WILD LANDS AND SYSTEM VALUES: OUR LEGAL ACCOUNTABILITY TO WILDERNESS

> Standing there, gaping at this monstrous and inhuman spectacle of rock and cloud and sky and space, I feel a ridiculous greed and possessiveness come over me. I want to know it all, possess it all, embrace the entire scene intimately, deeply, totally, as a man desires a beautiful woman. An insane wish? Perhaps not—at least there's nothing else, no one human, to dispute possession with me .... I am here not only to evade for a while the clamor and filth and confusion of the cultural apparatus but also to confront, immediately and directly if it's possible, the bare bones of existence, the elemental and fundamental, the bedrock which sustains us .... I dream of a hard and brutal mysticism in which the naked self merges with a non-human world and yet somehow survives still intact, individual, separate. Paradox and bedrock.[1]
>
> Edward Abbey, DESERT SOLITAIRE (1968)

INTRODUCTION

The Wilderness Act of 1964[2] created a system to preserve America's last remaining wild lands, places "where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."[3] The passage of the Wilderness Act was an implicit recognition of the growing concern among legislators and wilderness advocates that the few existing administrative schemes for the protection and management of wilderness areas, largely contained in Forest Service mandates governing primitive areas within its jurisdiction, were insufficient to guarantee the preservation of America's wild lands.[4] Politically influential, far-sighted persons, such as James P. Gilligan, Senator Hubert H. Humphrey of Minnesota, Howard Zahniser of the Wilderness Society, and David Brower of the Sierra Club, believed that a more comprehensive system was needed.[5] The Wilderness Act created the National Wilderness Preservation System for this purpose. Composed of designated wilderness areas, federally owned lands are to be

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1. EDWARD ABBEY, DESERT SOLITAIRE 6 (1968).
2. Wilderness Act, 16 U.S.C. §§ 1131-1136 (1994).
3. 16 U.S.C. § 1131(c).
4. *See* Daniel Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 ECOLOGY L.Q. 249, 250 (1988).
5. *See id.* For a detailed account of the persons and politics embodied in the legislative history of the Wilderness Act, see also CRAIG W. ALLIN, THE POLITICS OF WILDERNESS PRESERVATION 102-36 (1982).

administered "for the use and enjoyment of the American people" and managed in order to preserve their "wilderness character."[6]

Thus, the Wilderness Act granted legal status to the wilderness. But what is wilderness? What is the nature of wild lands that renders them legally, perhaps morally, significant? Is wilderness coextensive with its definition in the Wilderness Act? Or is there something more, unrepresented in or underlying wilderness law that drives the conflicts that wilderness managers face, that wilderness users confront, and that wilderness theorists dispute?

Historical, cultural, and philosophical attitudes toward wilderness demonstrate why the Wilderness Act was passed, and understanding them is necessary to anticipate what is and what can be expected of the statute.[7] These attitudes, in turn, recognize certain wilderness values that serve to justify the existing legal conception of wild lands. Clarifying these values is therefore essential to fully grasp and implement the purposes of the Wilderness Act.[8] There are two components or directives of the Wilderness Act: (1) provisions that affect the allocation or designation of wilderness areas; and (2) provisions that prescribe standards and set guidelines for wilderness management. The different values accorded to wilderness affect both designation and management decisions regarding wild lands.[9] More importantly, the concept or idea of wilderness, as it is derived from these values and defined in the law, holds the key to determining whether "the wilderness legacy Congress first created in 1964 will indeed be an enduring one."[10]

To thoughtfully consider the scope and effectiveness of wilderness law, the analysis should consist of three steps. First, wilderness must be clearly defined. Second, the conceptions or ideas of wilderness that underlie the definition(s) of wilderness must be revealed. Finally, the values of wilderness contained in these ideas must be exposed.

This analysis can begin in two places. First, the Wilderness Act specifically defines wilderness.[11] This definition applies to both the designation and the management components of the Act, as these processes are most appropriately conceived as intertwined. The values that justify designation set the contours for appropriate management and use decisions. "Simply allocating an area as wilderness does not assure its preservation.

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6. 16 U.S.C. § 1131(a).

7. *See* Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 289 (1966).

8. *See id.* at 288.

9. *See* JOHN C. HENDEE ET AL., WILDERNESS MANAGEMENT 4 (2d ed. 1990).

10. Rohlf & Honnold, *supra* note 4, at 252.

11. *See* 16 U.S.C § 1131(c).

Enlightened wilderness management also is needed."[12] Second, a definition of wilderness can be extrapolated from various other pieces of environmental legislation and accompanying administrative regulations that either directly or indirectly impact designated wild areas.[13] Yet, whether the law and its administrators succeed in preserving wilderness *as the Wilderness Act intended* is an inquiry that must address the values of wilderness that the law seeks to recognize.

This Note addresses the topic of legal accountability to wilderness by examining the meanings and values of wilderness suggested in wilderness law. By way of introduction to wilderness law, Part I describes the administrative precursors to the Wilderness Act—agency regulations and standards affecting wild lands prior to the passage of the Wilderness Act in 1964. It concludes with a delineation of the purposes of the Wilderness Act, its concomitant management goals, and the statutory definition of wilderness through which the administration of wilderness law and policy, under the Act, is to take shape. Here, the conflicts and compromises inherent in the language and mandate of the Wilderness Act are introduced.

Part II discusses the various pieces of substantive legislation protecting wilderness. The Wilderness Act, the National Forest Management Act, the National Environmental Policy Act, and the Emergency Salvage Timber Sale Program are analyzed for the clues they hold with respect to wilderness value. This Note suggests that two conceptual schemes—the utilitarian and the preservationist—are represented in the legal definition of wilderness and in the management plans devised for the protection of wild lands that arise from this definition. This Note seeks to reveal the differing, often conflicting, ideas about the legal and normative meanings and values of wild nature manifested by these two schemes.

Part III suggests that the goals and purposes of the Wilderness Act may be better achieved through a definition of wilderness that portrays the wilderness as an ecosystem rather than as an isolated component within the network of federal land. An ecosystemic or transboundary conception of wilderness more accurately represents the ecological value of wild lands. The conceptual mechanisms of ecosystem management are offered as a guide for wilderness law and policy. Ecosystem management is emerging among public lands managers and policy planners as a new paradigm for the administration

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12. HENDEE ET AL., *supra* note 9, at 4 (internal quote omitted) (quoting John C. Hendee, *A Scientist's View on Some Current Wilderness Management Issues*, 1 WILD LANDS 27, 28 (1974)).

13. *See, e.g.*, National Forest Management Act (NFMA), 16 U.S.C. §§ 1600, 1604 (1994); National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C) (1994); Emergency Salvage Timber Sale Program, Pub. L. No. 104-19, § 2001-2002, 109 Stat. 194, 240-47 (1995) [hereinafter Salvage Timber Rider]; The Glickman Mandate, DEP'T OF AGRIC., Release No. 0350.96 (July 2, 1996) [hereinafter Glickman Mandate].

of National Forests[14] and Parks[15] and should expand to wilderness law as well. Pursuant to ecosystem management principles, wilderness is understood to be harmed by management and use activities that fail to consider, value, and manage wilderness as a biological system. Such harm arises from activities that occur both within and/or adjacent to its constructed periphery. To be comprehensive and meaningful, according to ecosystem management, wilderness law must begin with an eye toward protecting the wilderness system.

