark Supreme Court decision at *Brown v. Board of Education* National Historic Site in Kansas,<sup>38</sup> see the site of Blackbeard's last battle and watch sea turtles hatch at Cape Hatteras National Seashore in North Carolina,<sup>39</sup> pay their respects at the Flight 93 National Memorial in Pennsylvania,<sup>40</sup> marvel at (or even climb) the tallest mountain in North America at Denali National Park and Preserve in Alaska,<sup>41</sup> walk the fields where the Civil War reached a turning point at Gettysburg National Military Park in

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<sup>32</sup> See *Cliff Dwellings*, NPS: MESA VERDE NAT'L PARK COLO., [https://www.nps.gov/meve/learn/historyculture/cliff\\_dwellings\\_home.htm](https://www.nps.gov/meve/learn/historyculture/cliff_dwellings_home.htm) [<https://perma.cc/N64Z-67X2>] (Aug. 10, 2022).

<sup>33</sup> See *The Deadliest Ground of the American Civil War*, NPS: ANDERSONVILLE NAT'L HIST. SITE GA., <https://www.nps.gov/ande/index.htm> [<https://perma.cc/S59T-8VPY>] (Mar. 4, 2022).

<sup>34</sup> See *Alabama: Selma to Montgomery National Historic Trail*, NPS, <https://www.nps.gov/places/selma-to-montgomery-national-historic-trail.htm> [<https://perma.cc/4WVK-KWDX>] (June 26, 2020).

<sup>35</sup> See *Discover a Premier Wilderness*, NPS: GATES OF THE ARCTIC NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/gaar/index.htm> [<https://perma.cc/D8XF-YCTB>] (Nov. 16, 2022).

<sup>36</sup> See *Wilderness Adventure*, NPS: KOBUK VALLEY NAT'L PARK ALASKA, <https://www.nps.gov/kova/index.htm> [<https://perma.cc/ZBL8-H48X>] (Oct. 21, 2022).

<sup>37</sup> See *A Wondrous Diversity of Life*, NPS: GREAT SMOKY MOUNTAINS NAT'L PARK NC, TN, <https://www.nps.gov/grsm/index.htm> [<https://perma.cc/T3PB-PL44>] (Aug. 30, 2022); *Nature & Science*, NPS: GREAT SMOKY MOUNTAINS NAT'L PARK NC, TN, <https://www.nps.gov/grsm/learn/nature/index.htm> [<https://perma.cc/MF86-N6N3>] (Sept. 14, 2022).

<sup>38</sup> See *The Road to Justice*, NPS: BROWN V. BD. OF EDUC. NAT'L HIST. PARK KAN., <https://www.nps.gov/brvb/index.htm> [<https://perma.cc/57VQ-QVMU>] (Nov. 4, 2022).

<sup>39</sup> See *Blackbeard (Edward Teach)*, NPS: CAPE HATTERAS NAT'L SEASHORE N.C., <https://www.nps.gov/caha/learn/historyculture/blackbeard-edward-teach.htm> [<https://perma.cc/7URB-TXXL>] (Sept. 27, 2021); *Sea Turtles*, NPS: CAPE HATTERAS NAT'L SEASHORE N.C., <https://www.nps.gov/caha/learn/nature/seaturtles.htm> [<https://perma.cc/H6PZ-3ZKM>] (June 22, 2022).

<sup>40</sup> See *A Common Field One Day. A Field of Honor Forever*, NPS: FLIGHT 93 NAT'L MEM'L, PA, <https://www.nps.gov/flni/index.htm> [<https://perma.cc/B4S6-QHE2>] (Oct. 31, 2022).

<sup>41</sup> See *More Than a Mountain*, NPS: DENALI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/dena/index.htm> [<https://perma.cc/7ZVG-XM3C>] (Oct. 24, 2022).

Pennsylvania,<sup>42</sup> and gaze at the Milky Way in Canyonlands National Park, an internationally designated “Dark Sky Park” in Utah.<sup>43</sup> A person could do all that and barely scratch the surface of what the national parks have to offer.

## 2. National Park Service Holdings and Statistics<sup>44</sup>

NPS holdings are large and hugely diverse, encompassing 423 different units across more than eighty-five million acres in the United States and its territories.<sup>45</sup> This includes sixty-three national parks, eighty-four national monuments, sixty-two national historical parks, seventy-three national historic sites, thirty-one national memorials, nineteen national preserves, eighteen national recreation areas, and seventy-three other units across thirteen other designation types.<sup>46</sup> In addition, there are 171 “Related Areas,” which the National Park Service either manages or otherwise supports, but the majority of which are not NPS units.<sup>47</sup>

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<sup>42</sup> See *A New Birth of Freedom*, NPS: GETTYSBURG NAT'L MIL. PARK PA, <https://www.nps.gov/gett/index.htm> [<https://perma.cc/JE4P-6YA4>] (Nov. 21, 2022).

<sup>43</sup> See *Lightscape/Night Sky*, NPS: CANYONLANDS NAT'L PARK UTAH, <https://www.nps.gov/cany/learn/nature/lightscap.htm> [<https://perma.cc/3QJK-K2LT>] (July 21, 2020). There are currently thirty-four NPS units that have been certified as Dark Sky Park by the International Dark Sky Association. *Where to Stargaze*, NPS: NIGHT SKIES, <https://www.nps.gov/subjects/night skies/stargaze.htm> [<https://perma.cc/EUF8-3LBW>] (June 14, 2022). See *International Dark Sky Parks*, INT'L DARK-SKY ASS'N, <https://www.darksky.org/our-work/conservation/idsp/parks/> [<https://perma.cc/MYX7-WYK7>] (last visited Jan. 16, 2023).

<sup>44</sup> “Holdings” refers to the various parcels of land managed by NPS.

<sup>45</sup> *About Us: National Park System*, *supra* note 31 (as of August 2022).

<sup>46</sup> The other designation types are: National Battlefields, National Battlefield Parks, National Battlefield Sites, National Military Parks, International Historic Sites, National Lakeshores, National Parkways, National Reserves, National Rivers, National Wild and Scenic Rivers and Riverways, National Scenic Trails, and National Seashores. *Id.* The Park Service also lists eleven units with other designations, all in and around Washington, D.C., including the White House, the National Mall and Memorial Parks, and the Constitution Gardens. For a full list of NPS units and designation types, see *id.*

<sup>47</sup> These “Related Areas” include fifty-five National Heritage Areas, forty-eight units in the National Wild and Scenic Rivers System, thirty units in the National Trails System, and twenty-five Affiliated Areas (such as the American Memorial Park in Saipan and the Inupiat Heritage Center in Alaska). *Id.* In addition, there are five Authorized Areas (including the Desert Storm/Desert Shield Memorial and Global War on Terrorism Memorial, both in Washington, D.C.) and three Commemorative Sites (for example, the Kennedy-King National Commemorative Site in Indiana).

Related areas are linked in importance and purpose to places managed directly by the National Park Service by preserving important segments of the nation's natural and cultural heritage . . . . The majority

Two-thirds of NPS land is in Alaska,<sup>48</sup> and the remaining third is primarily in the western half of the continental United States.<sup>49</sup>

A unit's title<sup>50</sup> is determined by Congress when the unit is first designated or if Congress elects to redesignate a unit.<sup>51</sup> While the complexities of different unit designations may seem needlessly complicated<sup>52</sup>—why have National Battlefields, National Battlefield Parks, National Battlefield Sites, and National Military Parks?—the different designations do mean different things and have real effects on how units are managed.<sup>53</sup> A baseline set of NPS policies and regulations apply to all units, but some activities are allowed in some units which are prohibited in others.<sup>54</sup> Similarly, Congress can elect to provide exceptions to that baseline NPS regulation regardless of unit type.<sup>55</sup> To understand fully what regulations apply to a particular unit, one must look to

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of related areas are . . . managed by other government agencies or non-government organizations and landowners. The National Park Service is involved in related area by directly managing the entire or sections of a related areas, or by providing technical or financial assistance.

*Id.*

<sup>48</sup> CONG. RSCH. SERV., FEDERAL LAND OWNERSHIP, *supra* note 11, at 5. As of 2018, NPS holdings in Alaska totaled 52,455,308 acres—less than that managed by either BLM or USFWS. *Id.* at 9 tbl. 2.

<sup>49</sup> *See id.* at 12–13 figs. 1–2.

<sup>50</sup> A unit's "title" refers to whether the unit is designated as a national park, battlefield, historic site, etc. For example, the Grand Canyon is a national park, while Cape Hatteras is a National Seashore. *About Us: National Park System*, *supra* note 31. They are all managed by the National Park Service and are part of the National Park System. *Id.*

<sup>51</sup> Note that national monuments are distinct in that they can be designated not just by Congress, but also by the President under the Antiquities Act. For further discussion of the president's authority to establish national monuments, see *infra* Section III.B. *See* CONG. RSCH. SERV., R41816, NATIONAL PARK SYSTEM: WHAT DO THE DIFFERENT PARK TITLES SIGNIFY? at Summary (2022) [hereinafter CONG. RSCH. SERV., PARK TITLES], [https://www.everycrsreport.com/files/2022-02-07\\_R41816\\_0c59298cafe2dff45190d653e649b36c8b794c9f.pdf](https://www.everycrsreport.com/files/2022-02-07_R41816_0c59298cafe2dff45190d653e649b36c8b794c9f.pdf) [<https://perma.cc/6TB7-MH26>].

<sup>52</sup> Some people do think that the different designations are too complicated and should be consolidated, and Congress has looked into the matter. However, the benefit of the "current, more loosely structured system [is that it] maximizes Congress's flexibility to title units to reflect their unique features." *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 1. NPS units "generally are managed to preserve resources . . ., hunting, mining, and other consumptive resource uses generally are not allowed. However, in the laws creating units, Congress sometimes has specified that some of those uses are allowed." LAURA B. COMAY, CONG. RSCH. SERV., RS20158, NATIONAL PARK SYSTEM: ESTABLISHING NEW UNITS 1 (2022), <https://crsreports.congress.gov/product/pdf/RS/RS20158/22> [<https://perma.cc/558G-LFSG>].



that individual unit and its regulations, rather than just the designation type and title.<sup>56</sup>

NPS units can be roughly divided into two types: those protected for their “Natural Values,” and those designated for their “Importance in History.”<sup>57</sup> The title of a park unit indicates the type of resource being protected, as well as the size of the unit.<sup>58</sup> For example, while they both protect historically and/or culturally important areas, national historic or battlefield parks will generally be larger than national historic or battlefield sites, and may cover a larger area or even multiple properties rather than just one building or isolated site.<sup>59</sup> National memorials are commemorative and “need not be sites or structures historically associated with their subjects.”<sup>60</sup> National parks and national preserves are generally (but not always) larger areas than, for example, national monuments.<sup>61</sup> And national parks often encompass both natural and cultural resources.<sup>62</sup> Note that some park units encompass several parcels of land with different classifications.<sup>63</sup> These unit classifications will not overlap—land designated as a national park cannot also be a national historic site—however, park land can also be designated as wilderness regardless of classification.<sup>64</sup> Additionally, while some titles are only used by the National Park Service (particularly, “national recreation area”),<sup>65</sup> others are used by multiple agencies.

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<sup>56</sup> However, that does not mean that the titles provide no guidance: “Congress has grouped similar units under similar titles, and often has followed precedents regarding the activities authorized in particular types of units. The designations have thus developed distinctive characteristics.” CONG. RSCH. SERV., PARK TITLES, *supra* note 51, at 1.

<sup>57</sup> *What's In a Name? Discover National Park System Designations*, NPS, <https://www.nps.gov/articles/nps-designations.htm> [<https://perma.cc/X9UJ-PGCS>] (Sept. 27, 2017).

<sup>58</sup> CONG. RSCH. SERV., PARK TITLES, *supra* note 51, at 3.

<sup>59</sup> *Id.* at 2–3.

<sup>60</sup> *What's In a Name? Discover National Park System Designations*, *supra* note 57.

<sup>61</sup> *Id.*

<sup>62</sup> CONG. RSCH. SERV., PARK TITLES, *supra* note 51, at 1.

<sup>63</sup> For example, Denali National Park and Preserve encompasses both the “national park” area (at the core of the park and encompassing the most visited area) which is 4.7 million acres and which is surrounded by a “preserve” of 1.3 million acres. *Park Statistics: Size*, DENALI NAT'L PARK & PRES., NAT'L PARK SERV. (Feb. 5, 2021), <https://www.nps.gov/dena/learn/management/statistics.htm> [<https://perma.cc/V7CP-6TGQ>]. See also *Basic Information: Popular Things To Do*, NPS: DENALI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/dena/planyourvisit/basicinfo.htm> [<https://perma.cc/PD4J-K4YH>] (Sept. 7, 2022); *Maps*, NPS: DENALI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/dena/planyourvisit/maps.htm> [<https://perma.cc/4FGP-3RYN>] (Sept. 28, 2022).

<sup>64</sup> See, e.g., *supra* note 63.

<sup>65</sup> COMAY, *supra* note 55, at 1.

