

OUTDOOR ALLIANCE

Evolution of the Threat to America's Public Lands August 2017

As outdoor recreationists, we rely on public land to pursue our passions. National Forests, lands managed by the Bureau of Land Management, National Parks, and other public lands are national treasures and the places we play. They are also the backbone of the \$887 billion outdoor recreation economy, which employs more than 7.6 million Americans.¹

In recent years, a long-simmering movement to transfer public lands to the states has come to a boil, with dozens of bills in state legislatures and in Congress proposing to transfer national public lands to the states, where they would immediately be under pressure for inappropriate development or outright privatization. As this neo-Sagebrush movement has grown, it has been met with concerted opposition from outdoor recreationists, hunters and anglers, conservationists, and Americans of all stripes determined to keep our common inheritance in public hands.

While public lands supporters have mobilized to defeat the most overt assaults, these threats haven't disappeared. Instead, they have transformed into more oblique attacks on our public lands system that continue to present just as grave of a threat to access to outdoor recreation, a healthy environment, and our national public lands birthright.

What defines “public lands”?

The term “public lands,” despite—or perhaps because of—its ubiquity, lacks precise definition.² While sometimes defined broadly as “all lands owned by the United States,”³ for people who enjoy outdoor recreation, the term might mean something in one sense broader, but in others more specific. Public lands, for those who recreate outdoors, can be often simply a shorthand that includes all places, including some state lands, where the public has essentially unfettered rights of access for free or for a nominal fee. It also might exclude some lands owned by the United States—like military areas—that lack rights of access.

What our community thinks of as “public lands,” however, share some essential attributes. These features that make up our common conception of public lands are under attack from a savvy political movement aimed at turning a public good into a source of profit for a politically connected few.

¹ Outdoor Industry Association, *The Outdoor Recreation Economy 2* (2017), available at https://outdoorindustry.org/wp-content/uploads/2017/04/OIA_RecEconomy_FINAL_Single.pdf.

² See GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 14 (6th ed. 2007).

³ *Id.*

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In our view, public lands are defined and maintained by three key attributes:

- Public ownership with rights of access;
- Public process to determine balanced management, with laws in place to protect the most important places; and
- Adequate resources for the agencies charged with these places' stewardship.

Each of these aspects is under renewed assault from individuals and organizations who see personal or political gain in shifting control over public resources.

Attacks on public ownership and access

The first attribute of public lands—public ownership with rights of access—has been the subject of the most overt attacks through the “transfer of public lands” movement. Over the past several years, high profile attempts have been made, by states and by members of Congress, to force the transfer of title of national public lands to states or private entities. Public ownership is among the most readily comprehensible attributes of public lands, and also an essential prerequisite for ensuring that public lands remain accessible, publicly managed, and adequately resourced. These attacks have generated a national movement to defend public ownership of public lands.

Examples of this type of attack have included:

- Demands by the State of Utah to transfer national public lands to the state.⁴
- Rep. Jason Chaffetz’s “Disposal of Excess Federal Lands Act of 2017,” which directs the sale of 3.3 million acres of public lands across 10 western states.⁵
- Rep. Mark Amodei’s “Honoring the Nevada Enabling Act of 1864 Act,” which would require the transfer of millions of acres of national public lands to the state of Nevada.⁶
- Rep. Don Young’s “State National Forest Management Act of 2015,” directing the Forest Service to sell parcels of National Forest land of up to 2 million acres to states provided that states then prioritize timber production.⁷

As has often been noted, state lands are often not public in the sense that members of the public are generally not free to access these places without specific authorization.

⁴ H.B. 148, 2012 Gen. Sess. (Utah) (codified at UTAH CODE ANN. §§ 63L-6-101–104 (Supp. 2014)). See generally Ruple, John and Keiter, Robert B., Alternatives to the Transfer of Public Lands Act (March 1, 2016). University of Utah College of Law Research Paper No. 157; Stegner Center White Paper No. 2016-01. Available at SSRN: <https://ssrn.com/abstract=2741156>.