Through an ecosystem management approach to wilderness law, conflicting meanings and values of wilderness and competing schemes for the use and management of wild lands can be reconciled in a cooperative effort to preserve the wilderness. To this end, Part III submits that an important aspect of the concern with substantive legal accountability to wilderness takes place at a conceptual level. If valid, détente between these conflicting values and competing uses with respect to the wilderness can begin with the integration of the many forms of wilderness value that legislators, administrators, and users seek to preserve through wilderness law.

This Note concludes by drawing on principles found in biodiversity legislation and ecosystem management proposals emphasizing the need to reframe wilderness law to achieve two primary goals: the substantive legal protection of wilderness systems and the clarification of the procedural requirements of an ecologically-oriented wilderness protection scheme for public lands and wilderness administrators. Wilderness law must make room for systems to accommodate wilderness values if our wild lands are to be protected in a way that can fulfill the Wilderness Act's objectives for the preservation of an enduring wilderness resource. Only through a shift in the law towards systems accountability can a comprehensive mechanism of substantive wilderness legislation be achieved. Moreover, only with a reorientation of perspective concerning the object of wilderness legislation can wild lands be preserved both to ensure their primeval integrity as well as their availability *as wilderness* for the use and enjoyment of present and future sojourners into wild nature.

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14. *See, e.g.*, Proposed Rule for National Forest System Land and Resource Management Planning, 60 Fed. Reg. 18,929 (1995) (to be codified at 36 C.F.R. § 219, subpt. A) (proposed April 13, 1995); *see generally* Walter Kuhlmann, *Making the Law More Ecocentric: Responding to Leopold and Conservation Biology*, 7 DUKE ENVTL. L. & POL'Y F. 133 (1996).

15. *See, e.g.*, John Freemuth, *Ecosystem Management and Its Place in the National Park Service*, 74 DENV. U. L. REV. 697 (1997) (examining the "role of ecosystem management within the NPS from the perspective of public policy and public administration").

I. BACKGROUND

Passed by the United States Congress and signed into law by President Johnson in September, 1964,[16] the Wilderness Act is the "major piece of legislation guiding both wilderness classification and management . . . ."[17] With respect to classification or designation, the Wilderness Act

> provide[s] for an "instant" wilderness system by proclaiming that all the lands administered by the U.S. Forest Service (USFS) as wilderness, wild, or canoe areas prior to 1964 would be known henceforth as wilderness areas . . . . [T]he Wilderness Act [also] instruct[s] the secretaries of agriculture and the interior to review certain lands within their respective jurisdictions and to make recommendations to the president regarding the suitability of these lands for classification as wilderness.[18]

With respect to management, the Wilderness Act's "fundamental . . . directive" to administering agencies "is to preserve the 'wilderness character' of designated wilderness areas."[19]

In order to understand the importance of the Wilderness Act in affording substantive protection to wilderness within the public lands system, it is appropriate to begin with a discussion of the type and effect of wilderness preservation efforts prior to passage of the Act in 1964. Two sets of administrative regulations within the context of the multiple use mandate that traditionally governs management and policy decisions with respect to federal lands—the "L-20" and the "U"—illustrate the concerns that motivated legislators and wilderness advocates to seek more rigorous and specific legal protection of wilderness.[20]

The legacy of wilderness preservation prior to 1964 provides insight into the compromise among the competing interests for the use of wild lands and the conflicting values of wilderness necessary for enactment of the statute. It is this compromise which manifests itself in the incongruity that pervades the goals, purposes, and mandate of the Wilderness Act itself. This incongruity—in goals, mandate, and values—is the source of many of the challenges that confront wilderness managers and threaten the wilderness character of remaining wild lands.[21]

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16. *See* 16 U.S.C. §§ 1131-1136 (1994).
17. HENDEE ET AL., *supra* note 9, at 106.
18. *Id.* at 123.
19. Rohlf & Honnold, *supra* note 4, at 252.
20. HENDEE ET AL., *supra* note 9, at 100-02.
21. This historical rationale for preserving wild lands and wilderness values arose during a period

A. Administrative Precursors of the Wilderness Act: Context and Inspiration

Prior to the enactment of the Wilderness Act, both the United States Forest Service and the United States National Park Service managed wild areas in their jurisdictions pursuant to administrative regulations designed to protect the "wilderness character" of primitive areas.[22] Up to 1964 and the passage of the Wilderness Act, the Forest Service and the National Park Service were the two federal administrative agencies with management schemes to preserve wilderness.[23] Areas subject to the agencies' protection were roadless and deemed by the administering Secretary or the Chief of the Forest Service to possess "wilderness quality."[24] Selection and management of these areas as wilderness was discretionary: "[r]esponsible officials were free to protect wilderness within the limits of these regulations or to ignore it, if they chose."[25]

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that has been deemed the "Progressive Era." Freemuth, *supra* note 15, at 697-98. Freemuth notes that this period of American history marks "the first time that an attempt was made to develop and apply somewhat universal principles to the tasks of natural resource management." *Id.* at 698. Insofaras ecosystem management is a comparatively normative and policy-oriented approach to reconstructing the underlying principles of public lands law and management, "[e]fforts to bring about ecosystem management have important parallels with [this] earlier time in natural resource policy." *Id.* at 697.

22. HENDEE ET AL., *supra* note 9, at 100.

23. *See id.* at 107. Originally, three federal agencies were affected by the Wilderness Act and charged with substantive responsibilities to manage wild lands within their administrative jurisdictions: the Forest Service, the National Park Service, and the Fish and Wildlife Service (Fish and Wildlife). *See id.* Prior to the Wilderness Act, Fish and Wildlife did not manage any wild areas specifically for wilderness purposes, because the agency's responsibilities to maintain and enhance species' habitat would have conflicted with the values, use, and management restrictions associated with wilderness preservation. *See id.* For example, in affirmatively managing its lands for habitat enhancement, proposals or desires to maintain the wild and primitive character of a wild area would often be rejected due to obligations to develop or otherwise alter the natural landscape of that area for the improvement of habitat or the perpetuation of species. *See id.* Subsequent to the Wilderness Act, however, Fish and Wildlife is responsible for protecting and maintaining the wilderness character of wild lands within its management jurisdiction. *See id.* With the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976, the Bureau of Land Management (BLM) became the fourth agency vested with wilderness responsibilities, being given the authority and discretion to manage wild lands within its jurisdiction. *See* FLPMA, 43 U.S.C. §§ 1701-1784 (1994); *see also* HENDEE ET AL., *supra* note 9, at 107. The provisions in FLPMA requiring the BLM to review roadless areas of 5000 acres or more within its jurisdiction and to make recommendations regarding their suitability for wilderness designation has been interpreted by the courts as a summary prohibition on BLM activities on such lands, pending their review by Congress for inclusion within the National Wilderness Preservation System, as would impair their wilderness character. *See* Robert Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 312 n.108 (1994). Under FLPMA, BLM's discharge of its wilderness responsibilities mirrors those responsibilities given to the other three agencies under the Wilderness Act. *See* HENDEE ET AL., *supra* note 9, at 107.