The NPS mission provides for resource preservation and therefore all park units are at least somewhat restrictive in how the land is allowed to be used.<sup>66</sup> However, units designated as national parks are generally the most restrictive in the activities they allow.<sup>67</sup> A unit designated as a national preserve, while perhaps similar to a national park in scale and wild character, will allow for far broader uses, such as hunting, snowmobiling, or mining, which “Congress considered incompatible with national park designation.”<sup>68</sup> Uses such as these, deemed incompatible with national parks, often constitute a major use in other park units, such as hunting in national preserves, off-road vehicle use in national recreation areas, or boating in national seashores.<sup>69</sup>

A unit’s title, in addition to signaling park uses and park purpose, can affect its attractiveness to visitors.<sup>70</sup> So, while a unit’s redesignation as a “national park” will impose greater protections (and restrictions) on the land, it will also most likely lead to increased visitation—which likely signals a boost to local economies, an additional burden on the resource, and the ire of locals whose favorite recreational park uses may have just been forbidden.

### 3. The National Park Service’s Fundamental Purpose and the Standard of Impairment

The National Park Service’s fundamental purpose is to provide for preservation first and enjoyment second—an interpretation supported by the agency’s history of protecting lands from resource- and treasure-hungry throngs. The 1916 “Act to Establish the National Park Service,” more commonly known as the NPS Organic Act, states that the National Park Service’s “fundamental purpose” will be to “conserve the scenery and the natural and historic objects and the wild life [sic] therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”<sup>71</sup>

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<sup>66</sup> CONG. RSCH. SERV., PARK TITLES, *supra* note 51, at 6–7; *NPS Organic Act*, *supra* note 16.

<sup>67</sup> CONG. RSCH. SERV., PARK TITLES, *supra* note 51, at 1.

<sup>68</sup> *Id.* at 2.

<sup>69</sup> *Id.* at 6. See, e.g., *Hunting Information*, NPS: DENALI NAT’L PARK & PRES. ALASKA, <https://www.nps.gov/dena/learn/management/hunting-information.htm> [<https://perma.cc/3WDB-RWA6>] (Aug. 20, 2021); *Off-Road Driving*, NPS, <https://www.nps.gov/aboutus/upload/Driving-Off-Road-in-National-Parks.pdf> [<https://perma.cc/349B-JS59>] (last visited Jan. 16, 2023); *Boating & Watersports: Recreation in Rivers, Lakes & Oceans*, NPS, <https://www.nps.gov/subjects/watersports/index.htm> [<https://perma.cc/XT3U-6Z7G>] (May 24, 2021).

<sup>70</sup> CONG. RSCH. SERV., PARK TITLES, *supra* note 51, at Summary.

<sup>71</sup> 16 U.S.C. § 1 (1916). The phrase “fundamental purpose” appears in the Organic Act. *Id.*

This is sometimes referred to as the National Park Service's "dual mission," wherein the agency is directed to provide both for current enjoyment as well as preservation.<sup>72</sup>

However, the concept of a dual mandate is misleading. The National Park Service itself has determined that the Organic Act "create[s] a single NPS mission with several components, the key to which is that future generations will be able to enjoy National Park System resources only if [NPS] successfully protect[s] them from impairment."<sup>73</sup> The National Park Service affirmed this official interpretation in its 2006 Management Policies, declaring that where conservation and enjoyment conflict, "conservation is to be predominant."<sup>74</sup> Scholars have also recognized the hierarchy in the NPS mission. Denise E. Antolini, for example, wrote of the importance of the preservation of "place" over catering to "people."<sup>75</sup> This fundamental purpose of conservation is clear in a plain reading of the Organic Act: The use and enjoyment must be carried out in a way that leaves the resource unimpaired. Use and enjoyment, while important, are subordinate to preservation.

This primary duty of preservation was recognized by Stephen Mather, the first Director of the National Park Service.<sup>76</sup> In 1925, Mather wrote that the National Park Service's duty, first and foremost, "is to protect the national parks and [other units] under its jurisdiction and keep them as nearly in their natural state as this can be done in view of the fact that access to them must be provided in order that they may be used

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For the text of the Organic Act as originally enacted, see *Act To Establish a National Park Service (Organic Act), 1916*, in AMERICA'S NATIONAL PARK SYSTEM: THE CRITICAL DOCUMENTS (Lary M. Dilsaver ed., 1994), [https://www.nps.gov/parkhistory/online\\_books/anps/anps\\_1i.htm](https://www.nps.gov/parkhistory/online_books/anps/anps_1i.htm) [<https://perma.cc/27FV-GG2K>].

<sup>72</sup> *NPS Organic Act*, *supra* note 16.

<sup>73</sup> *National Park Service Organic Act and Its Implementation Through Daily Park Management: Hearing Before the Subcomm. of Nat'l Parks of the H. Comm. on Res.*, 109th Cong. (2005) (statement of Stephen P. Martin, Deputy Director, National Park Service) [hereinafter Statement of Stephen P. Martin].

<sup>74</sup> Congress, recognizing that the enjoyment by future generations of the national parks can be ensured only if the superb quality of park resources and values is left unimpaired, has provided that when there is a conflict between conserving resources and values and providing for enjoyment of them, conservation is to be predominant. MANAGEMENT POLICIES 2006, *supra* note 18, at 10.

<sup>75</sup> Denise E. Antolini, *National Park Law in the U.S.: Conservation, Conflict, and Centennial Values*, 33 WM. & MARY ENV'T L. & POL'Y REV. 851, 854–55 (2009).

<sup>76</sup> See *Famous Quotes Concerning National Parks*, NPS, <https://www.nps.gov/parkhistory/hisnps/npsthinking/famousquotes.htm> [<https://perma.cc/TCQ5-TJFB>] (Jan. 16, 2003, 10:52 PM).

and enjoyed.”<sup>77</sup> The rest of the National Park Service’s responsibilities, he added, “must be secondary (but not incidental) to this fundamental . . . care and protection . . . .”<sup>78</sup>

The Organic Act has been altered in the century since it was passed, but subsequent legislation has reaffirmed, rather than altered, the NPS mission of preservation with use of the parks in a way that will leave them unimpaired for future generations.<sup>79</sup> The General Authorities Act of 1970 affirmed that the NPS mission extends to all units, regardless of whether they are characterized as natural, cultural, or historic resources.<sup>80</sup> The Redwoods National Park Expansion Act of 1978 in part amended the Organic Act, “reaffirm[ing] the mandate set forth in the Organic Act and direct[ing] the National Park Service to manage park lands in a manner that would not degrade park values.”<sup>81</sup> Congress again reaffirmed these values in 2014.<sup>82</sup> Therefore, it has long been—and continues to be—recognized that the NPS mission is to preserve all park units unimpaired and provide for the use and enjoyment of those parks in a way that leaves them unimpaired for future generations. Or, to phrase it another way, the National Park Service cannot allow for uses or enjoyment of a park that will leave the park impaired.

Despite specifying the fundamental purpose of the National Park Service, the Organic Act does not describe how the parks are to be managed.<sup>83</sup> Courts have subsequently held that the National Park Service

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> See *NPS Organic Act*, *supra* note 16.

<sup>80</sup> General Authorities Act, 54 U.S.C. § 100101 et seq. (2022). The Department of Justice described the impact of the General Authorities Act as “provid[ing] that all of the nation’s parks—whether they include natural, cultural or historic resources—are united under the mission, purpose and protection of the Organic Act.” *NPS Organic Act*, *supra* note 16.

<sup>81</sup> *NPS Organic Act*, *supra* note 16; Redwood National Park Expansion Act, Pub. L. No. 95-250 (1978).

<sup>82</sup> The Secretary, acting through the Director of the National Park Service, shall promote and regulate the use of the National Park System by means and measures that conform to the fundamental purpose of the System units, which purpose 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.

54 U.S.C. § 100101(a). This 2014 legislation reaffirmed the “fundamental purpose” of the Park Service and restates the 1970 declarations on the purpose and function of the national parks and the 1978 reaffirmation. See *id.*

<sup>83</sup> *NPS Organic Act*, *supra* note 16 (citing *S. Utah Wilderness All. v. Dabney*, 222 F.3d 819, 826 (10th Cir. 2000)).

has “broad discretion in determining which avenues best achieve the Organic Act’s mandate.”<sup>84</sup> While this provides a baseline for park management decisions, such management must also take into account additional legislation that may apply, such as broad laws, like the Wilderness Act of 1964 and the National Environmental Policy Act (“NEPA”), as well as legislation specific to a particular park unit, such as that park’s founding legislation.<sup>85</sup>

Finally, there is the impairment standard established by the Organic Act, which directs that the Parks are to be preserved “unimpaired for . . . future generations.”<sup>86</sup> The Act, however, does not define “impairment” or give guidance for implementing it, such as “how both the duration and severity of impairment are to be evaluated or weighed against the other value of public use of the park.”<sup>87</sup> The ordinary definition of “impairment” is “being in an imperfect or weakened state or condition[,] such as [being] diminished in function or ability [or] lacking full function or structural integrity.”<sup>88</sup> Because of the lack of legislative direction, courts have given broad deference to NPS determinations of whether an action constitutes “impairment” of park resources.<sup>89</sup>

In its 2006 Management Policies, the National Park Service stated that an action constitutes impairment when, “in the professional judgment of the responsible NPS manager, [it] would harm the integrity of park resources or values, including the opportunities that otherwise would be present for the enjoyment of those resources or values.”<sup>90</sup> Impacts—such as a refurbished visitor center or a new trail—are not necessarily

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<sup>84</sup> *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1454 (9th Cir. 1996).

<sup>85</sup> See *Wilderness: Law & Policy*, NPS, <https://www.nps.gov/subjects/wilderness/law-and-policy.htm> [<https://perma.cc/76RC-7JH7>] (Mar. 21, 2022); *NEPA*, NPS, <https://www.nps.gov/subjects/nepa/index.htm> [<https://perma.cc/9MKT-UC4F>] (Feb. 26, 2018); see, e.g., *Alaska: Alaska National Interest Lands Conservation Act*, NPS, <https://www.nps.gov/locations/alaska/anilca.htm> [<https://perma.cc/U7AJ-RFFW>] (Nov. 9, 2020); *Enabling Legislation*, NPS: DENALI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/dena/learn/management/enabling-legislation.htm> [<https://perma.cc/EPV7-JP7Z>] (Jan. 31, 2018).

<sup>86</sup> See Statement of Stephen P. Martin, *supra* note 73.

<sup>87</sup> See *S. Wilderness All. v. Dabney*, 222 F.3d 819, 826 (10th Cir. 2000).

<sup>88</sup> *Impaired*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/impaired> [<https://perma.cc/DA39-R9W7>] (Nov. 18, 2022).

<sup>89</sup> See Jamison E. Colburn, *National Park System and NEPA: Non-Impairment in an Age of Disruption*, 50 AKRON L. REV. 81, 85 (2017). See, e.g., *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1233 (E.D. Cal. 1999).

<sup>90</sup> The Management Policies go on to say that “[w]hether an impact meets this definition depends on the particular resources and values that would be affected; the severity, duration, and timing of the impact; the direct and indirect effects of the impact; and the cumulative effects of the impact in question and other impacts.” MANAGEMENT POLICIES 2006, *supra* note 18, at 11.

impairments but are more likely to be considered impairments when they affect resources or values<sup>91</sup> that are fundamental to the specific park, as determined by the park's founding legislation, general management plan, the "natural or cultural integrity of the park," or enjoyment of the park.<sup>92</sup> For example, an action that might impact wildlife at the General Grant National Memorial, a small unit significant for its historical nature (it houses General Grant's tomb),<sup>93</sup> is far less likely to be considered impairment than an action that will impact Katmai National Park and Preserve, which is renowned for its salmon-catching brown bears.<sup>94</sup>

To ensure that no impairment occurs, the National Park Service has a list of unacceptable impacts that fall short of the impairment standard but are still prohibited to ensure that no impact rises to the level of impairment.<sup>95</sup> The unacceptable impacts listed are still vague but provide park managers slightly more guidance than the obscure impairment standard.<sup>96</sup> There is considerable discretion given to NPS decision makers as to what constitutes impairment or an unacceptable impact.<sup>97</sup> Notably, the 2006 Management Policies state that the NPS mandate to conserve park resources and values "is independent of the separate prohibition on impairment and applies all the time with respect to all park resources and values, even when there is no risk that any park resources or values may be impaired."<sup>98</sup> While the Management Policies go on to say that impacts up to the point of the prohibited impairment standard can be allowed at the discretion of NPS management "when necessary and appropriate to fulfill the purposes of a park,"<sup>99</sup> this discretion can also be used to increase protections for park resources.<sup>100</sup>

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<sup>91</sup> "Park resources and values" is construed very broadly, from "the park's scenery, natural and historic objects, and wildlife, and the processes and conditions that sustain them" to "the park's role in contributing to the national dignity, the high public value and integrity, and the superlative environmental quality of the national park system, and the benefit and inspiration provided to the American people by the national park system . . ." *Id.* at 11–12.

<sup>92</sup> *Id.* at 11.

<sup>93</sup> See "Let Us Have Peace.", NPS: GENERAL GRANT NAT'L MEM'L NY, <https://www.nps.gov/gegr/index.htm> [<https://perma.cc/6W36-5X8F>] (Feb. 25, 2022).

<sup>94</sup> See *Welcome to Katmai Country*, NPS: KATMAI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/katm/index.htm> [<https://perma.cc/W84J-XNV4>] (Mar. 25, 2021).

<sup>95</sup> MANAGEMENT POLICIES 2006, *supra* note 18, at 12.

<sup>96</sup> See *id.* at 12.

<sup>97</sup> See *id.*

<sup>98</sup> *Id.* at 10.