⁵ H.R. 621, 115th Cong. (2017).

⁶ H.R. 1484, 114th Cong. (2015).

⁷ H.R. 3650, 114th Cong. (2015).

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The Colorado State Land Board, for instance, states that “State trust lands are not open to public use except when leased to a specific party (private or public).”⁸ Additionally, removing public lands from public ownership would circumvent the laws and regulations in place to ensure public input and balance in land management decisions. Although public lands are concentrated in the West, all Americans pay the costs of management. Transferring management costs to the states would create immediate, severe financial pressure for states to generate revenue from those lands, likely through a combination of higher fees for recreational use and greatly increased resource development.

As a national movement has become galvanized to defend public lands, members of the neo-Sagebrush movement have become increasingly aware of the political costs of proposing large-scale transfers of public lands, and indeed, polling across the West has consistently shown deep opposition to the transfer of public lands.⁹ In the most high-profile example of the growing awareness of the broad support for public lands, Rep. Jason Chaffetz (R-UT) announced in February 2017 that he would withdraw his bill, H.R. 621, to force the transfer of 3.3 million acres of public lands to western states. In announcing the bill’s withdrawal, Rep. Chaffetz wrote, “I am sensitive to the perceptions this bill creates in the current environment,” adding that “As a proud gun owner, hunter and public lands enthusiast, I want to be responsive to my constituents who enjoy these lands.”¹⁰

In a second example, Rep. Mark Amodei (R-NV) announced in May 2017 that he would not be reintroducing his bill from the 114th Congress, H.R. 1484, “Honoring the Nevada Enabling Act,” which proposed to force the transfer of nearly 7.3 million acres of public land to the state of Nevada in the bill’s first phase alone.¹¹ “Transferring millions of acres of public lands ... is not something I think the majority of people think is a good idea,” Rep. Amodei told the Reno Gazette-Journal at the time.¹²

⁸ Colorado State Land Board, *Recreation*, <https://www.colorado.gov/pacific/statelandboard/recreation-0> (last visited June 14, 2017). The Land Board explains that “Unlike other types of publicly owned land, state trust land was set aside for the specific purpose of providing financial support for various public institutions, primarily K-12 public education. The State Land Board raises revenue by leasing these properties to public and private parties. Because state trust land is held in trust and leased to generate revenue, it is not open for general public use.”

⁹ See, e.g., Bruce Finley, *Western Voters Prioritize Conservation and Keeping Public Lands Public, Poll Finds*, DENVER POST, Feb. 1, 2017, available at <http://www.denverpost.com/2017/01/31/western-conservation-public-lands-poll/>.

¹⁰ Juliet Eilperin, *Facing Backlash, Utah Rep. Jason Chaffetz Withdraws Bill to Transfer Federal Land to the States*, WASH. POST, Feb. 2, 2017, available at https://www.washingtonpost.com/news/energy-environment/wp/2017/02/02/facing-backlash-utah-rep-jason-chaffetz-withdraws-bill-to-transfer-federal-land-to-the-states/?utm_term=.89c3c20635c0.

¹¹ Benjamin Spillman, *Congressman Won’t Revive Bill to Unload Federal Land*, RENO GAZETTE-JOURNAL, May 15, 2017, available at <http://www.rgj.com/story/life/outdoors/2017/05/16/congressman-wont-revive-bill-unload-federal-land/324081001/>.

¹² *Id.*

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While public lands supporters should be heartened by these victories, there is reason to exercise caution. First, the threat of large-scale transfers of public lands remains alive, with state resolutions continuing to thrive.¹³ Second, with “keeping public lands public” becoming an increasing focal point of conservation efforts, political figures with otherwise checkered records on public land issues have begun to cast themselves as champions by virtue of their opposition to the most extreme proposals for public lands. Then-Rep. Ryan Zinke, for example, earned wide praise during his confirmation hearings for Secretary of Interior by expressing his opposition to public lands transfer, despite his otherwise poor conservation record.¹⁴

Attacks on public process and conservation laws

While attacks on public ownership of public lands have become more politically fraught, neo-Sagebrush advocates have found more oblique—but potentially just as effective—means of undercutting the attributes that secure recreation and conservation values on public lands and prevent the privatization of public resources.