24. HENDEE ET AL., *supra* note 9, at 100.

25. *Id.* at 102.

Underlying these administrative regulations were principles derived from the multiple-use mandate, the traditional guide for administrators with respect to the use and management of federal lands.[26] Codified in the Multiple-Use, Sustained Yield Act of 1960 (MUSYA),[27] the multiple-use doctrine, a land management standard developed by Gifford Pinchot in 1947,[28] requires that federal lands' "forest surface resources be managed 'so that they are utilized in the combination that will best meet the needs of the American people.'"[29] "In its purest form, the multiple use mandate gives federal land managers broad discretion to manage federal lands for the combination of uses that provide 'the greatest good of the greatest number in the long run.'"[30] Thus, prior to the Wilderness Act, any protection of the wilderness character of roadless, primitive lands in National Forests was the result of administrative discretion occurring in the shadow of the substantive legislative mandate to managers to accommodate multiple-uses of the nation's federal lands.

One consequence of the competition between wilderness preservation and multiple-use—inevitable in light of the discretionary and largely regulatory protection afforded wild lands prior to the Wilderness Act—was the holding open of federal lands to the possibility of development for commodity use.[31] The widespread acceptance of multiple use as a guiding federal land management standard was largely due to its open-ended nature, allowing administrators and policy makers prized discretion to manage lands as they deemed appropriate.[32] As a result, "[t]he regulations governing the use of primitive areas were not very protective of the wilderness qualities of those areas . . . ."[33] For example, the L-20 regulation adopted by the Forest Service in 1929 was largely "a list of permitted and prohibited uses" that allowed for multiple activities such as timber harvesting, grazing, recreation, and some road construction to facilitate limited commercial development.[34] These activities are "generally considered incompatible with contemporary notions of wilderness."[35] While the L-20 did provide a scheme for agency accommodation of these uses with the goal of maintaining primitive areas'

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26. *See id.* at 100-01.
27. 16 U.S.C. §§ 528-531 (1994).
28. *See* GIFFORD PINCHOT, BREAKING NEW GROUND 119 (1947).
29. Scott W. Hardt, *Federal Land Management in the Twenty-First Century: From Wise Use to Wise Stewardship*, 18 HARV. ENVTL. L. REV. 345, 348 n.16 (1994) (quoting 16 U.S.C. § 531(a)).
30. *Id.* at 348.
31. *See id.*
32. *See id.* at 348 n.18.
33. Rohlf & Honnold, *supra* note 4, at 250.
34. HENDEE ET AL., *supra* note 9, at 100.
35. *Id.*

natural and undisturbed condition, the regulation was "not very protective of the resource."[36]

Dissatisfaction with the L-20 led to the promulgation of the U Regulations in 1939 as a more rigid means to preserve roadless and primitive lands in the national forests.[37] The U Regulations, however, continued the discretionary, multiple-use tradition of federal lands management and wilderness preservation.[38] While the "U Regulations broadened the purpose of wilderness as earlier defined by the L-20 Regulation," activities such as mining, grazing, and water resource development continued to be allowed.[39] Appropriate mitigation measures for minimizing or compensating for adverse impact on particular areas' wilderness character and value could be required under the U Regulations but were left to the judgment of the particular administering agency.[40]

"Because of the discretionary nature of wilderness protection under an administrative system of designation [and management], wilderness proponents were concerned that undeveloped lands would not necessarily receive appropriate safeguards . . . ."[41] Thus inspired, legislative protection for wilderness and for the creation of a system of wilderness within national forest lands began to take shape.[42]

B. The Wilderness Act: Purposes of Protection, Goals for Management, Potential for Conflict

The Wilderness Act was "a product of congressional compromise."[43] It intended to provide permanent protection for existing, designated wild and primitive areas. It also removed them from what drafters and wilderness advocates perceived as haphazard, discretionary development, and preservation patterns which had existed under previous administrative schemes—like the L-20 and the U Regulations—for the management and use of wild lands.[44] The Act also intended that various pre-existing uses of wild lands such as mining, grazing, recreation, scientific research, and limited commercial development would continue in a manner that would not destroy

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36. *Id.*
37. *Id.* at 101.
38. *See id.*
39. *Id.*
40. *See id.*
41. *Id.* at 102.
42. *See id.*
43. Rohlf & Honnold, *supra* note 4, at 255.
44. *See id.* at 250.

the primitive character of the wild lands sought to be preserved.[45] Congress, therefore, had three purposes in mind for the enactment of legislation specifically designed to protect wild lands.[46] The first section of the Wilderness Act reflects these intentions and describes two of the three general purposes for statutory wilderness protection.[47] The third purpose is delineated in a separate and later section of the Act.[48]

First, the Act states that Congress enacted wilderness legislation to protect land in its essentially natural state.[49] The first purpose of the Wilderness Act is to "assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas . . . leaving no lands designated for preservation and protection in their natural condition."[50] This suggests that legislators at the time of enactment of the Wilderness Act—in the tradition of American naturalists, preservationists, and wilderness proponents such as John Muir and Aldo Leopold—were influenced by the belief that "natural communities have an inherent right to exist."[51] Second, Congress enacted wilderness legislation to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness"[52] to be used, studied, and enjoyed.[53] This second purpose demonstrates that "[e]ven though Congress recognized that humans and their technology pose threats to wild areas, Congress clearly did not intend to exclude people from wilderness."[54] Third, Congress sought to preserve wild and pristine areas from development while avoiding economic hardship to adjacent communities and development interests who would be affected by the designation of certain lands as wilderness.[55]

The goals for wilderness management—the general mandate for achievement of the purposes of the Wilderness Act—mirror the stated purposes for wilderness preservation and are also introduced in the first

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45. *See id.* at 255-58.

46. *See id.* at 258.

47. *See* 16 U.S.C. § 1131(a); *see also* Rohlf & Honnold, *supra* note 4, at 255-56.

48. *See* 16 U.S.C. § 1133(d); *see also* Rohlf & Honnold, *supra* note 4, at 257-58.

49. *See* 16 U.S.C. § 1131(a); *see also* Rohlf & Honnold, *supra* note 4, at 255.

50. 16 U.S.C. § 1131(a).

51. Rohlf & Honnold, *supra* note 4, at 255. *See generally* ALLIN, *supra* note 5 (presenting a comprehensive discussion of the politics, concessions, and compromises required to achieve legislative protection of wilderness through the Wilderness Act and explaining the role and importance of both Leopold and Muir in the legislative, administrative, and historical progression toward a system for the meaningful protection of wilderness).

52. 16 U.S.C. § 1131(a).

53. *See* Rohlf & Honnold, *supra* note 4, at 256.