<sup>99</sup> *Id.* Note that the 2006 Management Policies are the agency interpretation of its mandate as set in the Organic Act and subsequent legislation. However, agency interpretations of their organic acts are given considerable deference.

<sup>100</sup> Statement of Stephen P. Martin, *supra* note 73.

Too much discretion is given to park managers in determining whether something constitutes an “impairment” of a park resource. In practice, a non-impairment determination is often the park superintendent’s signature, affixed to a Finding of No Significant Impact made during a NEPA study, that, in the manager’s judgment, the action will not constitute an impairment of a park resource.<sup>101</sup> While parks need to be able to address their needs without endless red tape, the Parks are currently being impaired by overcrowding, and the impairment standard could be more forcefully used to preserve park resources.<sup>102</sup>

*B. The Problem of Overcrowding*

The NPS 2021 visitation report lists some staggering numbers.<sup>103</sup> According to the National Park Service, “[o]f 423 parks in the National Park System, just 25 received more than 50 percent of the system’s total 297.1 million recreation visits in 2021.”<sup>104</sup> Eight parks accounted for 25% of all recreation visits.<sup>105</sup> “Forty-four parks set a record for recreation visits in 2021. . . . Great Smoky Mountains National Park set a visitation record in 2021 and passed 14 million recreation visits for the first time.”<sup>106</sup>

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<sup>101</sup> See NPS, GUIDANCE FOR NON-IMPAIRMENT DETERMINATIONS AND THE NPS NEPA PROCESS 1, 3 (2011).

<sup>102</sup> It is beyond the scope of this Note to lay out a reimagined way of making non-impairment determinations. The NEPA process, sometimes at play in park actions, can be a stand-in for a formal finding of no-impairment (akin to a NEPA “Finding of No Significant Impact” document). See NEPA, Pub. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321–4347 (2012)). Ideally, the non-impairment determination would involve some meaningful study, discussion, or consultation, while also not burdening the park with a years-long compliance process that would prevent anything, especially positive or protective changes, from occurring. However, while an improved non-impairment determination process could aid in reducing negative impacts on park resources (particularly if they included an analysis of cumulative impacts, including individually insignificant but cumulatively meaningful impacts), some current problems could have been lessened. Currently, however, the Park Service requires a lot of money and ideally new land to resolve some of its worst problems, which a revitalized non-impairment process would not have been able to prevent.

<sup>103</sup> See *Most Famous National Parks Set Visitation Records in 2021*, NPS: OFF. OF COMM’N, <https://www.nps.gov/orgs/1207/most-famous-national-parks-set-visitation-records-in-2021.htm> [<https://perma.cc/2SRZ-MVN9>] (Feb. 16, 2022).

<sup>104</sup> Those twenty-five most visited national parks represent just 6% of the National Park System. *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

Seventy-three park units received over one million visits, eleven had over five million, and three parks each had over ten million visitors in 2021.<sup>107</sup>

Over the past century, visitation has naturally increased.<sup>108</sup> In 1904, the national parks received 120,690 recreation visits; 1,022,091 in 1920; 16,410,148 in 1940; 71,586,000 in 1960; and by 1990, the national parks received over 255,000,000 recreation visits.<sup>109</sup> In total, NPS says the national parks received 15,391,325,968 recreation visits between 1904 and 2021.<sup>110</sup>

What do these visitation numbers actually mean? In many parks, these statistics tell a quantitative story of an overcrowding crisis that is best narrated. According to the *New York Times*:

Americans are flocking to national parks in record numbers, in many cases leading to long lines and overcrowded facilities. . . . [I]n place of serenity, many visitors have instead found packed parking lots, congested trailheads, overrun campsites and interminable lines. Hikers at Zion National Park, in Utah, have faced wait times of four hours to access certain trails. Visitors to Arches National Park, in the same state, are being turned away at the gate—“The park is currently full,” the Parks Service’s Twitter feed routinely announces—and asked to return at a later time.<sup>111</sup>

The photos that accompany the quoted *Times* article complete the narrative: at Acadia, a crowd of people watching the sunrise at 4:53 AM and overlooks with barely a spare spot to stand; at the Grand Canyon, lines of cars waiting to go through the entrance gate, visitors crowded like sardines at the famous Mather overlook, and shuttles packed with visitors both sitting and standing; at Yellowstone, boardwalks are jam-packed with tourists.<sup>112</sup>

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<sup>107</sup> The three parks that received over ten million visitors each were Blue Ridge Parkway, Great Smoky Mountains National Park, and Golden Gate National Recreation Area. *Id.*

<sup>108</sup> See *About Us: Visitation Numbers*, NPS, <https://nps.gov/aboutus/visitation-numbers.htm> [<https://perma.cc/6BVF-GS9Q>] (Feb. 16, 2022).

<sup>109</sup> While visitation numbers do not always rise from year to year (see, for example, greatly reduced visitation during WWII and the height of the COVID-19 pandemic in 2020—during which many parks and park facilities were closed), the overall trend is a large and continuous increase in visitation over the decades. *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> *How Crowded Are America’s National Parks? See for Yourself*, *supra* note 6.

<sup>112</sup> *Id.*



This is a problem across the National Park System and around the country.<sup>113</sup> It has spurred many articles, from those explaining why the surge in visitation “may ruin your next trip”<sup>114</sup> or suggesting other places to visit instead<sup>115</sup> to those arguing for policy changes to combat the crisis.<sup>116</sup>

The overcrowding is damaging to more than just the visitor experience—it is damaging the parks themselves. In Yellowstone, “a growing number of visitors are walking off boardwalks, making their own trails, throwing stuff into hot springs, or driving off roads and trampling fragile natural areas.”<sup>117</sup> In Rocky Mountain National Park, “visitors

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<sup>113</sup> Mai Tran, *It's Not Sustainable: Overcrowding Is Changing the Soul of US National Parks*, GUARDIAN (Sept. 10, 2021, 6:00 AM), <https://www.theguardian.com/environment/2021/sep/10/overcrowding-changing-us-national-parks> [<https://perma.cc/8GR3-VMPC>] (“Travelers, tour guides and [NPS] workers share how years of record-high tourism levels are reshaping popular destinations.”).

<sup>114</sup> See Greg Iacurci, *National Parks Are Booming. That May Ruin Your Next Trip*, CNBC (Aug. 22, 2021, 8:00 AM), <https://www.cnbc.com/2021/08/22/national-parks-are-booming-that-may-ruin-your-next-trip.html> [<https://perma.cc/X2PM-KL7S>] (explaining that parks are adopting “advance-reservation systems to limit congestion,” and how it “may frustrate would-be travelers who can’t get one of the limited reservations”).

<sup>115</sup> See, e.g., Alicia Johnson, *US National Parks Are Overcrowded—Here’s What Experts Say to Do Instead*, LONELY PLANET (June 25, 2021), <https://www.lonelyplanet.com/news/overcrowding-at-us-national-parks> [<https://perma.cc/JXD8-SY4S>] (recommending visiting smaller city parks instead and being flexible).

<sup>116</sup> See, e.g., Kristopher J. Brooks, *Our National Parks Are Overcrowded. Here’s How To Fix That*, CBS NEWS (July 28, 2021, 5:21 PM), <https://www.cbsnews.com/news/national-parks-overcrowded-yellowstone-yosemite-reservations-senator-king/> [<https://perma.cc/4NGU-7S55>] (arguing that cars are the big problem and advocating for increased use of reservation systems by parks and free shuttles); Jonathan Thompson, *More National Parks Won’t Solve Overcrowding*, HIGH COUNTRY NEWS (Sept. 9, 2021), <https://www.hcn.org/articles/national-park-system-more-national-parks-wont-solve-overcrowding> [<https://perma.cc/49QH-KGCK>] (arguing that the parks need more funding to build more campgrounds, implement shuttle systems, and hire more staff to cope with the visitation numbers); Elisabeth Kwak-Hefferan, *8 Ways To Ease Overcrowding at Our National Parks*, 5280 (Sept. 2020), <https://www.5280.com/2020/09/8-ways-to-ease-overcrowding-at-our-national-parks/> [<https://perma.cc/WT23-6TC6>] (offering eight solutions: “Shut the Gates,” “Ditch the Cars,” “Alter Pricing,” “Point Out the Road Less Traveled,” “Manage the Ick,” “Ask People Not To Do It for the ‘Gram,” “Spread the Love,” “Do Your Part”); Michael Childers, *Overcrowded US National Parks Need a Reservation System*, THE CONVERSATION (June 1, 2021, 8:51 AM), <https://theconversation.com/overcrowded-us-national-parks-need-a-reservation-system-158864> [<https://perma.cc/3R2W-XTY2>] (arguing that “neither more money nor additional park rangers will solve the overcrowding crisis. . . . [Instead] the most popular national parks need a reservation system to save those protected lands from further damage”).

<sup>117</sup> Jim Robbins, *How a Surge in Visitors Is Overwhelming America’s National Parks*, YALE ENV’T 360 (July 31, 2017), <https://e360.yale.edu/features/greenlock-a-visitor-crush-is-overwhelming-americas-national-parks> [<https://perma.cc/QE2W-RJEV>].

are spreading out beyond existing trails, [and] increasing wildlife disruption . . . . [In] Arches and Canyonlands, there has been more vandalism, particularly defacing Indigenous rock imagery. . . . Upticks in graffiti, litter, social trails, and improperly disposed of human waste are concerns in many parks.”<sup>118</sup>

The damage from overcrowding has risen to the level of unacceptable impact and, in some instances, impairment to the parks themselves. This is not preservation, and it is also not “enjoyment.” The National Park Service knows this, and the government has held hearings on the issue in an attempt to find solutions.<sup>119</sup> The fact that so many people value and seek out the national parks shows the genius of their founding. But their success may be their undoing. This overcrowding means that solitude, wilderness, and wildlife are harder to find and enjoy. The vast and breathtaking “Crown Jewels” of the National Park System, such as the Grand Canyon, Yellowstone, and Yosemite, are being destroyed from within by their own popularity, and the National Park Service, despite its duty to intervene under both the Organic Act and their own Management Policies, is incapable of doing so on its own.

What is the solution? In addition to more funding and staffing, the country needs more parks. By expanding parks and park protections, the National Park System can be both preserved and progressed. The national parks, even those that remain calm and quiet, still need preservation. Meanwhile, the country needs increased equity in access to parks, protection of its cultural resources, an outlet for the parks which are overflowing, and protection of its natural resources and the environment from ever-expanding development.

## II. MECHANISMS FOR CREATING NATIONAL PARK UNITS

### A. *Congressional Authority to Create Park Units*

The primary authority to establish national parks rests with Congress.<sup>120</sup> Bills establishing park units can be enacted individually or as

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<sup>118</sup> Kurt Repanshek, *Senators Hear Litany of Problems Caused by Overcrowding in National Parks*, NAT'L PARKS TRAVELER (July 28, 2021), <https://www.nationalparks.traveler.org/2021/07/senators-hear-litany-problems-caused-overcrowding-national-parks> [<https://perma.cc/CC8R-X22H>] (quoting Kristen Brengel, Senior Vice President at the National Parks Conservation Association).

<sup>119</sup> See *Impacts of Overcrowding in Our National Parks on Park Resources and Visitor Experiences: Hearing Before the Subcomm. of Nat'l Parks of the S. Comm. on Energy & Nat. Res.*, 117th Cong. (2021) (statement of Michael T. Reynolds, Regional Director for Interior Regions 6, 7 & 8, National Park Service); Repanshek, *supra* note 118.

<sup>120</sup> See COMAY, *supra* note 55, at 2.

part of large omnibus laws<sup>121</sup> and generally originate in either the House Committee on Natural Resources or the Senate Committee on Energy and Natural Resources.<sup>122</sup> Congress has broad discretion as to what to include in such a law: “An act of Congress creating a National Park System unit may explain the unit’s purpose; set its boundaries; provide specific directions for land acquisition, planning, uses, and operations; and authorize appropriations for acquisition and development.”<sup>123</sup> In short, such legislation is broad and contains whatever information Congress deems necessary. Congress may also pass legislation directing the National Park Service to study an area for potential addition into the National Park System, before designating the area as a unit of the National Park System.<sup>124</sup> However, a National Park Service area study is not required for a unit to be added to the National Park System by Congress.<sup>125</sup>

There are three official criteria that Congress will evaluate when considering whether to add a unit to the National Park System: national significance, suitability, and feasibility.<sup>126</sup> In determining whether an area is nationally significant, there are four standards that the unit must meet: (1) “it is an outstanding example of a particular type of resource”; (2) “it possesses exceptional value or quality in illustrating or interpreting the natural or cultural themes of [the] Nation’s heritage”; (3) “it offers superlative opportunities for recreation for public use and enjoyment, or for scientific study”; and (4) “it retains a high degree of integrity as a true, accurate, and relatively unspoiled example of the resource.”<sup>127</sup>

A wide variety of natural areas and cultural sites can meet the criteria for national significance.<sup>128</sup> For example, a natural area that is nationally significant may be “a rare remnant natural landscape or biotic area of a type that was once widespread but is now vanishing due to human settlement and development”; particularly ecologically or geologically diverse; “has outstanding scenic qualities”; or is “a critical refuge that is

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<sup>121</sup> *Id.*

<sup>122</sup> *See id.* “Bills to create units generally are within the jurisdiction of the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources, with appropriations typically contained in Interior, Environment, and Related Agencies’ appropriations acts.” *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See id.*

<sup>125</sup> COMAY, *supra* note 55, at 3.