Right now, public lands are appropriately managed for an array of values, including resource development. The balance among these at-times-competing uses is properly set through public processes and governed by laws, like the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA), as well as land management planning processes, like Forest Planning and BLM planning, which ensure that agencies consider public input on land management decisions. Balanced use of public lands also requires the integrity of conservation tools like the Antiquities Act and the Wilderness Act to protect imperiled areas and make sure that some places are left

¹³ In 2017 alone, land transfer bills were introduced, at minimum, in Nevada (*e.g.*, S.J. Res. 7, 79th Leg. (Nev. 2017) (urging Congress to enact legislation to transfer public lands to Nevada)); New Mexico (*e.g.*, S.B. 182, 2017 Reg. Sess. (N.M. 2017) (requesting the transfer of unleased federal mineral rights beneath private land in New Mexico to the state)); Oregon (*e.g.*, H.J. Mem. 2, 2017 Reg. Sess. (Or. 2017) (urging the President and Congress to transfer title of certain federal public lands to the state)); Utah (*e.g.*, H.J. Res. 17, 2017 Reg. Sess. (Utah 2017) (calling for the federal government to “Relinquish control over public lands within the state of Utah consistent with the equal sovereignty and equal footing enjoyed by all other states”)); Washington (*e.g.*, H.B. 1103, 2017 Reg. Sess. (Wash. 2017) (calling on the federal government to “extinguish title to all public lands,” and “transfer title to public lands to the state of Washington”)); Wyoming (*e.g.*, H.B. 293, 2017 Reg. Sess. (Wyo. 2017) (directing the board of land commissioners to develop a plan for the management of federal public lands and minerals transferred to the state)); and Missouri (*e.g.*, S. Con. Res. 2, 99th Gen. Ass., 1st Sess. (Mo. 2017) (urging the federal government to transfer public lands to the western states)).

¹⁴ See, *e.g.*, Anna Callaghan, *What's the Outdoor Industry Saying About Trump's Interior Secretary Pick?*, OUTSIDE MAGAZINE, Dec. 15, 2015, <https://www.outsideonline.com/2143231/whats-outdoor-industry-saying-about-trumps-interior-secretary-pick>. As a congressman, Secretary Zinke earned a four percent lifetime score from the League of Conservation Voters. League of Conservation Voters, National Environmental Scorecard: Rep. Ryan Zinke, <http://scorecard.lcv.org/moc/ryan-zinke>.

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free from development. These attacks are often characterized as measures meant to ensure “local control” over what are in fact national resources and pursue the same objectives as the land transfer movement: moving public resources into private hands.

One example of this type of attack on public lands—shifting control away from public lands’ rightful and nationally dispersed stakeholders—is Rep. Jason Chaffetz’s bill, H.R. 622, to transfer law enforcement functions on public lands to local entities.¹⁵ This example is particularly noteworthy because, while Rep. Chaffetz ultimately responded to public pressure to withdraw his H.R. 621 land transfer bill, he continued to feel comfortable in pursuing his bill to transfer this important aspect of control.

Numerous other attacks on public process—often in the guise of “local control”—have sprung up over recent years, sometimes intermixed with attacks on conservation tools like the Antiquities Act and the Wilderness Act. Recent bills aiming to shift control over national public lands to smaller, more localized entities include:

- Rep. Raul Labrador’s “Self-Sufficient Community Lands Act,”¹⁶ which would transfer control over virtually unlimited areas within National Forests to small advisory panels appointed by a state’s governor as a means of promoting timber harvest.
- Sen. Orrin Hatch’s “Protecting States’ Rights to Promote American Energy Security Act,”¹⁷ which would give states primary authority to regulate hydraulic fracturing on national public lands as a way to circumvent federal environmental protections.
- Sen. Jim Inhofe’s “Federal Land Freedom Act of 2017,”¹⁸ which would give states power “to control the development and production of all forms of energy on all available Federal land,” (exempting only National Parks, Wilderness, tribal areas, and National Wildlife Refuges), and remove the applicability of NEPA, the APA, and the Endangered Species Act from development decisions.