54. *Id.*

55. *See id.* at 257-58.

section of the Wilderness Act.[56] As a first step, Congress created the National Wilderness Preservation System "to be composed of federally owned areas designated by Congress as 'wilderness areas.'"[57] The Act states that these wilderness areas

> shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, [and for] the preservation of their wilderness character.[58]

The third purpose of wilderness legislation is nearly a multiple-use strategy with respect to the desired accommodation of wilderness preservation with commercial and development interests. The Act provides for the continuation of pre-existing uses and activities such as mining, water and power development, grazing, and affirmative actions to preserve or restore wilderness health with respect to the control of fire and insects within wilderness boundaries.[59] Continued use of motorboats and aircraft in wild areas where these uses are preestablished is also allowed under the Act.[60]

While these three Wilderness Act objectives are interrelated, they are also, perhaps, inherently divergent.[61] Congress sought to preserve the integrity of wild lands and to accommodate human use and enjoyment by protecting and managing these lands to ensure the endurance of the wilderness resource.[62] At the same time, various and rather incongruent attitudes toward and values of wilderness that both prompted and rendered controversial enactment of wilderness legislation also lie within these legislative objectives. On the one hand, Congress wanted to preserve wilderness for its own sake, to recognize the intrinsic value existing in wild nature.[63] This is evidenced in the desire to preserve wilderness character and in the management directive that human use and enjoyment of wilderness leave this wilderness character unimpaired.[64] On the other hand, Congress sought the preservation of wilderness to give deliberate effect to anthropocentric and utilitarian values of wild lands.[65] For example, "[p]reserving outdoor recreational opportunities

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56. *See* 16 U.S.C. § 1131(a).
57. *Id.*
58. *Id.*
59. *See* 16 U.S.C. § 1133(d).
60. *See* 16 U.S.C. § 1133(d)(1).
61. *See* Rohlf & Honnold, *supra* note 4, at 255.
62. *See id.* at 258.
63. *See id.* at 256.
64. *See* 16 U.S.C. § 1131(a).
65. *See* Rohlf & Honnold, *supra* note 4, at 256.

in wild areas was a major impetus behind passage of wilderness legislation," as was the desire to discover from wild and undisturbed lands any scientific and biological secrets they might hold that could benefit research and the human species in general.[66] Beyond the benefits derived from preserving wilderness for its own sake,

> [t]here are additional benefits to science and conservation in the preservation of wilderness. Here ecologists can study and measure the processes of nature as a check against man's artificial manipulation of his environment in other places .... Many kinds of scientific research are impossible except in areas where nature's processes are kept as undisturbed as possible.[67]

The Wilderness Act seems to suggest that the use and enjoyment of designated wild lands is "contingent upon the maintenance of these areas 'as wilderness.'"[68] Yet, use activities carry with them the possibility of damaging, perhaps irretrievably, the wilderness character of a designated area. Management and implementation schemes for the achievement of the purposes and goals of the Wilderness Act are therefore key to integrating the various uses of and values in wild nature. Moreover, the focus of modern controversy surrounding the management and use of wild lands lies within this integration process.[69] To determine the scope of the Wilderness Act's management directive, and, in turn, to assess the compatibility of different conceptions of wilderness values and attendant wilderness management schemes, it is necessary to clarify the definition of wilderness.[70]

C. The Wilderness Act: A Definition of Wilderness

The first section of the Wilderness Act contains the definition of wilderness that governs administrative decisions regarding designated wild lands.[71] Wilderness is defined in terms of a lack of human presence, in contrast to those areas "where man and his own works dominate the landscape."[72] Further, wilderness is

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66. *Id.*
67. *Id.* at 257 (quoting 110 CONG. REC. 17,427, 17,436 (1964) (statement of Rep. Price)).
68. HENDEE ET AL., *supra* note 9, at 107.
69. *See* Rohlf & Honnold, *supra* note 4, at 252.
70. *See id.*
71. *See* 16 U.S.C. § 1131(c).
72. *Id.*

> an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness . . . retain[s] its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions .[73]

The Wilderness Act identifies four essential wilderness values or characteristics beyond those suggested in the initial defining language. Wilderness is a place that:

> (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.[74]

This statutory definition of wilderness identifies appropriate uses of designated wild lands as those which preserve wilderness character.[75] The Act goes on to prohibit certain non-conforming uses considered detrimental to the wilderness character of an area, stating that "there shall be no temporary road, no use of motor vehicles, motorized equipment[,] . . . no other form of mechanical transport, and no structure or installation within any such area."[76]

In this same section, however, the Wilderness Act provides that where "necessary to meet minimum requirements for the administration of the area[,] . . . including measures required in emergencies involving the health and safety of persons within the area[,]" the listed prohibitions may be excepted and non-conforming uses permitted.[77] Additional exceptions are also possible, the most significant of which is that "[w]ithin wilderness areas . . . such measures may be taken as may be necessary in the control of fire, insects and diseases, subject to such conditions as the Secretary deems desirable."[78] Where human or forest health is at stake, affirmative management procedures, for example, the construction of temporary roads or salvage logging, may be authorized by the Secretary (of either the Department

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73. *Id.*
74. *Id.*
75. *See* 16 U.S.C. § 1133(b).
76. *Id.* § 1133(c).
77. *Id.*
78. *Id.* § 1133(d)(1).

of Agriculture or the Department of the Interior, depending upon where the wild lands in question are located) for the preservation of an area's wilderness character or for the preservation of human health or life at risk within the boundaries of the designated area.[79]

Whether the Wilderness Act succeeds in its intended mission to provide substantive, comprehensive protection and preservation of designated areas will depend on the congruence of the wilderness values implicit in its provisions. It will also depend on the multiple and conflicting requirements and preferences in wilderness management and use, and with the needs and ecological realities challenging these areas in a world of rapidly increasing population, mechanization, and scarcity of the wild and primeval resource.

II. PROTECTION AND VALUE OF WILDERNESS

The Wilderness Act and its administrative regulations are not the only legal tools devised to preserve wild lands and wilderness values. Other pieces of public lands law and their attendant regulations—for example, the National Forest Management Act (NFMA),[80] the National Environmental Policy Act (NEPA),[81] and the Emergency Salvage Timber Sale Program ("Salvage Timber Rider")[82]—explicitly or implicitly afford protection to wilderness and recognize wilderness values. In general, there are two conceptual schemes contained in these statutes and regulations with respect to the definition, representation, and value of wilderness: preservationism and utilitarianism.[83]

Wilderness law carries several distinct—though perhaps not irreconcilable—ideas concerning the appropriate mechanisms for achieving meaningful, substantive accountability to wilderness. Part II discusses wilderness legislation in its many forms, as well as attendant administrative regulations and their mechanisms for the preservation of wild lands and the representation of wilderness values.

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79. *See id.* § 1133(c)-(d).

80. National Forest Management Act, Pub. L. No. 94-588, 90 Stat. 2949 (1994) (codified as amended in 16 U.S.C. §§ 1600-1614 and other scattered sections of 16 U.S.C.).

81. National Environmental Policy Act, 42 U.S.C. §§ 4331-70 (1994).

82. Emergency Salvage Timber Sale Program, Pub. L. No. 104-19, § 2001-2002, 109 Stat. 194, 240-47 (1995).

83. *See* discussion *infra* Part II.B.