<sup>126</sup> *See* NPS, CRITERIA FOR NEW NATIONAL PARKS (2005) [hereinafter CRITERIA FOR NEW NATIONAL PARKS], <http://npshistory.com/brochures/criteria-parklands-2005.pdf> [<https://perma.cc/8SSW-EZ4M>].

<sup>127</sup> *Id.*

<sup>128</sup> *See id.*

necessary for the continued survival of a species.”<sup>129</sup> Cultural areas of national significance are similarly diverse, including resources that are associated with key events or people in the nation’s history that shed light on new cultures or that are architecturally exceptional.<sup>130</sup>

The two other factors, suitability and feasibility, can be hard to pin down. To be “suitable,” the area must be of a type “not already adequately represented in the National Park System or . . . not comparably represented and protected for public enjoyment by another land-managing entity.”<sup>131</sup> To be “feasible,” the site “must be of sufficient size and appropriate configuration to ensure long-term protection of the resources and to accommodate public use . . . [and] must have potential for efficient administration at a reasonable cost.”<sup>132</sup> Even if an area is nationally significant, local resistance, land ownership complications, other comparable resources, and many other factors can prevent a place from being added to the National Park System.<sup>133</sup>

While these criteria may seem prohibitively restrictive, Congress has added many units to the National Park System over the decades.<sup>134</sup> Critically, Congress makes the rules for what should be added to the National Park System, and therefore can apply them flexibly.

Recent examples of congressional additions to the National Park System come from legislation such as the Omnibus Public Land Management Act of 2009,<sup>135</sup> the Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015,<sup>136</sup> and the John D.

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<sup>129</sup> *See id.*

<sup>130</sup> In addition, many sites that offer superb recreational activities are part of the National Park System, but they must meet the criteria based on their natural or cultural significance, rather than their recreational potential. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> CRITERIA FOR NEW NATIONAL PARKS, *supra* note 126. “Important feasibility factors include landownership, acquisition costs, life cycle maintenance costs, access, threats to the resource, and staff or development requirements.” *Id.*

<sup>133</sup> *See id.*

<sup>134</sup> *See, e.g., About Us: Recent Changes to the National Park System*, NAT’L PARK SERV., <https://www.nps.gov/aboutus/recent-changes.htm> [https://perma.cc/9EFK-V4CW] (Oct. 19, 2022).

<sup>135</sup> Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11. This law created Paterson Great Falls National Historical Park, President Williams Jefferson Clinton Birthplace Home National Historical Site, and River Raisin National Battlefield Park; and it redesignated three national historic sites as national historical parks. *See About Us: Recent Changes to the National Park System*, *supra* note 134.

<sup>136</sup> Carl Levin and Howard P. “Buck” McKeon Nat’l Def. Authorization Act for Fiscal Year 2015, P.L. 113-291 (2014). This law created the Desert Storm and Desert Shield Memorial (not yet established—subject to Commemorative Works Act review), Coltsville National

Dingell, Jr. Conservation, Management, and Recreation Act,<sup>137</sup> all of which added multiple new units to the National Park System.<sup>138</sup> Individual legislation to add park units is rare.<sup>139</sup>

*B. Executive Authority Under the Antiquities Act*

The President has the ability to add units to the National Park System by establishing national monuments<sup>140</sup> under the Antiquities Act of 1906 (the “Act”).<sup>141</sup> The Act provides that “[t]he President may, in the President’s discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments.”<sup>142</sup> The Act was signed into law by President Theodore Roosevelt in response to concerns over the looting and destruction of archaeological sites.<sup>143</sup> “The Act [is] designed to protect

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Historical Park (not yet established—awaiting land acquisition), Harriet Tubman National Historical Park, Manhattan Project National Historical Park, Blackstone River Valley National Historical Park, Valles Caldera National Preserve, World War I Memorial, and Tule Springs Fossil Beds National Monument; and it redesignated three national monuments to national historical parks and a national monument and preserve. *See About Us: Recent Changes to the National Park System*, *supra* note 134.

<sup>137</sup> John D. Dingell, Jr. Conservation, Management, and Recreation Act, P.L. 116-9 (2019). This Act created Medgar and Myrlie Evers Home National Monument, Mill Springs Battlefield National Monument, and Camp Nelson Heritage National Monument; and it variously redesignated eight other units. *See About Us: Recent Changes to the National Park System*, *supra* note 134.

<sup>138</sup> *See supra* notes 131–33.

<sup>139</sup> *See, e.g., About Us: Recent Changes to the National Park System*, *supra* note 134. The legislation authorizing units listed as “new parks” is nearly all omnibus legislation. For example, Ste. Genevieve National Historical Park in Missouri was newly established in October of 2020 by the 2018 Consolidated Appropriations Act (P.L. 115-141) and was the only park unit created therein. *H.R. 1625—Consolidated Appropriations Act, 2018: Summary*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/1625> [<https://perma.cc/S3V6-8G8R>] (last visited Jan. 16, 2023).

<sup>140</sup> Note that Congress can also designate a unit as a “national monument,” and therefore one must look at the unit’s founding legislation to determine whether it was established by the president or the legislature. *See COMAY*, *supra* note 55, at 2.

<sup>141</sup> Antiquities Act of 1906, 16 U.S.C. § 431 et seq. For a section-by-section overview of the provisions in the Antiquities Act, see *Archeology: Antiquities Act of 1906*, NPS, <https://www.nps.gov/subjects/archeology/antiquities-act.htm> [<https://perma.cc/J63X-D56J>] (Sept. 7, 2022).

<sup>142</sup> 54 U.S.C. § 320301.

<sup>143</sup> The preservation of the famous cliff dwellings at Mesa Verde in Colorado was of particular concern. *See Archeology: Antiquities Act of 1906*, *supra* note 141.

federal lands and resources quickly,”<sup>144</sup> and is intended to protect specific sites or features that are threatened. The Act has been key to the conservation of public lands.<sup>145</sup>

Over 150 sites have been designated as national monuments under the Act.<sup>146</sup> Historically, many of the national monuments created by presidential order have been “converted” to national parks by Congress.<sup>147</sup> Many national monuments established under the Act are under the jurisdiction of the National Park Service, but some are managed by other agencies.<sup>148</sup> The use of the Antiquities Act has been a source of controversy, with contention over issues as varied as the amount of land protected, the purpose of protection, and the inclusion of private land within monument boundaries.<sup>149</sup>

While the Antiquities Act has and can continue to protect many important sites, there are three hurdles to using the Act alone to expand the National Park System. First, land designated as a national monument must already be owned by the federal government.<sup>150</sup> To be added to the National Park System, any land not already owned by the federal government must be approved by Congress.<sup>151</sup> However, private land may be donated and then included in a presidentially proclaimed national monument.<sup>152</sup> Additionally, there is the potential that private land could be

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<sup>144</sup> CONG. RSCH. SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT, at Summary (2021).

<sup>145</sup> See Julie Turkewitz, *Trump Slashes Size of Bears Ears and Grand Staircase Monuments*, N.Y. TIMES (Dec. 4, 2017), <https://www.nytimes.com/2017/12/04/us/trump-bears-ears.html> [<https://perma.cc/CN2E-YJKL>].

<sup>146</sup> *General Antiquities Act*, DOJ, <https://www.justice.gov/enrd/general-antiquities-act> [<https://perma.cc/DNW7-63W3>] (last visited Jan. 16, 2023).

<sup>147</sup> COMAY, *supra* note 55, at 2. The Grand Canyon, for example, was proclaimed to be a national monument by President Theodore Roosevelt in 1908, and subsequently designated as a national park by an act of Congress in 1919. *Management: Authorization Summary*, NPS: GRAND CANYON NAT'L PARK ARIZ., <https://www.nps.gov/grca/learn/management/index.htm> [<https://perma.cc/Y9NM-M8YJ>] (Oct. 12, 2022). Similarly, in Alaska, Katmai was designated as a national monument in 1918 under the Antiquities Act and became Katmai National Park and Preserve in 1980 with the passage of Alaska National Interest Lands Conservation Act. *Management*, NPS: KATMAI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/katm/learn/management/index.htm> [<https://perma.cc/LJ67-9W4Q>] (June 19, 2020).

<sup>148</sup> *General Antiquities Act*, *supra* note 146.

<sup>149</sup> See CONG. RSCH. SERV., *supra* note 144, at 1–2.

<sup>150</sup> See *id.* at 6.

<sup>151</sup> *Id.*

<sup>152</sup> Donation of private land for the purpose of becoming a national monument occurred as recently as the Obama Administration, when the land for both the César E. Chávez

condemned by the president for the purpose of establishing a national monument.<sup>153</sup> “It remains untested whether relinquishment of nonfederal lands must be voluntary . . . [since to] date, no presidential declaration of a monument has converted private property to federal property.”<sup>154</sup>

Second, many aspects of this presidential power are controversial, and the protection given to Antiquities Act–established national monuments is less permanent than those protected by Congress,<sup>155</sup> particularly after President Trump’s reduction of two national monuments in 2017.<sup>156</sup> Because of this, Congress had debated whether to limit presidential authority under the Act.<sup>157</sup> While the presidential power to create national monuments under the Act has been upheld by the Supreme Court in all three cases it has heard on the issue,<sup>158</sup> national monuments established by the president may be abolished by Congress and potentially by future presidents as well.<sup>159</sup> Congressional abolition of presidential monuments is less noteworthy because Congress has the power to establish, alter, or delist any unit in the National Park System. Congress is, however, an unwieldy instrument, while an anti-conservation president can much more easily use the Antiquities Act (if they are able) to destroy protections for national monuments that were established under the Act.

President Obama was one of the most prolific users of the Antiquities Act.<sup>160</sup> He established twenty-nine new monuments and enlarged five, for a total of 553.6 million acres.<sup>161</sup> However, federal land expansion and regulation has long been a partisan issue,<sup>162</sup> and, in 2017, President Trump “slashed” the size of two national monuments, Bears Ears and

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National Monument in California and the Katahdin Woods and Waters National Monument in Maine were donated by private individuals. *Id.* at 6–7.

<sup>153</sup> *Id.* at 7.

<sup>154</sup> *Id.*

<sup>155</sup> See CONG. RSCH. SERV., *supra* note 144, at Summary.

<sup>156</sup> See Turkewitz, *supra* note 145.

<sup>157</sup> See CONG. RSCH. SERV., *supra* note 144, at 12.

<sup>158</sup> *General Antiquities Act*, *supra* note 146. See *United States v. California*, 436 U.S. 32, 35–36 (1978); *Cappaert v. United States*, 246 U.S. 128, 137 (1976); *Cameron v. United States*, 252 U.S. 450, 455 (1920).

<sup>159</sup> See CONG. RSCH. SERV., *supra* note 144, at Summary.

<sup>160</sup> President Franklin D. Roosevelt used the Act more often than any other president, but President Obama used it to protect more acreage. *Id.* at 14.

<sup>161</sup> The proclamations made under the Act in the last few decades is starkly different between administrations. Republican Presidents Reagan and George H.W. Bush did not make any proclamations under the Act. Then, President Clinton, a Democrat, established nineteen new monuments and enlarged three, followed by Republican President George W. Bush, who established six new monuments. *Id.*

<sup>162</sup> See Turkewitz, *supra* note 145; see also CONG. RSCH. SERV., *supra* note 144, at 15.

Grand Staircase-Escalante, by approximately two million acres, “the largest rollback of federal land protection in the nation’s history.”<sup>163</sup> He argued that the land should be opened for development and local use, and that the monuments were larger than was legally permitted, since the Antiquities Act states that monuments should be limited to the smallest size necessary to grant the protections required.<sup>164</sup>

Bears Ears National Monument in Utah is managed by BLM, contains many significant archaeological sites, and is sacred to many local tribes,<sup>165</sup> at whose behest President Obama had established the monument in 2016.<sup>166</sup> President Trump reduced the size of Bears Ears by 85%, opening the delisted areas to “oil and gas extraction, mining, . . . and other commercial activities.”<sup>167</sup> Grand Staircase-Escalante National Monument is also in Utah and managed by BLM, and is a place of extreme beauty, diverse geological features, and archaeological, paleontological, and biological importance.<sup>168</sup> It was established in 1996 by President Clinton and reduced by nearly half by President Trump.<sup>169</sup> President Biden reversed the Trump administration’s changes in 2021, an action that was praised by environmentalists, Democrats, and some locals and local tribes, and scorned by Republican lawmakers and local mining and ranching supporters.<sup>170</sup> However, since then, doubt has been cast on the permanence of Antiquities Act protections.

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<sup>163</sup> See Turkewitz, *supra* note 145.

<sup>164</sup> See *id.*

<sup>165</sup> *Bears Ears National Monument*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/national-conservation-lands/utah/bears-ears-national-monument> [<https://perma.cc/6QDP-ZMLT>] (last visited Jan. 16, 2023).

<sup>166</sup> See Turkewitz, *supra* note 145.

<sup>167</sup> See *id.*

<sup>168</sup> *Grand Staircase-Escalante National Monument*, BUREAU OF LAND MGMT., <https://www.blm.gov/programs/national-conservation-lands/utah/grand-staircase-escalante-national-monument> [<https://perma.cc/7TSA-UC2K>] (last visited Jan. 16, 2023).

<sup>169</sup> CONG. RSCH. SERV., *supra* note 144, at 12.