Additionally, a number of attacks on important conservation tools have been sold as local-control efforts. Tools like the Antiquities Act, which allows Presidents to designate National Monuments, and the Wilderness Act, are an essential part of a balanced system of public lands management.¹⁹ Examples of recent attacks include:

¹⁵ Local Law Enforcement for Local Lands Act, H.R. 622, 115th Cong. (2017).

¹⁶ H.R. 2316, 114th Cong. (2015).

¹⁷ S. 316, 115th Cong. (2017).

¹⁸ S. 335, 115th Cong. (2017).

¹⁹ While opponents of the Antiquities Act often cite a lack of public process as a reason for their objections, our experience with presidential monument designations has been that designations are virtually never made without serious opportunities for public input. See Letter from Adam Cramer, Executive Director, Outdoor Alliance, to Secretary of Interior Ryan Zinke (May 12, 2017), *available at*

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- Sen. Lisa Murkowski’s “Improved National Monument Designation Process Act,”²⁰ barring the President from designating Monuments without approval from the legislature of states where a Monument is located.
- Rep. Mark Meadows’s “Local Wilderness Management Act,”²¹ barring the Forest Service and BLM from managing recommended Wilderness to protect an area’s Wilderness character without approval from county governments.

Finally, attacks on the public process were pivotal in Congress’s decision to throw out BLM’s “Planning 2.0” rulemaking to update the agency’s planning regulations using the Congressional Review Act in March 2017.²² Opponents of the planning rule successfully characterized opening up the process for additional public input as hampering development opportunities on public land and undercutting the position of local governments in planning.²³

Reductions in resources for land managers

In addition to attacks on public ownership and control over public lands, neo-Sagebrush legislators have worked to deprive land management agencies of the resources they need to fulfill their stewardship responsibilities. When land management agencies are starved of critical resources, public lands suffer. Funding shortages reduce the ability of land managers to achieve recreation and conservation goals and cause greater frustration with land managers. This increases the ability of public lands opponents to scapegoat management agencies and build pressure for local control or transfer. Financial shortfalls also decrease the ability of agencies to expeditiously process

<https://static1.squarespace.com/static/54aabb14e4b01142027654ee/t/59163ab52e69cf82b8d9dc5e/1494629045626/OA+Monument+Review.pdf>. Additionally, public lands protections are fundamentally different in character from decisions to open areas for development in that protecting areas remains a reversible choice; Congress retains the ability to alter or revoke Monument designations, though it has generally abstained from doing so because of the popularity of protections.

²⁰ S. 33, 115th Cong. (2017).

²¹ H.R. 6156, 114th Cong. (2016).

²² Pub. L. No. 115-12 (2017).

²³ See Pamela King, *Oil and Gas Industry Applauds Planning 2.0 Repeal*, ENERGY WIRE, March 8, 2017, <https://www.eenews.net/energywire/2017/03/08/stories/1060051100> (“Keeping the rule would have opened too wide a gate for public input — and, therefore, uncertainty — in the early stages of the project planning process, said Dan Naatz, senior vice president of government relations and political affairs for the Independent Petroleum Association of America.”). The rulemaking was importantly opposed by the National Association of Counties. Chris Marklund, National Association of Counties, *Congress Reboots BLM’s Planning 2.0 Rule*, <http://www.naco.org/articles/congress-reboots-blm%E2%80%99s-planning-20-rule> (“Throughout the rulemaking process, NACo expressed concern that BLM’s Planning 2.0 rule, as written, could dilute county input into federal land management decisions and hinder local government consultation and collaboration with BLM.”).

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permits, for activities ranging from recreation to resource extraction, further frustrating all public lands stakeholders.