A. Wilderness Law

The Wilderness Act first contains a dialectical definition of wilderness. Wilderness is a place that exists in contrast to other areas "where man and his own works dominate the landscape."[84] The absence of physical evidence of human activities is thus an identifying characteristic of wilderness.[85] A second defining element is that wilderness is an area which retains its "primeval" or primitive character.[86] This second element hints toward a possible third element, suggesting that the law may recognize wilderness as some sort of system, perhaps possessing ecological value, that warrants legal protection.[87] This notion of the ecological value of wild nature, an idea with which Wilderness Act legislators were certainly familiar, is most often associated with Aldo Leopold's "biotic community" from which a "land ethic" is derived: "[a] thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise."[88] The Wilderness Act intends to secure for present and future generations an enduring resource of wilderness possessing these two characteristics: (1) the dialectical—land whose definition and value, perhaps even meaning, arises from a lack of substantial human imprint, whose defining characteristic lies in the absence of noticeable human impact; and (2) the primeval—land whose character and value lie in its having been primarily affected only by the forces

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84. 16 U.S.C. § 1131(c).

85. *See* Rohlf & Honnold, *supra* note 4, at 254-55. Rohlf and Honnold note that statutory phrases in the Act such as "'undeveloped Federal land,' 'without permanent improvements or human habitation,' and 'imprint of man's work substantially unnoticeable,'" illustrate the legislative judgment that wilderness is in an important sense defined and valued dialectically, meaning that wilderness is defined negatively, in terms of the absence of something rather than the presence of something. *Id.* at 255. Wilderness, according to this view, is defined as it contrasts with other areas of land where human presence is permanent and pervasive. *See id.* This anthropocentric definition of wilderness is telling in terms of the substantive value it ascribes to wild lands. Noteworthy, too, is that according to this view, value in the wilderness is imputed to the wilderness rather than discovered there. *See generally* HOLMES ROLSTON, ENVIRONMENTAL ETHICS: DUTIES TO AND VALUES IN THE NATURAL WORLD (1988) (a comprehensive introduction to environmental ethics and the philosophical underpinnings of value in nature). Rolston contends that there is intrinsic, non-instrumental, value in the natural world. Rolston also describes in conceptual and scientific detail the bases of the theory that there is ecological value in nature.

86. 16 U.S.C. § 1131(c) (1994); *see* Rohlf & Honnold, *supra* note 4, at 255.

87. *See* Rohlf & Honnold, *supra* note 4, at 255.

88. ALDO LEOPOLD, A SAND COUNTY ALMANAC 262 (1949); *see also* Rohlf & Honnold, *supra* note 4, at 254. Leopold and his SAND COUNTY ALMANAC have been an invaluable inspiration to land managers ascribing to an ecological view of the natural world. *See id.* In brief, Leopold's ethic with respect to accountability to the natural world is as follows: "All ethics so far evolved rest upon a single premise: that the individual is a member of a community of interdependent parts . . . . The land ethic simply enlarges the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land." LEOPOLD, *supra*, at 239. Rohlf and Honnold add that for Leopold, "wilderness was the land ethic's ultimate expression—an interdependent biotic community unimpaired by human manipulation." Rohlf & Honnold, *supra* note 4, at 254.

of nature.[89] Dialectic, non-human, primeval, and perhaps even ecological values of wilderness, in addition to the anthropocentric and instrumental values associated with multiple-use principles, are recognized in wilderness law.

The regulations that govern the administration of the Wilderness Act reinforce the significance the law attaches to the preservation of these wilderness elements. For example, Forest Service regulations state that "[n]atural ecological succession will be allowed to operate freely to the extent feasible"[90] and "[w]ilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions."[91] Included in the regulations for both the Forest Service and the Bureau of Land Management (BLM) is a provision that public lands designated as part of the National Wilderness Preservation System will be administered to "preserve and protect" their wilderness character.[92] While the federal agencies responsible for wilderness areas may continue to manage such areas for purposes other than those provided for in the Wilderness Act, the Act does require these agencies to manage such areas in ways that do not undermine or devalue their wilderness character.[93]

Pursuant to this requirement, Forest Service regulations state that unless otherwise excepted "there shall be in National Forest Wilderness no commercial enterprises; no temporary or permanent roads; no aircraft landing strips . . . no use of motor vehicles, motorized equipment . . . structures or installations; and no cutting of trees for nonwilderness purposes."[94] These regulations provide for affirmative actions where necessary, either to preserve or restore wilderness character or to prevent activities that harm such character; however, accountability to wild lands and wilderness values remains the determinative test for the legitimacy of such activities.[95]

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89. *See* 16 U.S.C. § 1131(a).

90. 36 C.F.R. § 293.2(a) (1997).

91. 36 C.F.R. § 293.2(b) (1997).

92. 36 C.F.R. § 293.2 (1997); 43 C.F.R. § 8560.0-2 (1997).

93. *See* 16 U.S.C. § 1133(b).

94. 36 C.F.R. § 293.6 (1997). The BLM regulations addressing these uses, similarly characterized as "prohibited" or "nonconforming" uses deemed to be in conflict with the wilderness character of designated areas, are virtually identical. 43 C.F.R. § 8560.1-2 (1997).

95. *See* 16 U.S.C. § 1133(b), (c). The Wilderness Act states that the prohibitions or nonconforming uses it identifies apply "[e]xcept as specifically provided for in this chapter." *Id.* § 1133(c). The exceptions are contained both in section 1133(d) immediately following the list of prohibited uses and in the regulations for the agencies managing designated areas within their jurisdiction. *See* 36 C.F.R. § 293.3(a) (1997) (Forest Service); 43 C.F.R. § 8560.3 (1997) (BLM). It is worth noting that these exceptions are "special provisions" and "emergency administrative functions" to be pursued under the discretion and authority of the Secretary of the applicable federal agency where necessary for the control of fire, insects, and disease or where the health and safety of persons or damage to property is at stake. *Id.* Their allowance remains subject to the overriding objective of the preservation of wilderness character of

While the Wilderness Act and its implementing regulations reveal those characteristics that the law seeks to protect in designated areas, the question remains whether these wilderness values are legally significant *only* as they occur within the boundaries of designated areas. If, as is later suggested, wild lands are conceived systemically—as ecosystems rather than discrete and insular pieces of the public lands fabric—and if the underpinnings of wilderness value are explored, management and use of adjacent lands should, albeit must, account for wilderness values if the character of designated wild lands is to be preserved. Recognition of these values as inhering in lands not presently included in the National Wilderness System—perhaps in lands not suitable for wilderness designation at all—may be essential to achieving the objective of the Wilderness Act with respect to formally designated areas.

As described below, directives for the protection of wild lands are not restricted to the Wilderness Act and its attendant agency regulations, and are not found solely in statutes and regulations whose primary purpose is wilderness preservation. Similarly, policies and decisions that only address activities and uses occurring within designated areas at the exclusion of those taking place beyond wilderness boundaries—the existing legal approach to wilderness preservation—may not be able to comprehensively achieve wilderness preservation and legal accountability to wild lands. Meaningful and substantive wilderness preservation is a cooperative and transboundary affair. Since wild lands and wilderness values are at stake in jurisdictions beyond those directly governed by the Wilderness Act, several other statutes and regulations addressing the use and management of public lands are useful in constructing management policies and guidelines better suited for a more inclusive accountability to wilderness.