<sup>170</sup> President Biden “reinstate[d] and slightly expand[ed] the original 1.3 million acre boundaries of Bears Ears National Monument, and restore[d] the original 1.8 million acre boundaries of Grand Staircase-Escalante,” in addition to “restor[ing] protections covering the Atlantic Ocean’s first marine monument, the Northeast Canyons and Seamounts,” which had also been reduced by President Trump. Summing up the divisive interests at play, the article says that “Mr. Trump had sharply reduced the size of all three national monuments at the urging of ranchers, the fishing industry and many Republican leaders, opening them to mining, drilling and development.” Coral Davenport, *Biden to Restore Three National Monuments in Utah and New England*, N.Y. TIMES, <https://www.nytimes.com/2021/10/07/climate/bears-ears-grand-staircase-escalante-biden.html> [<https://perma.cc/AK5B-L4F8>] (Oct. 13, 2021).



Finally, designation under the Antiquities Act is more limited than the protections Congress can provide.<sup>171</sup> Congress has the authority to appropriate land and add it to the National Park System under any designation (e.g., “national park,” “national battlefield”), anywhere, and with any protections it wishes. Meanwhile, there are a few location-based limitations on the president’s authority to establish national monuments under the Antiquities Act: “Extensions or establishment of monuments in Wyoming require the authorization of Congress, and withdrawals in Alaska exceeding 5,000 acres are subject to congressional approval.”<sup>172</sup>

The Antiquities Act can provide a quick fix where it is needed to protect a resource, and designation can be done without often messy and protracted congressional involvement.<sup>173</sup> It is an option that has merits and should be used when necessary. However, in the face of this park-wide crisis, and especially after President Trump’s novel attempt to delist Bears Ears, it is a first step but not a permanent solution. Broader congressional action is required to protect the country’s wonders.

### C. *The Agency’s Limited Power*

Although the Secretary of the Interior does not have the authority to establish or expand units in the National Park System,<sup>174</sup> both DOI and NPS play an important role in the establishment of park units. This is due to the area studies that Congress can authorize them to perform, as well as their power to recommend new units for inclusion in the National Park System.<sup>175</sup> This role is defined by the National Parks Omnibus Management Act of 1998, in which Congress “amended existing law pertaining to creating NPS units to standardize procedures, improve the information about potential additions, prioritize areas, focus on outstanding areas, and ensure congressional support for area studies.”<sup>176</sup>

Every year, the National Park Service is required to deliver to Congress a list of areas that the NPS recommends “for study for potential

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<sup>171</sup> See generally CONG. RSCH. SERV., *supra* note 144, at Summary, 3–4.

<sup>172</sup> COMAY, *supra* note 55, at 2 n.2 (internal citations omitted).

<sup>173</sup> Coral Davenport, *Haaland Wants to Restore Environmental Safeguards for Three National Monuments*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/climate/bears-ears-biden-haaland.html> [<https://perma.cc/Z5PV-4QNY>].

<sup>174</sup> The Secretary of the Interior does have some authority to alter the boundaries of existing parks. COMAY, *supra* note 55, at 2 n.2. See also MANAGEMENT POLICIES 2006, *supra* note 18, at 31–32.

<sup>175</sup> See COMAY, *supra* note 55, at 3–5.

<sup>176</sup> *Id.* (internal citation omitted). See National Parks Omnibus Management Act of 1998, P.L. 105-391.

inclusion in the National Park System.”<sup>177</sup> Possible land for inclusion is determined by identifying units supported by “local ‘grassroots’ preservation interests, elected officials, and professional evaluations.”<sup>178</sup> Then the National Park Service, with the advice of the private citizens who compose the National Park System Advisory Board, determines which of those areas to recommend to Congress for further study.<sup>179</sup> Under 16 U.S.C. 1a-5,

NPS must consider three issues in developing for Congress the list of areas recommended for study: (1) whether an area is nationally significant and would be a suitable and feasible addition to the National Park System; (2) whether an area represents or includes themes, sites, or resources “not already adequately” represented in the National Park System; and (3) requests for studies in the form of public petitions and congressional resolutions (the “popular demand” factor).<sup>180</sup>

The first issue that NPS must consider is essentially the three criteria that a unit must meet to be added to the National Park System: national significance, suitability, and feasibility.<sup>181</sup> In addition to the new recommendations, the National Park Service submits a list of areas previously studied at the request of Congress—the “areas are to be ranked in order of priority for addition to the park system.”<sup>182</sup> However, recent administrations have failed to provide annual recommendation lists to Congress.<sup>183</sup> The Bush Administration generally opposed any expansion of the National Park System, and the Obama Administration, at least initially, did not submit recommendations, stating that they were attempting to complete already authorized studies.<sup>184</sup>

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<sup>177</sup> COMAY, *supra* note 55, at 2 n.10 (internal citations omitted). Although by law this duty is assigned to the Secretary of the Interior, “[i]n practice, NPS performs the functions assigned to the Secretary.” *Id.* at 4 n.20.

<sup>178</sup> *Id.* at 5 n.22.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 4. For a further breakdown of the three criteria required for a unit to be added to the National Park System, see MANAGEMENT POLICIES 2006, *supra* note 18, § 1.3.

<sup>181</sup> *Id.* § 1.3.1 to 1.3.3. See *supra* Section II.A for further discussion of the criteria necessary to be added to the National Park System.

<sup>182</sup> COMAY, *supra* note 55, at 4.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

The National Park Service requires congressional authorization to begin an area study.<sup>185</sup> These studies usually take years to prepare, due both to the high number of authorized studies and the intensive requirements of the studies.<sup>186</sup> These studies are expensive—in 2011, NPS estimated that a typical study costs between \$150,000 to \$500,000—requiring public involvement and must be NEPA compliant.<sup>187</sup> In these studies, the National Park Service must assess the criteria for inclusion—“whether an area contains natural or cultural resources that are nationally significant, whether it constitutes one of the most important examples of a type of resource, and whether it is a suitable and feasible addition to the System.”<sup>188</sup>

Another requirement in area studies is consideration of whether another management option would be appropriate.<sup>189</sup> These other options “include administration by other federal agencies, state or local governments, Native American authorities, and the private sector,” and include considerations such as “technical or financial assistance; other designations . . . ; and cooperative management between NPS and another agency.”<sup>190</sup> The National Park Service will generally only suggest the addition of an area to the System if other management options do not adequately protect the area.<sup>191</sup>

The National Park Service has, of course, a critical role to play in protecting the parks. However, it has little, if any, power to expand them. At the same time, it is the expert agency when it comes to park management and should use that power to advocate strongly for the expansion of the National Park System key to protecting the existing parks. In addition, it should strengthen the impairment standard to slow the insidious

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<sup>185</sup> *Id.* at 2. The congressional authorization requirement was added by the National Parks Omnibus Management Act of 1998, and there are some exceptions. For example, the Park Service “has standing authority to take certain actions, provided that they cost less than \$25,000 . . . includ[ing] preliminary activities, such as resource assessments of areas, ‘reconnaissance surveys’ of areas, and updates of previous studies.” *Id.* at 2–3.

<sup>186</sup> *Id.* at 3.

<sup>187</sup> *Id.*

<sup>188</sup> These factors of national significance, suitability, and feasibility are the “three criteria” for addition to the National Park System, as discussed above. For more detail on these three factors, see COMAY, *supra* note 55, at 3; MANAGEMENT POLICIES 2006, *supra* note 18, § 1.3 to 1.3.3.

<sup>189</sup> In other words, “whether protection by means other than NPS management” would be more suitable. COMAY, *supra* note 55, at 4.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

impairment that is an effect of individually insignificant, cumulative impacts, and loudly declare its need for more funding and staffing.

### III. THE PROPOSED EXPANSION: NEW PARKS, LARGER PARKS, BIGGER BUDGET

The overcrowding crisis cannot be resolved by NPS management alone. While there are steps the National Park Service can take to mitigate resource damage and improve visitor experience, a true solution needs to be larger in scale and more permanent: a significant expansion of the National Park System. The proposed expansion is twofold: an expansion of existing park units and the creation of new NPS park units. Other congressional action, such as budget and staffing increases, and variations in park uses, values, and management, is also necessary. While presidential action is possible and encouraged as a short-term solution, broad congressional legislation is necessary to ensure the continued existence of the National Park System in the twenty-first century and beyond.

Throughout its history, the National Park Service has seen periods of expansion. The most significant single piece of expansive legislation was the 1980 Alaska National Interest Lands Conservation Act ("ANILCA"), which protected over 150 million acres of land in Alaska with various designations across multiple agencies.<sup>192</sup> ANILCA doubled all NPS holdings with its expansion of three existing parks and creation of ten new units.<sup>193</sup> It also tripled the amount of designated wilderness in the United States and added many millions of acres to BLM, USFWS, and Forest Service.<sup>194</sup>

While ANILCA cannot be repeated due to the unique circumstances that existed in Alaska leading up to and culminating in its passage,<sup>195</sup> it

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<sup>192</sup> See Alaska National Interest Lands Conservation Act, Pub. L. No. 96-487 (1980).

<sup>193</sup> *Testimony: Alaska National Interest Lands Conservation Act*, NAT'L PARKS CONSERVATION ASS'N (Dec. 3, 2015), <https://www.npca.org/articles/901-testimony-alaska-national-interest-lands-conservation-act> [<https://perma.cc/N8LU-UMZB>]. The new NPS areas established were Aniakchak National Monument, Bering Land Bridge National Preserve, Cape Krusenstern National Monument, Gates of the Arctic National Park, Kenai Fjords National Park, Kobuk Valley National Park, Lake Clark National Park, Noatak National Preserve, Wrangell–Saint Elias National Park, and Yukon Charley Rivers National Preserve. Pub. L. No. 96-487 (1980). The park units expanded and redesignated were Glacier Bay National Monument, which became Glacier Bay National Park and Preserve; Katmai National Monument, which became Katmai National Park and Preserve; and Mount McKinley National Park, which became Denali National Park and Preserve. *Id.*

<sup>194</sup> *Testimony: Alaska National Interest Lands Conservation Act*, *supra* note 193.

<sup>195</sup> See, e.g., *Alaska National Interest Lands Conservation Act: Creation of Wrangell–St.*

can be used as a model for the kind of sweeping legislation that is necessary to preserve the National Park System today. It shows that a large expansion of public lands is possible. Other methods can and should be used to aid in the preservation of the parks, including presidential and NPS action, but these are not a substitute for a major congressional expansion of the National Park System.

A. *The “What”: The Proposed Expansion and New NPS Sites*

The proposed expansion of the National Park System will both increase the size of existing parks and create entirely new park units. While some of this expansion will come from the transfer of federal lands from various agencies to the National Park Service, it will also require the acquisition of new land by the federal government. A minor component, while not technically expanding the overall holdings of the National Park System, is the redesignation of NPS units to afford them increased protection.

The expansion should target five primary types of land for acquisition to address both the social and environmental needs of the National Park System and the country. First, the government needs to prioritize areas that provide key ecosystem services, particularly regulating services. Ecosystem services are ecological processes that benefit humans,<sup>196</sup> and regulating services include critical climate services such as wastewater treatment, carbon sequestration and storage, pollination, and control of parasites, air quality, and erosion.<sup>197</sup> All regulating processes “work together to make ecosystems clean, sustainable, functional, and resilient to change,”<sup>198</sup> and are especially critical now in the face of our changing climate. Many ecosystems provide multiple key ecosystem services, and some ecosystems to target include wetlands, Alaskan tundra, and expanses of the northern Great Plains and southeastern coastal basins.<sup>199</sup>

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*Elias*, NPS: WRANGELL–ST ELIAS NAT’L PARK & PRES. ALASKA, <https://www.nps.gov/wrst/learn/management/alaska-national-interests-lands-conservation-act.htm> [<https://perma.cc/NW5R-WVUB>] (Jan. 3, 2020).

<sup>196</sup> See *More About Ecosystem Services*, FOREST SERV., [https://www.fs.usda.gov/ecosystem-services/About\\_ES/](https://www.fs.usda.gov/ecosystem-services/About_ES/) [<https://perma.cc/57YV-2QZC>] (last visited Jan. 16, 2023).

<sup>197</sup> See *Ecosystem Services & Biodiversity*, FOOD & AGRIC. ORG. OF THE U.N., <https://www.fao.org/ecosystem-services-biodiversity/background/regulating-services/en/> [<https://perma.cc/ZL2W-ZSCF>] (last visited Jan. 16, 2023); *More About Ecosystem Services*, *supra* note 196.

<sup>198</sup> *Ecosystem Services*, NAT’L WILDLIFE FED’N, <https://www.nwf.org/Educational-Resources/Wildlife-Guide/Understanding-Conservation/Ecosystem-services> [<https://perma.cc/CZ48-EV5X>] (last visited Jan. 16, 2023).

<sup>199</sup> These areas are particularly important for their storage potential for CO<sub>2</sub>. See *Which*

Second, the expansion should target landscapes and ecosystems that are disappearing due to human development.<sup>200</sup> The majority of human development that causes the loss of natural resources is not logging, but development of residential and commercial infrastructure and mining and energy development.<sup>201</sup> In the American West, “only 12 percent of lands . . . are actually protected from development,”<sup>202</sup> and such development is causing fragmentation of previous contiguous ecosystems.<sup>203</sup> Some of these disappearing landscapes include pine forests, prairies, grasslands, and shrublands.<sup>204</sup> Many of these areas will overlap with areas providing key ecosystem services, and they often provide critical wildlife habitat.