In recent decades, Congress has prioritized reducing federal spending, curtailing the size of government, and lowering taxes. These measures have taken a long-term toll on land management agencies.²⁴ Additionally, funding for land management agencies remains subject to sequestration under the Budget Control Act of 2011, resulting in an approximately 8 percent additional cut to agency budgets.²⁵ The Trump Administration has recently proposed further steep cuts, requesting a 12 percent reduction in Interior appropriations relative to the 2017 continuing resolution level.²⁶

On top of these dramatic cuts to public land budgets, wildfire suppression continues to consume an ever-increasing share of the budgets for land management. According to the U.S. Forest Service, climate change has led to fire seasons that are 78 days longer than in 1970 on average.²⁷ Since 1995, the percentage of the Forest Service budget dedicated to fire has risen from 16 percent to more than 50 percent, leading to a corresponding 39 percent reduction in non-fire agency personnel.²⁸ When fire suppression costs exceed appropriated dollars, the problem grows worse still, with agencies forced to borrow from non-fire accounts to cover suppression costs. This dynamic affects all non-fire agency programs, including recreation.

In addition to tangible, on the ground effects, this lack of resources undermines confidence in federal land managers, increasing the political will for more extreme changes to public lands management. While broad, bipartisan agreement exists for the need to reform fire funding,²⁹ some members of Congress have used this necessity as leverage for anti-public lands legislation. This includes large-scale forestry changes under the guise of fire preparedness that would reduce the role of NEPA and public process in the approval of timber projects.³⁰

²⁴ See Jamila Blake, The Wildlife Society, TWS Joins Coalition Effort to Strengthen Conservation Funding, Feb. 28, 2017, <http://wildlife.org/tws-joins-coalition-effort-to-strengthen-conservation-funding/>.

²⁵ *Id.*

²⁶ U.S. Dep. of Int., Fiscal Year 2018 Interior Budget in Brief DH-5, May 2017, *available at* https://www.doi.gov/sites/doi.gov/files/uploads/2018_highlights_book.pdf.

²⁷ U.S. Forest Service, Department of Agriculture, The Rising Cost of Fire Operations: Effects on the Forest Service's Non-Fire Work 2 (Aug. 4, 2015), <http://www.fs.fed.us/sites/default/files/2015-Fire-Budget-Report.pdf>.

²⁸ *Id.*

²⁹ The Wildfire Disaster Funding Act, which proposed a comprehensive and widely supported fire funding fix, attracted a strongly bipartisan list of 151 House co-sponsors in the 114th Congress. H.R. 167, 114th Cong. (2015).

³⁰ See, e.g., Resilient Federal Forests Act of 2017, H.R. 2936, 115th Cong. (2017).

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Years of Congress choosing to starve land management agencies has also led to a substantial maintenance backlog on public lands. This backlog has in turn been used to justify further cuts in funding through the Land and Water Conservation Fund (LWCF) on the theory that agencies need to “take care of what they have” before acquiring additional land.³¹ These theories are doubly damaging. They overlook how important acquiring inholdings is for efficient management of public lands, while downplaying how acquisitions have facilitated improved access. Further, they have led to drawn out fights over the future of programs like LWCF and attacks on the future of targeted land acquisitions.

Moving forward

As the outdoor recreation community and others who care about public lands continue to fight for the places we care about, it is essential that we broadly recognize and respond to threats that go beyond fights over the title to public lands. Keeping public lands in public hands remains essential, and the threat of large-scale transfers remains real, but just as importantly, advocates for public lands must act to ensure the protection of the other essential attributes of public lands that protect the values they provide.

³¹ “As more land is acquired, federal land management agencies are racking up as much as \$19 billion in federal maintenance backlogs on existing lands. This is unacceptable,” House Natural Resources Chair Rob Bishop wrote in a 2015 op-ed, titled “Why I Let the Land and Water Conservation Fund Expire.” Rob Bishop, *Why I Let the Land and Water Conservation Fund Expire*, POLITICO, Dec. 8, 2015, <http://www.politico.com/agenda/story/2015/12/land-water-conservation-fund-000339>.