The National Forest Management Act (NFMA)[96] was enacted to curtail the discretion that the Forest Service, pursuant to MUSYA and its multiple-use mandate,[97] had traditionally been accorded with respect to the management of national forest lands.[98] NFMA contains an ecosystem-based management provision that directs the Secretary of Agriculture to specify guidelines for land management plans designed to provide for biological diversity and multiple-use objectives.[99] NFMA's planning regulations include

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the designated area at stake. *See id.* The language of the statute and regulations indicates that the preservation of the value of the wilderness as defined in the Wilderness Act remains the overriding concern with respect to management and identification of appropriate use. *See id.*

96. *See* Pub. L. No. 94-588, 90 Stat. 2949 (1994) (codified as amended in 16 U.S.C. §§ 1600-1614 and other scattered sections of 16 U.S.C.).

97. *See* 16 U.S.C. §§ 528-531 (1994); *see also* discussion *infra* Part I.A.

98. *See* Keiter, *supra* note 23, at 309.

99. *See* 16 U.S.C. § 1604(g)(3)(B) (1994); Keiter, *supra* note 23, at 310. In another article, Keiter further notes that NFMA requires forest planners to weigh both "'economic and *environmental* aspects' in

"[r]ecognition that the National Forests are ecosystems and their management for goods and services requires an awareness and consideration of the interrelationships among plants, animals, soil, water, air, and other environmental factors within such ecosystems."[100] NFMA and its regulations demonstrate that legislators and Forest Service administrators recognize a need for management schemes that are empowered to "safeguard[]" the ecological integrity of the national forests generally.[101] Forest Service regulations specifically state that forest plans developed as part of that agency's wilderness management responsibilities "shall" be designed in such a way that allowable uses "do not impair the values for which wilderness areas were created."[102] This administrative responsibility to preserve natural value extends visibly beyond the scope or intent of the multiple-use mandate formerly associated with undesignated federal lands.[103] Moreover, as biological diversity is a central aspect of the primeval character that thrives in wilderness areas, NFMA (optimistically) might be construed to recognize wilderness values present in undesignated lands and to require that, even in *non-wild* nature, these values are worthy of consideration in agency planning processes.[104]

NFMA might even go further than the Wilderness Act in recognizing ecological value if its biological diversity provision is interpreted as a substantive requirement for the mitigation of impacts adverse to ecological value and biodiversity or for the reformulation of policy to accommodate them. If, however, the provision is found to have purely procedural significance—allowing public land planners to give merely cursory consideration to these values in implementing management and use decisions—progress toward attributing legal status to these values will not be achieved.[105]

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striking a multiple-use balance." Robert Keiter, *Natural Ecosystem Management in Park and Wilderness Areas: Looking at the Law* [hereinafter Keiter, *Looking at the Law*], *in* ECOSYSTEM MANAGEMENT FOR PARKS AND WILDERNESS 15, 20 (James K. Agee & Darryll R. Johnson eds., 1988) (citing 16 U.S.C. § 1604(g)(3)(A)).

100. 36 C.F.R. § 219.1(b)(3) (1995); *see* Kuhlmann, *supra* note 14, at 154.

101. Keiter, *supra* note 23, at 311; *see generally* 36 C.F.R. §§ 219.1(3), 219.27(5), 219.19 (1997).

102. 36 C.F.R. § 219.18(a) (1997).

103. *See id.* The language of wilderness regulations to the effect that public lands managers *shall* regulate human use of wilderness areas "in accord with . . . estimates of the maximum levels of use that allow natural processes to operate freely and that do not impair the values for which wilderness areas were created," *id.*, marks an expanded pool of values implicated in management decision-making when compared to the relevant considerations of MUSYA—"outdoor recreation, range, timber, watershed, and wildlife and fish purposes." 16 U.S.C. § 528 (1994).

104. *See* Keiter, *supra* note 23, at 310.

105. *See id.*

Recent Forest Service planning policy suggests a broadening mandate among land managers to consider a larger scope of values in decision-making processes. The Forest Service's proposed planning regulations are grounded in principles of ecosystem management.[106] Ecosystem Management is defined as: "A concept of natural resources management wherein National Forest activities are considered within the context of economic, ecological, and social interactions within a defined area or region over both short- and long-term."[107]

Recognition of ecological values, however, remains subject to administrative discretion. While management decisions appear more comprehensive with respect to the scope of legal and administrative accountability, in reality:

> a manager may engage in Ecosystem Management and evaluate the overall economic, ecological, and social context as being well-served by a particular management program . . . without ever taking cognizance of, or ever separately examining the degradation of, the purely ecological interactions that will determine whether the 'ecosystem' . . . is thriving or losing ground."[108]

Still, the fact that the Forest Service is at least addressing the emerging management principles of ecosystems theory and policy is a marked change from traditional instrumental and anthropocentric multiple-use doctrine and could lead in a positive direction to accountability for wild lands and wilderness values present in a particular system. Time and ecologically-minded exercises of administrative discretion will be the ultimate tests for the farsightedness of these proposed regulations in the absence of substantive law to clarify wilderness objectives.

The National Environmental Policy Act (NEPA) can also be interpreted to recognize the ecological value of wild lands.[109] Pursuant to NEPA, any "major federal action significantly affecting the quality of the human environment" must be accompanied by a detailed environmental impact statement (EIS) that includes an analysis of the cumulative environmental

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106. *See* Proposed Rule for National Forest System Land and Resource Management Planning, 60 Fed. Reg. 18,886 (1995) (to be codified at 36 C.F.R. § 219, subpt. A) (proposed April 13, 1995).

107. *Id.* at 18,920.

108. Kuhlmann, *supra* note 14, at 154. Kuhlmann notes that under current law, "being aware that forests are ecosystems means that the agency must be aware of the interrelationships among *plants, animals, soil, water, air and other environmental* factors . . . ." *Id.* (citing 36 C.F.R. § 219.1(b)(3) (1997)) (emphasis added). The proposed regulations, in contrast, "cloak[ ] ecological factors within a broader policy concept of Ecosystem Management" with the result that the "distinct duty" to recognize biological or ecological—in the scientific sense of the word—is eliminated. *Id.* at 155.

109. *See* 42 U.S.C. §4332(2)(C) (1994).

effects of a proposed agency action.[110] In this way, NEPA is a vehicle through which non-human values in wild lands are entered into land managers' decision-making processes. Moreover, because federal actions often affect wild lands, and wild lands possess ecological value, NEPA, too, can be said to reflect the legal status of such value and to require its consideration in assessing the impacts, and ultimately the appropriateness, of a proposed agency action.

NEPA is not, however, an environmental protection statute. Adverse environmental impacts need only be considered. There is no substantive requirement that they necessarily be mitigated. Still, wilderness value and ecological value have a place in the decision-making calculus, albeit a potentially insignificant one. Both NEPA and NFMA suggest, by virtue of their recognition of the validity of ecological value in public lands decisions, the possibility for guarded optimism. Perhaps the traditional, purely instrumental approach to the evaluation and management of federal lands is waning in its dominance of the field.