Third, the expansion must target overcrowded areas. This means expanding the boundaries of already existing parks that are overcrowded, allowing for an internal dispersal of crowds within the park. It also

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*Area Is the Best for Geologic Carbon Sequestration?*, U.S. GEOLOGIC SERV., <https://www.usgs.gov/faqs/which-area-best-geologic-carbon-sequestration> [https://perma.cc/H6P6-BWXC] (last visited Jan. 16, 2023). Wetlands are particularly important for a variety of ecosystem services, including carbon sequestration, wastewater treatment, and flood control, in addition to the critical habitat they provide for many wildlife species. See *Ecosystem Services & Biodiversity*, *supra* note 197; *Ecosystem Services*, *supra* note 198.

<sup>200</sup> Many landscapes are disappearing due to climate change, but those can only be preserved indirectly by mitigating the climate crisis. For more on landscapes disappearing due to climate change, see, for example, Amy E. East & J.B. Sankey, *How Is Modern Climate Change Affecting Landscape Processes?*, EOS (Dec. 16, 2020), <https://eos.org/editors-vox/how-is-modern-climate-change-affecting-landscape-processes> [https://perma.cc/3NPA-SYMN]; Estonian Rsch. Council, *The Landscapes We Are Familiar With Are Disappearing Due to the Changing Climate*, PHYS.ORG (Sept. 18, 2019), <https://phys.org/news/2019-09-landscapes-familiar-due-climate.html> [https://perma.cc/PK9W-2A8P]; Bob Berwyn, *5 Science Teams Racing Climate Change as the Ecosystems They Study Disappear*, INSIDE CLIMATE NEWS (Feb. 6, 2019), <https://insideclimatenews.org/news/06022019/climate-change-scientists-ecosystem-disappearing-mountain-glaciers-ice-forests-oceans/> [https://perma.cc/8RKG-EMHN].

<sup>201</sup> See *The Disappearing West*, CTR. FOR AM. PROGRESS, <https://disappearingwest.org/land.html> [https://perma.cc/Z54U-RPQH] (last visited Jan. 16, 2023).

<sup>202</sup> See *id.*

<sup>203</sup> See *id.*

<sup>204</sup> See, e.g., *Imperiled Ecosystems in Florida*, LANDSCOPE, [http://www.landscope.org/florida/ecosystems/featured\\_ecosystems/disappearing\\_landscapes/](http://www.landscope.org/florida/ecosystems/featured_ecosystems/disappearing_landscapes/) [https://perma.cc/2CW4-4ESS] (last visited Jan. 16, 2023); *Imperiled Ecosystems in Washington*, LANDSCOPE, <http://www.landscope.org/washington/ecosystems/featured/disappearing/> [https://perma.cc/U7TF-PUPA] (last visited Jan. 16, 2023); *Disappearing Landscapes in Colorado*, LANDSCOPE, [http://www.landscope.org/colorado/ecosystems/featured\\_ecosystems/disappearing\\_landscapes/](http://www.landscope.org/colorado/ecosystems/featured_ecosystems/disappearing_landscapes/) [https://perma.cc/3KZY-U8ED] (last visited Jan. 16, 2023). See *Disappearing Landscapes: Key Endangered Ecosystems*, LANDSCOPE, [http://www.landscope.org/explore/ecosystems/disappearing\\_landscapes/](http://www.landscope.org/explore/ecosystems/disappearing_landscapes/) [https://perma.cc/7M7V-UK3N] (last visited Jan. 16, 2023).

means creating new units close to crowded existing units, particularly where the environment is similar to that of the crowded area.

Fourth, the proposed expansion will include parks in and around urban areas. Urban and urban-adjacent parks are important because they preserve green spaces in some of the areas most threatened by development and increase equity in park access by making parks more accessible,<sup>205</sup> and because green spaces promote human and environmental health in urban areas.<sup>206</sup>

Finally, the expansion should target cultural resources important to minority groups. The National Park System includes some such sites, including sites critical to the civil rights movement, like the Selma to Montgomery National Historic Trail and Little Rock Central National Historic Site;<sup>207</sup> the Gullah Geechee Heritage Corridor;<sup>208</sup> numerous historic Native American cultural and archaeological sites in the southwest, like Chaco Culture National Historic Park and Aztec Ruins National Monument;<sup>209</sup> the WWII Japanese internment camp at Manzanar National Historic Site;<sup>210</sup> and, more recently, sites important to the Mexican-American experience like César E. Chavez National Monument, which was established by President Obama in 2012.<sup>211</sup> While the National Park System has expanded to include more cultural sites that tell key parts of the minority experience in America, there is more work to be done on this front. Doing so will continue to make the parks more inclusive to all Americans, and the National Park Service can better interpret the many different American experiences to all visitors.

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<sup>205</sup> See Callum Mair, *Why We Need Green Spaces in Cities*, NAT. HIST. MUSEUM, <https://www.nhm.ac.uk/discover/why-we-need-green-spaces-in-cities.html> [https://perma.cc/UFN2-KPG3] (last visited Jan. 16, 2023).

<sup>206</sup> See Dan Lambe, *Why We Need Green Space Now More than Ever*, ARBOR DAY FOUND. (June 22, 2020), <https://arbordayblog.org/corporate-partners/why-we-need-green-space-now-more-than-ever/> [https://perma.cc/GNA8-ZKG3]; Mair, *supra* note 205.

<sup>207</sup> See *Travel America's Diverse Cultures: African American Sites*, NPS, <https://www.nps.gov/subjects/travelamericancultures/afamsites.htm> [https://perma.cc/6DZ9-BYWZ] (Aug. 22, 2017).

<sup>208</sup> See *Travel America's Diverse Cultures: Places Reflecting America's Diverse Cultures*, NPS, <https://www.nps.gov/subjects/travelamericancultures/index.htm> [https://perma.cc/2VVR-XQEK] (Sept. 20, 2022).

<sup>209</sup> See *America, the Nation of Nations*, NPS, <https://www.nps.gov/articles/nationofnations.htm> [https://perma.cc/DDP3-WY5X] (Aug. 22, 2017).

<sup>210</sup> See *One Camp, Ten Thousand Lives; One Camp, Ten Thousand Stories*, NPS: MANZANAR NAT'L HIST. SITE CAL., <https://www.nps.gov/manz/index.htm> [https://perma.cc/27EC-63BU] (Apr. 16, 2021).

<sup>211</sup> See *Management*, NPS: CÉSAR E. CHÁVEZ NAT'L MONUMENT CAL., <https://www.nps.gov/cech/learn/management/index.htm> [https://perma.cc/96NK-S8TY] (Aug. 10, 2020).

In determining which areas to consider for expansion, the National Park Service looks to “diverse sources, such as local ‘grassroots’ preservation interests, elected officials, and professional evaluations . . . [and] the Secretary [of the Interior]’s annual list for Congress of damaged or threatened areas on the Registry of Natural Landmarks and the National Register of Historic Places.”<sup>212</sup> Anyone can recommend that NPS investigate a site for potential addition to the National Park System, and numerous conservation groups have done so.<sup>213</sup>

In determining which sites to add to the National Park System, the government should look to past unit area studies done by the National Park Service, proposals from conservation groups and others, and “lost parks”<sup>214</sup> that have failed to be established in the past. The National Parks Conservation Association currently lists eight sites that they think should either be expanded or newly created.<sup>215</sup> The Sierra Club similarly lists twelve places that they believe “deserve national park protection.”<sup>216</sup> Parks and Points currently has a list of the sites—some already part of the National Park System and some not—one of which they think is likely to become the sixty-fourth national park.<sup>217</sup> All of the sites proposed are critically important ecological or cultural sites that, if added

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<sup>212</sup> COMAY, *supra* note 55, at 5 n.22.

<sup>213</sup> See *infra* notes 214–18.

<sup>214</sup> For a discussion of America’s “lost parks,” see, for example, Lary M. Dilsaver, *Not of National Significance: Failed National Park Proposals in California*, 85 CAL. HIST. 2, 4 (2008).

<sup>215</sup> These sites are Julius Rosenwald and Rosenwald Schools National Historical Park, Fort Monroe National Monument, Avi Kwa Ame National Monument, Blackwell School National Historic Site, Casa Grande Ruins National Monument, Santa Monica Mountains National Recreation Area, Amache National Historic Site, and Emmett Till and Mamie Till-Mobley National Historical Park. *Future Parks: What National Park Sites Should Be Expanded or Created Next?*, NAT’L PARKS CONSERVATION ASS’N, <https://www.npca.org/campaigns/future-parks> [<https://perma.cc/EV2S-925F>] (last visited Jan. 16, 2023).

<sup>216</sup> Michael Kellett, *A Modest Proposal: We Need More National Parks*, SIERRA CLUB (Aug. 17, 2021), <https://www.sierraclub.org/sierra/modest-proposal-we-need-more-national-parks> [<https://perma.cc/CYU4-JK4L>]. The parks the Sierra Club proposes creating are the Tongass National Park, Ancient Forest National Park, Craters of the Moon National Park, Gila National Park, Shortgrass Prairie National Park, North Woods National Park, Lake Erie Watershed National Park, High Allegheny National Park, Green Mountain National Park, Maine Woods National Park, Florida Big Bend National Park, and Vieques National Park. *Id.*

<sup>217</sup> These sites are Delaware Water Gap, Bison Bridge, Chiricahua National Monument, Craters of the Moon National Monument and Preserve, Driftless Rivers, Ocmulgee Mounds National Historic Park, Rock Creek Park, Katahdin National Monument and Maine Woods, Bandelier National Monument, and Mount Hood. See Derek Wright & Amy Beth Wright, *The Race to National Park 64*, PARKS & POINTS, <https://www.parksandpoints.com/race-to-national-park-64> [<https://perma.cc/7F3S-AWBZ>] (last visited Jan. 16, 2023).



to the National Park System in one sweeping piece of legislation, would change—or rather, preserve—the American landscape forever, for good.<sup>218</sup>

When looking at sites to add to the National Park System all sites should be considered, including those under private ownership, those controlled by the states, and those managed by other federal agencies. Several of the sites proposed by the Sierra Club and National Parks Conservation Association are either controlled by another agency<sup>219</sup> or already managed by the National Park Service.<sup>220</sup> In addition, Congress and the president should consider units managed by the National Park Service that may have cultural or historic resources that could be highlighted by redesignation or tribal co-management, if appropriate.<sup>221</sup> Redesignating and transferring sites, while requiring congressional action, are the simplest actions that could be taken, and could still have a positive impact by redirecting some visitor traffic and increasing protections. However, the National Park System and the country needs more parks, and the acquisition of new parks from nonfederal sources is the ultimate goal.

*B. The “How”: Government Roles and Issues to Overcome*

1. The Congressional Role

Congressional action is critical to this expansion. Congress is, for the most part, the only body that can redesignate National Park Service units, transfer land between agencies, expand existing parks and create new parks (and acquiring land for that purpose), and increase the NPS budget.<sup>222</sup> All of these actions together are required to transform the National Park Service into an entity that can preserve and protect our most important natural and cultural sites for the enjoyment of future generations. And Congress is the only entity that can do this.

The redesignation of park units is important for two reasons: First, a unit's title can impact the visitation it receives,<sup>223</sup> and therefore

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<sup>218</sup> See, e.g., *id.*

<sup>219</sup> Such as the Tongass National Forest, Monongahela National Forest, and Green Mountain and Finger Lakes National Forests. See Kellett, *supra* note 216.

<sup>220</sup> For example, Fort Monroe National Monument, Katahdin Woods & Waters, and Craters of the Moon National Monument and Preserve. See *Future Parks: What National Park Sites Should Be Expanded or Created Next?*, *supra* note 215; Kellett, *supra* note 216.

<sup>221</sup> The benefits of tribal co-management or full tribal management of both NPS and independent sites are outside the scope of this Note but should be seriously considered when making future management decisions. See *infra* Section IV.E.

<sup>222</sup> See *supra* Section II.A.

<sup>223</sup> See CONG. RSCH. SERV., PARK TITLES, *supra* note 51, at Summary.

can help attract visitors to lesser-visited parks; and second, redesignation of parks can involve changing the protections that the unit receives.<sup>224</sup> In so doing, Congress can afford greater protections to NPS land that is currently degraded by mineral exploration and other harmful practices.<sup>225</sup> The transfer of land from other federal agencies to the National Park Service is important for similar reasons. Because the National Park Service generally provides greater protections than other federal agencies,<sup>226</sup> it can provide increased protection for land that provides important ecosystem services and wildlife habitat.

The NPS as an agency must be expanded to allow for management, infrastructure, and staffing at new and expanded park units. However, the NPS budget is already too small to allow for proper management of existing park units.<sup>227</sup> Therefore, Congress must increase the NPS budget to provide for staffing, management, and infrastructure of new and existing parks at a proportionately higher level than currently exists.

## 2. The Executive Role

While congressional action is critical to the expansion of the National Park System, the Executive also has a major role to play. First, the president must establish new national monuments under the Antiquities Act to protect areas that are under specific and immediate threat. This is the type of action for which the Antiquities Act was designed and for which it is best suited.<sup>228</sup> Second, the president and the National Park Service must update their management policies, including ways in which no-impairment determinations are made, to help alleviate the strain on the parks. Management policies should primarily be altered to affect the “additional considerations” that must accompany an expansion of the National Park System.<sup>229</sup> Third, the National Park Service can continue preparing area studies on potential new park units authorized by Congress, as well as

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<sup>224</sup> See *id.*

<sup>225</sup> For a discussion of mineral exploration in national parks, see Eva Novak, *Mining and the National Park System*, 2 J. ENERGY L. & POL'Y 165, 166–67 (1982).

<sup>226</sup> See Sarah Blount & Michael Pope, *The Key Roles of America's Federal Land Agency*, NAT'L ENV'T EDUC. FOUND. (July 30, 2021), <https://www.neefusa.org/nature/land/key-roles-america-s-federal-land-agencies#National-Park-Service-B> [<https://perma.cc/D4PY-48AJ>].

<sup>227</sup> “A related issue [to the addition of Park Service units] is how to properly maintain existing and new units given limited fiscal and staffing resources.” COMAY, *supra* note 55, at Summary.

<sup>228</sup> See CONG. RSCH. SERV., *supra* note 144, at Summary, 1.

<sup>229</sup> See *infra* Part IV.

reconnaissance surveys of potential new park areas under its own authority to show its desire to expand the National Park System and do what it can to encourage it.

### 3. Issues to Overcome

There are five major issues that this proposal must overcome to become a reality.<sup>230</sup> Despite these challenges, America's national parks must be preserved, and this expansion is the best way to do so. While the creation of new national park units—let alone a large number of them at once—is not an easy task, it has been done before<sup>231</sup> and can be done again.

The first obstacle to the proposal is the opposition that expansion will face by those who oppose increases in federal control and regulation. This will include partisan opposition, primarily by Republicans who oppose increasing federal regulations<sup>232</sup> and by western mining and livestock interests who argue that too much land is already too heavily regulated.<sup>233</sup> A response to these arguments is that only about 12% of western land is regulated,<sup>234</sup> and its preservation is critically important to biodiversity, the provision of ecosystem services, and the continued existence of some of America's greatest places. Luckily, national parks, as one of the government institutions most favorably regarded by the public,<sup>235</sup> tends to garner more bipartisan support than other areas.<sup>236</sup> That being said, partisan gridlock and broad conservative opposition is the primary reason that this proposed expansion will not happen.

The second obstacle is the related issue of government spending: This proposal is expensive, from the money needed for land acquisitions to the increased staffing and infrastructure budget of the National Park Service. The response to this issue is much the same as to the previous

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<sup>230</sup> Although an article could be written on each of these issues, this Note will only give an overview of what it determines are the major hurdles to a large expansion of the National Park System. *See supra* Section III.B.3.

<sup>231</sup> *See infra* Section II.A.

<sup>232</sup> Jenny Rowland-Shea, *The Rise to Power of the Congressional Anti-Parks Caucus*, CTR. FOR AM. PROGRESS (Apr. 11, 2016), <https://www.americanprogress.org/article/the-rise-to-power-of-the-congressional-anti-parks-caucus/> [<https://perma.cc/KX3D-AVPY>].

<sup>233</sup> *See* H. Duane Hampton, *Opposition to National Parks*, 25 J. FOREST HIST. 36, 37–38 (1981).

<sup>234</sup> *The Disappearing West*, *supra* note 201.

<sup>235</sup> *Public Expresses Favorable Views of a Number of Federal Agencies*, PEW RSCH. CTR. (Oct. 1, 2019), <https://www.pewresearch.org/politics/2019/10/01/public-expresses-favorable-views-of-a-number-of-federal-agencies/> [<https://perma.cc/NLY9-Z6XA>].

<sup>236</sup> *See* Rowland-Shea, *supra* note 232.

one: These places and our preservation of them are what make America a great nation. Although expensive, their preservation is of tantamount importance and is worth every penny.

Third, an expansion will face opposition from local residents who do not want their use of the land obstructed and do not want a local federal presence.<sup>237</sup> There are three main elements to this opposition: first, opposition to having federal employees nearby, opposition to government action generally, and mistreatment of federal employees;<sup>238</sup> second, the desire to prevent access to and use of these places from being curtailed by the increased protections;<sup>239</sup> and third, opposition to the increased tourism that will inevitably come from having a new park unit nearby.<sup>240</sup> Some of these people will never be happy speaking to any government employee, however, negative local sentiment towards National Park Service employees does tend to diminish over time.<sup>241</sup> Additionally, they may come to appreciate the benefits of having a park nearby, both because of the economic boost from tourism and because of the protections given to places that they care about.<sup>242</sup>

The fourth issue is already limited park staffing. The issue of overcrowding cannot be solved solely by increasing the staffing at afflicted parks, and an expanded National Park System is necessary to alleviate pressure on existing parks while expanding protections to new areas.<sup>243</sup> However, current parks desperately need increased staffing, and any expansion must include increased staffing at all parks. The staffing problem must be addressed by a change in hiring policies, not just by increased staff allotment under the current system.<sup>244</sup>

Finally, a major expansion must overcome the perceived difficulty for a new park unit to meet the necessary criteria to be added to the National Park System.<sup>245</sup> The proposal may involve the addition of lands

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<sup>237</sup> See, e.g., Hampton, *supra* note 233, at 38–41.

<sup>238</sup> See *id.* at 42, 44.

<sup>239</sup> See *id.* at 38–39.

<sup>240</sup> See *id.* at 40 n.17.

<sup>241</sup> See, e.g., *Testimony: Alaska National Interest Lands Conservation Act*, NAT'L PARKS CONSERVATION ASS'N (Dec. 3, 2015), <https://www.npca.org/articles/901-testimony-alaska-national-interest-lands-conservation-act> [<https://perma.cc/VY4Z-7MHX>].

<sup>242</sup> See Larry Moore, *Your Next Trip to the Great Outdoors Helps the Economy*, U.S. FOREST SERV. (July 5, 2017), <https://www.fs.usda.gov/features/your-next-trip-great-outdoors-helps-economy> [<https://perma.cc/M4VW-NJ36>].

<sup>243</sup> *Contra* Thompson, *supra* note 116.

<sup>244</sup> See *infra* Section IV.A.

<sup>245</sup> “It is generally regarded as difficult to meet the criteria and to secure congressional

that members of Congress or others do not view as appropriately significant, feasible, or suitable for addition under the current guidelines.<sup>246</sup> Even if a unit is not considered appropriately significant on its own, however, the addition of many units is necessary to preserve all units. So, while a new unit may not be significant enough on its own, it will still provide important ecological preservation functions and provide recreational activities, while also, by its very existence, helping to preserve the most nationally significant parks. Additionally, Congress has the ability to decide what units are added to the National Park System and can therefore interpret the criteria of national significance, feasibility, and suitability in the way that they see fit.<sup>247</sup>

C. *The “Why”: Legal, Social, and Environmental Reasons to Expand the National Park System*

The reasons for preserving the national parks are as varied and numerous as the visitors who marvel, camp, hike, stargaze, learn, relax, and wonder at and in the national parks. The parks are uniquely important to each individual who visits them. Many writers have attempted to describe the importance of the parks. According to Terry Tempest Williams, the parks are “breathing spaces for a society that increasingly holds its breath”;<sup>248</sup> Mollie Beattie reflected that “[w]hat a country chooses to save is what a country chooses to say about itself,”<sup>249</sup> and the inimitable Edward Abbey joked that “the national parks belong to everyone. To the people. To all of us. The government keeps saying so and maybe, in this one case at least, the government is telling the truth. Hard to believe, but possible.”<sup>250</sup>

The spiritual and hard-to-pin-down importance of parks to the American spirit are accompanied by legal, social, and environmental reasons to expand the parks and preserve the environment. Critically, with

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support and funding for expanding the National Park System.” COMAY, *supra* note 55, at Summary.

<sup>246</sup> For further discussion of the criteria a unit must meet for addition to the National Park System, see *supra* Section II.A.

<sup>247</sup> See *supra* Section II.A.

<sup>248</sup> TERRY TEMPEST WILLIAMS, *THE HOUR OF THE LAND* 88 (2017).

<sup>249</sup> Emily Sue, *It's Time We Save Our National Parks from Climate Change's Wrecking Ball*, DAILY TARGUM (Mar. 11, 2022, 12:00 AM), <https://dailytargum.com/article/2022/03/its-time-we-save-our-national-parks-from-climate-changes-wrecking-ball> [<https://perma.cc/S9XR-7GFB>].

<sup>250</sup> ELIOT PORTER & EDWARD ABBEY, *APPALACHIAN WILDERNESS: THE GREAT SMOKEY MOUNTAINS* 49 (1970).

overcrowding that is overwhelming and degrading parks, it is necessary to fulfill the NPS mission of preserving the parks unimpaired, as written in the Organic Act and affirmed in subsequent legislation.<sup>251</sup> It also would have an important positive impact on proposed doctrines such as the public trust, the rights of nature, and the human right to nature.<sup>252</sup>

Additionally, access to green spaces is important for humans and has important physical, social, and mental benefits.<sup>253</sup> Creating more parks in urban areas will lead to more equitable access to the outdoors and its many benefits and creating parks that focus on the minority experience welcomes more people to the American experience. If, as Edward Abbey points out, the parks really are for everyone,<sup>254</sup> then they should be equally accessible to everyone and reflect the history and experiences of all Americans.

Finally, it is imperative to preserve the environment.<sup>255</sup> Conservation of natural habitat will help preserve biodiversity, which “is essential for the processes that support all life on Earth . . . .”<sup>256</sup> Biodiversity is important for utilitarian reasons—the many services it provides humans—and is important intrinsically, philosophically standing for the principle that we all have a right to exist.<sup>257</sup> Preservation of the environment protects a myriad of ecosystem services that humans need to survive, services which include flood and erosion control, preservation of air quality, carbon sequestration, and pollination.<sup>258</sup> Nothing exists in a vacuum—clean air does not recognize the boundaries of national parks any more than bears do. Preserving some land will not prevent degradation of unprotected land, but it can help mitigate the effects of development.

<sup>251</sup> See *supra* Section I.A.3.

<sup>252</sup> See, e.g., Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 273–74 (1980).

<sup>253</sup> *Human Benefits of Green Spaces*, UNIV. DEL., <https://www.udel.edu/academics/colleges/canr/cooperative-extension/fact-sheets/human-benefits-of-green-spaces/> [<https://perma.cc/A2N6-XG72>] (Jan. 31, 2009).

<sup>254</sup> PORTER & ABBEY, *supra* note 250, at 49.

<sup>255</sup> *Six Reasons Why a Healthy Environment Should Be a Human Right*, U.N. ENV'T PROGRAMME (Apr. 13, 2021), <https://www.unep.org/news-and-stories/story/six-reasons-why-healthy-environment-should-be-human-right> [<https://perma.cc/77AR-BLTP>].

<sup>256</sup> *Why Is Biodiversity Important?*, THE ROYAL SOC'Y, <https://royalsociety.org/topics-policy/projects/biodiversity/why-is-biodiversity-important/> [<https://perma.cc/2CSZ-GB5X>] (last visited Jan. 16, 2023).

<sup>257</sup> See *What Is Biodiversity?*, AM. MUSEUM OF NAT. HIST., <https://www.amnh.org/research/center-for-biodiversity-conservation/what-is-biodiversity> [<https://perma.cc/WFQ5-KWH7>] (last visited Jan. 16, 2023).

<sup>258</sup> See *supra* Section III.A.

The National Park Service is uniquely situated to address ecosystem degradation and increase equitable access to nature. It can do so through this proposed expansion while also helping to conserve already existing park units. The expansion is proposed for the National Park Service (rather than public land generally) because the problem of overcrowding is NPS-specific. Additionally, the National Park Service has numerous advantages over state and other federal agencies when it comes to resource preservation. For example, while state parks would have to be created by every individual state, a major expansion of the National Park System could be achieved in one piece of federal legislation. Other federal agencies have competing mandates that do not prioritize preservation in the way that the NPS Organic Act does.<sup>259</sup> Other federal land management agencies also lack the reach of the National Park Service, which manages small urban sites in New York City, massive wilderness parks in Alaska, and everything in between.<sup>260</sup> BLM, for example, is primarily a western agency that has long been criticized as deserving the moniker the “Bureau of Livestock and Mining.”<sup>261</sup> Finally, the National Park Service is better equipped to deal with visitation because it already manages hundreds of millions of visitors annually,<sup>262</sup> and many of the sites proposed for expansion are already part of the National Park System.<sup>263</sup>

#### IV. ADDITIONAL CONSIDERATIONS

Although the focus of this proposal is an expansion of National Park Service holdings, there are many additional management decisions that must be made to ensure that the expansion alleviates as much pressure on the system as possible. The following list of additional considerations is not exhaustive but serves to call attention to some important

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<sup>259</sup> *NPS Organic Act*, DOJ, <https://www.justice.gov/enrd/nps-organic-act#:~:text=16%20U.S.C.,while%20protecting%20them%20from%20impairment> [https://perma.cc/UU29-24DJ] (May 12, 2015).

<sup>260</sup> See *About Us: National Park System*, *supra* note 31.

<sup>261</sup> Richard Spotts, *Reform the Bureau of Land Management: Biden Must Succeed Where Obama Failed*, THE REVELATOR (Jan. 19, 2021), <https://therevelator.org/reform-blm-biden/> [https://perma.cc/2SQ3-BUHZ].