The Salvage Timber Rider, touted as a sweeping assault on the nation's forests and an affront to both legal and environmental accountability,[111] contained a surprise recognition of wilderness value. In no way does the Salvage Rider explicitly recognize ecological value. However, in terms of wilderness protection, designated wilderness areas were exempted from its timber and salvage sales provisions.[112] Most importantly, with respect to

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110. *Id.* Under NEPA, the EIS must contain an analysis of: the environmental impacts of a proposed action; any unavoidable adverse environmental effects of the proposal if implemented; alternatives to the proposal; the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity; and any irreversible or irretrievable commitments of resources which would be involved in the proposed action if implemented. *See id.*

The Council on Environmental Quality (CEQ) regulations for the implementation of NEPA include among the cumulative environmental effects to be considered "effects on air and water and other natural systems, including ecosystems." 40 C.F.R. § 1508.8 (1997).

111. *See* Tara L. Mueller, *The Salvage Timber Sales Law: A Serious Threat to Public Lands Management*, 26 ENVTL. L. REP. 10,065 (1996). This Note's use of the Salvage Timber Rider as an example of legislative—and, more importantly, administrative—recognition of the importance of wild lands and wilderness values in public lands management is in no way intended to denote approval of the now-extinct salvage timber "law." On the contrary, this Note seeks only to point out that designated wilderness and (some) pristine, roadless areas were fortunate enough, through deliberate exclusion, to escape the Salvage Rider's directed wrath upon our nation's national forests. The damage inflicted by the Salvage Rider on forests at the perimeter of designated wilderness areas and pristine, roadless areas, however, raises exactly the issue that should ignite heightened attention to a more ecological or ecosystem management type of principled approach to wilderness law. *See* discussion *infra* Part III.

112. *See* Salvage Timber Rider, at § 2001(g), 109 Stat. at 244-45. The provisions of the Salvage Rider of importance for the purposes of this Note are as follows:

> The term "salvage timber sale" means a timber sale for which an important reason for entry includes the removal of disease- or insect-infested trees, dead, damaged or down trees, or trees affected by fire or imminently susceptible to fire or insect attack. Such term also includes the removal of associated trees . . . .

wilderness preservation issues, Secretary of Agriculture Dan Glickman issued a directive (the Glickman Mandate) to Forest Service Chief Jack Ward Thomas in July 1996 that clarified the policy and procedure for implementing Salvage Timber Rider provisions.[113] The Glickman Mandate stated that use of the Salvage Rider to execute sales of timber in pristine and inventoried roadless areas not yet selected for wilderness review or designation would be prohibited, and the construction of new roads for the purposes of performing Salvage Timber Rider contracts would be minimized.[114]

The Glickman Mandate suggested that the Forest Service was willing to lend an ear to the potential significance of values present in, perhaps even adjacent to, areas as yet "untrammeled by man."[115] It is reasonable to assume—given the Salvage Timber Rider's grant to the Forest Service of cursory substantive responsibilities and virtually unfettered discretion with respect to the preservation of any non-instrumental values present in forested lands—that had the Secretary not seen something in wild lands worthy of consideration and protection, accountability to them would have been ignored. Further, because of the use of the Salvage Timber Rider to harvest green and healthy trees—in explicit contradiction to its stated forest health emergency objectives—and because compliance with environmental law was entirely relegated to agency discretion,[116] the Glickman Mandate is important as an example of administrative attention to the need to preserve wilderness values

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Id. § 2001(a)(3), 109 Stat. at 241.

Under the Salvage Rider, any sale pursued under the generally applicable timber and salvage sale provision, section 2001(b), is deemed to satisfy the requirements of all major federal environmental legislation. No agency activity pursued under the auspices of the Salvage Rider is subject to review according to other substantive environmental laws. Neither NEPA, NFMA, FLPMA, nor the Endangered Species Act (hereinafter ESA) apply to Salvage Rider actions. *See id.* § 2001(i), 109 Stat. at 245. *See generally* Inland Empire Public Lands Council v. United States Forest Serv., 88 F.3d 754 (9th Cir. 1996); Idaho Sporting Congress, Inc. v. United States Forest Serv., 92 F.3d 922 (9th Cir. 1996) (both cases holding that actions taken by the Forest Service pursuant to the Salvage Timber Rider allow for only limited judicial review of agency action, and compliance with other federal environmental or natural resources laws is not required).

As noted, the Salvage Rider does exempt designated wilderness areas from its application. *See id.* § 2001(g), 109 Stat. at 244-45.

113. *See* Glickman Mandate, *supra* note 13 ("Q. Why are you issuing this salvage directive to the Forest Service? A. Public concerns have been raised about whether some of the sales being offered . . . under the salvage rider are appropriate and in compliance with the spirit and intent of the President's directive.").

114. *See id.* ("Q. Why does the Secretary's directive prohibit the entry into inventoried roadless areas for salvage sales under the rider? A. Inventoried roadless areas are usually very pristine, relatively untouched areas of nature that contribute greatly to maintaining wildlife habitat, water quality, recreation opportunities, and other important environmental benefits. With the shrinking number of roadless areas in the U.S., more people want to ensure that inventoried roadless areas are managed well and that the public has a voice in the management of them.").

115. 16 U.S.C. § 1131(c).

116. *See* Salvage Timber Rider, at § 2001(c)(1), 109 Stat. at 242.

in pristine and roadless areas. This is true even if neither state nor federal legislators have yet recognized or granted these areas legal significance.

Where the law fails to provide substantive protection for wild lands and the values they embody, the procedural provisions of NFMA and NEPA, as well as the Glickman Mandate and the Proposed Forest Service Planning Regulations, indicate that agency administrators will face the challenge and preserve wild lands, their wilderness character, and their wilderness values. They may accomplish this either by according specific protection to wilderness, or through the capture of wilderness value through a mandate to consider ecological forces at play in a particular area. It may even be that such procedural attention to wilderness value can be a harbinger of change in public lands management toward a more comprehensive and meaningful recognition of the values of wild nature that are not clearly vindicated in the substantive law.

B. Wilderness Value

The legal recognition of wilderness value through indirect and largely procedural mechanisms still does not conceptually extend beyond the principal legislation's definition and representation of wilderness. These mechanisms rely on the delineation of the two elements of wilderness to which the Wilderness Act accorded legal significance: the non-human and primeval aspects of wild lands.[117] Like the Wilderness Act, they go no further to explain what it is about wilderness that has been legislatively and administratively deemed to deserve legal status, protection, and preservation.

Given an anomalous statutory definition of wilderness in the Wilderness Act, and a legal framework composed largely of administrative regulations and procedures for the discretionary definition and protection of wilderness and its values, existing wilderness law appears inadequate to discover what is fundamentally at stake in wilderness preservation. An inquiry into the conceptual foundation of the human appreciation and value of wilderness is a task left undone. However, this inquiry is necessary, for if the nature of the thing preserved is understood, the values it represents can be substantively articulated in the language of the law; and the law can be, if needed, reconceived or reinforced in order to provide the protection for its subjects as it intended.[118] Moreover, where the values that justify wilderness preservation

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117. *See* 16 U.S.C. § 1131(a), (c).