<sup>262</sup> *Annual Visitation Highlights*, NPS, <https://www.nps.gov/subjects/socialscience/annual-visitation-highlights.htm#:~:text=In%202021%2C%20the%20National%20Park,for%20visitors%20than%20in%202020> [https://perma.cc/AGZ8-YFE3] (July 26, 2022).

<sup>263</sup> See, e.g., *President Biden Signs Law to Expand and Redesignate Brown v. Board of Education National Historical Park*, NPS, <https://www.nps.gov/orgs/1207/brown-v-board-of-education-national-historical-park-expansion-and-redesignation.htm> [https://perma.cc/JMD8-JECL] (May 12, 2022).

issues that will continue to challenge the National Park Service as well as address some potential solutions.

A. *Increased Staffing*

First, the National Park Service needs more staff.<sup>264</sup> Increasing the number and size of national parks will have many benefits, but people will always want to visit iconic sites like the Grand Canyon, Yellowstone, and Yosemite.<sup>265</sup> Overcrowded parks are particularly in need of increased staff<sup>266</sup>—interpretive rangers, who instruct visitors on wildlife safety and leave-no-trace principles, to step in when visitors are damaging the park resources and perform crowd control and other functions; maintenance staff to respond to increased use of toilets and trash cans, to upkeep park roads, and provide other critical functions; and critical law enforcement and medical personnel.

There are two issues that must be addressed to solve the staffing deficit: funding and incentives. The process to increase funding for increased staffing, while not easy, is relatively straightforward.<sup>267</sup> However, the National Park Service must also work to incentivize potential employees, many of whom are “seasonal,”<sup>268</sup> such as by ensuring that affordable and relatively comfortable housing is available, increasing salaries, and addressing concerns with the application system.<sup>269</sup>

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<sup>264</sup> This discussion focuses on public-facing “interpretive” park rangers, as well as law enforcement and maintenance staff to some extent. While “behind-the-scenes” resources staff are very important (they manage a park’s museum collections, conduct wildlife research, write management plans, and more), they are not the subject of this discussion.

<sup>265</sup> See Thompson, *supra* note 116.

<sup>266</sup> The need for increased staff has been discussed in various articles. See, e.g., Brooks, *supra* note 116; Kwak-Hefferan, *supra* note 116.

<sup>267</sup> See *How Are National Parks Funded?*, NPF BLOG, <https://www.nationalparks.org/connect/blog/how-are-national-parks-funded> [<https://perma.cc/9MNL-NQFN>] (last visited Jan. 16, 2023).

<sup>268</sup> Meaning they are employed at a park on a season-by-season basis.

<sup>269</sup> The Park Service was facing a potential crisis for the 2022 summer season as many parks struggle to hire enough employees. See Grace Bennett, *National Parks Are Swamped, but the Park Service Faces Mountainous Employment Crises*, ONLABOR (Apr. 20, 2022), <https://onlabor.org/national-parks-are-swamped-but-the-park-service-faces-mountainous-employment-crises/#:~:text=NPS%20Is%20Underfunded%20and%20Understaffed,16%25%20of%20its%20staff%20capacity> [<https://perma.cc/P79Z-KDHE>]. The problem likely stems from recent changes in the way in which applications are accepted for park regions, a new assessment required for applicants, and the failure to offer competitive salaries—all of which seem to have resulted in fewer overall applicants. *Id.* For a discussion of the role housing plays, see Rob Hotakainen, *NPS Employees Face a Worsening*



### B. *Pre-emptive Crowd Management*

Relatedly, the National Park Service must take pre-emptive action to prevent anticipated crowds from damaging park resources, as argued by Jonathan Thompson.<sup>270</sup> This includes building infrastructure to channel crowds into areas that can stand up to the higher use, as well as restricting access to sensitive or vulnerable areas before they become overrun and damaged.<sup>271</sup>

Two solutions to the overcrowding crisis that have been suggested are limits on visitation<sup>272</sup> and fee increases.<sup>273</sup> Reservation systems have begun to appear at some of the most crowded parks, such as Acadia and Yosemite.<sup>274</sup> Similarly, parks are considering or beginning to implement lottery systems for popular areas or hikes.<sup>275</sup> However, reservations and other limits on visitation raises the concern of equity in access. Not everyone will have the certainty to book an entry ticket to a park six months before their visit. One suggestion to mitigate this is to reserve a certain percentage of tickets to be released several days before or day-of.<sup>276</sup> Fee increases are even more concerning because of their potential to price people out of parks.<sup>277</sup>

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*Housing Crunch as Prices Soar*, GREENWIRE (Feb. 1, 2022, 1:22 PM), <https://www.eenews.net/articles/nps-employees-face-a-worsening-housing-crunch-as-prices-soar/> [<https://perma.cc/84U3-CJBP>]. These problems are not new. See Robert Cahn, *Low Pay and Changing Roles Thin Ranks of Park Rangers*, CHRISTIAN SCI. MONITOR (May 30, 1991), [https://www.csmonitor.com/1991/0530/30121.html?cmpid=shared-facebook&fbclid=IwAR2Gxhk4Aei8PNOpRCGIIn5RzJ2FDHDDdQBq9U1fuQNIv0Z9W7ED0\\_E76klnY](https://www.csmonitor.com/1991/0530/30121.html?cmpid=shared-facebook&fbclid=IwAR2Gxhk4Aei8PNOpRCGIIn5RzJ2FDHDDdQBq9U1fuQNIv0Z9W7ED0_E76klnY) [<https://perma.cc/Z5S3-ENLC>].

<sup>270</sup> See Thompson, *supra* note 116.

<sup>271</sup> *Id.* Thompson argues that this pre-emptive action includes both “administrative moves such as updating resource management plans; building new trails, campgrounds, or toilets; [and] restricting access to sensitive areas,” as well as “higher-level actions such as designating the area as a national monument, a conservation area, a national park, or even a wilderness area.” *Id.*

<sup>272</sup> See, e.g., Iacurci, *supra* note 114; Kwak-Hefferan, *supra* note 116.

<sup>273</sup> See, e.g., Timothy Egan, *National Parks for the 1 Percent*, N.Y. TIMES (Nov. 3, 2017), <https://www.nytimes.com/2017/11/03/opinion/national-parks-entrance-cost.html> [<https://perma.cc/S4UN-HQNJ>]; Kwak-Hefferan, *supra* note 116.

<sup>274</sup> Iacurci, *supra* note 114.

<sup>275</sup> Zion National Park is considering implementing a lottery system for the hike at Angels Landing. *Id.* In Denali National Park and Preserve, a lottery system has been used for years, where winners are allowed to drive the usually restricted park road for a few days at the end of the summer season. *Road Lottery and Military Appreciation Day*, NPS: DENALI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/dena/planyourvisit/road-lottery.htm> [<https://perma.cc/Z86L-3NNA>] (Sept. 21, 2022).

<sup>276</sup> See Kwak-Hefferan, *supra* note 116.

<sup>277</sup> See *id.*

### C. *Park Transportation*

An important element in managing crowded parks is the provision of free transportation into and around the parks. Alternative modes of transporting visitors around the most crowded parks and park areas could help alleviate crowds of vehicles and reduce harmful emissions. Some parks already implement such systems,<sup>278</sup> but they must be more broadly applied to relieve congestion. Zion National Park,<sup>279</sup> Grand Canyon National Park,<sup>280</sup> Denali National Park and Preserve,<sup>281</sup> and Acadia National Park<sup>282</sup> have all implemented shuttle systems to reduce traffic congestion and promote the national parks' goals. Additionally, there may be some national parks that benefit from a shuttle system due to the specific nature of their wildlife or park road system. The shuttles should be both free and mandatory.<sup>283</sup>

### D. *Promotion Versus Preservation*

Expansion or not, the balance between promotion of preservation of park areas is both critically important and very difficult to attain. It is something that NPS management will continue to grapple with—sending visitors away from crowded areas will crowd the solitude of the quiet spaces. But if visitation is not mitigated—and perhaps diverted—what will be left of the National Park Service's crown jewels?

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<sup>278</sup> See, e.g., *Zion Canyon Shuttle System*, NPS: ZION NAT'L PARK UTAH, <https://www.nps.gov/zion/planyourvisit/zion-canyon-shuttle-system.htm> [<https://perma.cc/5QNT-WF5S>] (Dec. 6, 2022); *How to Explore Denali National Park and Preserve*, NPS: DENALI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/dena/planyourvisit/visiting-denali.htm> [<https://perma.cc/W9VD-X5XT>] (Nov. 30, 2022).

<sup>279</sup> See *Zion Canyon Shuttle System*, *supra* note 278.

<sup>280</sup> See *Getting Around the Park—Public Transportation*, NPS: GRAND CANYON NAT'L PARK ARIZ., <https://www.nps.gov/grca/planyourvisit/gettingaround.htm> [<https://perma.cc/3JPJ-5DH2>] (Sept. 11, 2022).

<sup>281</sup> See *How to Explore Denali National Park and Preserve*, *supra* note 278; see also *The Year Everything Changed: The 1972 Shuttle Bus Decision in Mount McKinley National Park*, NPS: DENALI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/articles/000/dena-1972-shuttle-bus-decision.htm> [<https://perma.cc/8543-GJDP>] (Sept. 17, 2020).

<sup>282</sup> See *A History of the Acadia's Island Explorer*, NPS, <https://www.nps.gov/articles/island-explorer-shuttle.htm> [<https://perma.cc/D2AQ-QJ6F>] (Mar. 31, 2022).

<sup>283</sup> Allowing visitors to decide whether they want to use the shuttle or take their chances waiting in line in their cars would defeat the purpose. To meet demand, the shuttles can be used during the busiest times of year, and the road can be opened up to vehicle traffic in the off-season, as is done in other parks, such as with the Zion Canyon Shuttle at Zion National Park. See *Zion Canyon Shuttle System*, *supra* note 278.

### *E. Co-management*

Another important management decision is the formation of partnerships with land managed by state parks and other federal agencies and co-management of park areas with local tribes. Some parks have relationships with local tribes, some parks abut tribal land, and some parks allow special use for traditional activities.<sup>284</sup> The National Park Service, as a federal agency, has a fiduciary duty to tribes.<sup>285</sup> There has recently been discussion about equitable management practices, whether land should be returned to tribes for management, and how joint management can lead to a greater understanding and preservation of the National Park System.<sup>286</sup> National parks should also work with nearby state parks<sup>287</sup> and various BLM and USFWS units to promote shared priorities, such as good land stewardship and wildlife preservation, and to provide the best interpretive resources to visitors.

### CONCLUSION

America's national parks represent the nation at its best. Their impairment by overcrowding and congressional inaction shows the nation at its worst. But, while the overcrowding crisis faced by many parks could signal their destruction, it also offers an opportunity to rebuild a more

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<sup>284</sup> See, e.g., *Management*, NPS: CANYON DE CHELLY ARIZ., <https://www.nps.gov/cach/learn/management/index.htm> [<https://perma.cc/WR5E-JGAU>] (July 12, 2021); *Subsistence*, NPS: DENALI NAT'L PARK & PRES. ALASKA, <https://www.nps.gov/dena/learn/subsistence.htm> [<https://perma.cc/KQE4-WVNN>] (July 24, 2019); *Yellowstone National Park Engages with Tribes to Improve Partnerships*, NPS: YELLOWSTONE NAT'L PARK ID, MT, WY, <https://www.nps.gov/yell/learn/news/21023.htm> [<https://perma.cc/Y8QD-9GEU>] (Aug. 23, 2021). See Nicolas Brulliard, *This Land Is Their Land*, NAT'L PARKS CONSERVATION ASS'N (Oct. 8, 2020), <https://www.npca.org/articles/2742-this-land-is-their-land> [<https://perma.cc/84FJ-6TKU>].

<sup>285</sup> See *Associated Tribes of Badlands National Park*, NPS: BADLANDS NAT'L PARK S.D., <https://www.nps.gov/badl/associated-tribes.htm> [<https://perma.cc/GK43-LQH9>] (Nov. 26, 2022).

<sup>286</sup> See David Treuer, *Return the National Parks to the Tribes*, ATLANTIC (Apr. 12, 2021), <https://www.theatlantic.com/magazine/archive/2021/05/return-the-national-parks-to-the-tribes/618395/> [<https://perma.cc/SP2X-CA2P>]; Jim Robbins, *How Returning Lands to Native Tribes Is Helping Protect Nature*, YALE ENV'T 360 (June 3, 2021), <https://e360.yale.edu/features/how-returning-lands-to-native-tribes-is-helping-protect-nature> [<https://perma.cc/EPS4-J4H6>].

<sup>287</sup> For example, Denali National Park and Preserve has a relationship with Denali State Park, where a national park ranger has previously been placed in the state park to give interpretive programs to visitors there. E-mail from Elizabeth Beavers, Chief of Interpretation, Denali Nat'l Park & Pres., to author (Dec. 2, 2022, 3:45 PM) (on file with author).

resilient National Park System that will preserve the best of the country's scenery and heritage for generations to come. Through a combination of congressional legislation to create, expand, and better fund national parks, executive action to quickly establish national monuments on federal land, and proactive, pre-emptive management decisions within the National Park Service and DOI, this proposal for a major expansion of the National Park System can be achieved. Not only will this ensure the National Park Service can fulfill its mission of unimpaired preservation but will increase equitable access to the outdoors and preserve ecosystems and wildlife for a healthier country, planet, and future.

1-2023

## America's (Second) Best Idea: A Proposal for a Major Expansion of the National Park System

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