118. McCloskey, *supra* note 7, at 289 (stating that certain "attitudes in America's cultural history" have, over time, "produced national leadership that was finally able to persuade its citizens to value wilderness," with the Wilderness Act as the end result). This inquiry into wilderness attitudes is important in understanding—and criticizing—wilderness law. *See* RODERICK NASH, WILDERNESS AND THE

are made explicit and recognized in a substantive legal mandate for accountability to wilderness, the legislation itself becomes less susceptible to misinterpretation by administrators and the courts. Finally, as a result of this inquiry into the conceptual rationale for wilderness protection, the wilderness itself becomes less vulnerable to future legislation, management plans, and human use activities that may fail to recognize its non-instrumental, primeval value as wilderness.

Public land and natural resource policy in general have historically been shaped by a dialogue between two distinct conceptual schemes or competing schools of thought: utilitarianism and preservationism.[119] The utilitarian school justifies protection of nature and its natural value for the purpose of maximizing human benefit, rather than grounding accountability in something

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AMERICAN MIND 92-107 (3d ed. 1982) (stating that "[a]ppreciation of wilderness led easily to sadness at its disappearance from the American scene. What to do beyond regretting, however, was a problem, . . . [b]ut as the Romantic and nationalistic vindications of wilderness developed, a few Americans conceived of its deliberate preservation"). *Id.* at 92.

McCloskey attributes the notion that one's conception of a thing inevitably determines and governs one's relationship to, interaction with, and treatment of the thing, to Immanuel Kant's theory of associationism. *See* McCloskey, *supra* note 7, at 290. Kant, he states, believed that the ideas a person associates with nature determine the response that person will have toward nature. *See id.* Kant's theory is contained in the CRITIQUE OF JUDGMENT, where he articulates his notion of the aesthetic value of the natural world; Kant conceived of the aesthetic value of nature largely in terms of its sublime characteristics and believed that the ideas a person associated with sublime scenes determine whether one's response will be one of terror or admiration. *See id.*

Modern environmental philosophers have further explored Kant's associationist argument in favor of natural value and describe it as one of many variants of instrumental value in which nature, in particular the wilderness, is valued not for what it is but for what it offers to the human experience. In particular, Kant's position has been characterized as "The Cathedral Argument" which justifies wilderness preservation for the aesthetic pleasure and spiritual inspiration it gives to humans. *See* George Sessions, *Ecocentrism, Wilderness, and Global Ecosystem Protection*, *in* THE WILDERNESS CONDITION: ESSAYS ON ENVIRONMENT AND CIVILIZATION 90, 97 (Max Oelschlaeger ed., 1992). Sessions goes on to say that although the inspirational value of wilderness is an important aspect of its value, it is the wilderness as a biological system that possesses value and should be addressed, using Kant's own terminology, as an end in itself. *See id.*

119. *See* Keiter, *supra* note 23, at 296-97. In the language of contemporary environmental philosophy, utilitarianism with Kant is termed instrumentalism to refer to its thesis that the value existing in nature derives solely from its relationship to and uses for human and cultural purposes. *See id.* The preservationist school, the utilitarians' antagonist, is associated with the ideal of preserving "static landscapes and scenery from despoliation." *Id.* Preservationists generally held a "romantic view of nature with man largely divorced from the scene." *Id.* The preservationists intention, in philosophical terms, locates the rationale for wilderness preservation in a form of intrinsic value theory, whereby nature has value for what it is in itself, value that exists irrespective of the presence of humans. There are numerous permutations within intrinsic value theory, largely differentiated in terms of the relationship between nature and culture, world and self, and the range of objects or systems in the natural world to which intrinsic value is attributed. *See generally* WARWICK FOX, TOWARD A TRANSPERSONAL ECOLOGY: DEVELOPING NEW FOUNDATIONS FOR ENVIRONMENTALISM (1990); ARNE NAESS, ECOLOGY, COMMUNITY AND LIFESTYLE (1989); THE WILDERNESS CONDITION: ESSAYS ON ENVIRONMENT AND CIVILIZATION (Max Oelschlaeger ed., 1992) (contemporary philosophical theories describing the many instances of ecological value in wild nature).

independent that arises from what the natural world is, or something it possesses, regardless of its utility to humans.[120] This theory has evolved into the multiple-use management directives that have been the standard for public lands management and policy since codified in MUSYA,[121] whose primary concern lies in notions of fairness, efficiency, and sustainability defined in terms of human need and consumption.[122]

In contrast, the preservationist school is derived from the "romantic" conception of nature as being devoid of human presence, where nature and natural value are sought to be protected from human despoliation.[123] John Muir, for example, is a legendary preservationist.[124] A staunch advocate of granting reserved status to wild lands and managing them based on maintaining their wildness, for Muir, "the essence of wilderness was . . . freedom [and] solitude."[125] Preservationists such as Muir are credited with providing the legacy from which wilderness law and the National Wilderness Preservation System have sprung.[126]

Both of these conceptual forces are at play in the statutory definition and values accorded to wilderness in the Wilderness Act. Pursuant to utilitarian theory, land in its natural condition is to be preserved and protected in order "to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."[127] Wilderness is granted legal status for the use and enjoyment of the American public.[128] In its definition of wilderness, the Wilderness Act states that one of several characteristics of lands qualifying for inclusion in the system is that it "has outstanding opportunities for solitude or a primitive and unconfined type of recreation."[129] Moreover, in the provision of the Wilderness Act guiding wilderness management decisions, agencies implementing the legislation are instructed that unless an exception in the Act itself exempts an activity or policy from its general mandates, "wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use."[130]

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120. *See* Keiter, *supra* note 23, at 296.

121. 16 U.S.C. § 528 (1994); *see also* discussion *infra* Part I.A.

122. *See* Keiter, *supra* note 23, at 296.

123. *See id.* at 297.

124. *See id.*

125. HENDEE ET AL., *supra* note 9, at 7.

126. *See* Keiter, *supra* note 23, at 297. "The national parks are [also] viewed as representing the 'preservation' approach to public land management." Freemuth, *supra* note 15, at 705.

127. 16 U.S.C. § 1131(a).

128. *See id.*

129. 16 U.S.C. § 1131(c).

130. 16 U.S.C. § 1133(b).

The preservationist perspective is also represented in existing wilderness legislation. Lands are designated and uses prescribed for the purpose of preserving the wilderness character of selected areas.[131] Lands designated and managed for the purpose of preserving their wilderness character are those lands which, among other characteristics, have ecological, geological, or scientific value.[132] At least one federal district court has interpreted the primary objective of Congress in establishing the Wilderness Preservation System as the desire to preserve lands in their "untouched and natural state."[133] Finally, as previously noted, the regulations guiding agencies' implementation of the substantive mandates of wilderness legislation allow that management practices and uses, even emergency preservation or human health and safety measures, be undertaken to preserve the wilderness character of an area.[134]

The divergent values of wilderness reflected in these justifications for wilderness preservation contribute greatly to the challenges facing contemporary wilderness management.[135] As previously noted, Congress attempted to achieve three goals through the Wilderness Act: preservation of wild lands, protection and maintenance of natural areas for present and future human uses such as recreation and scientific research, and accommodation of local and commercial interests.[136] Also, the achievement of one statutory purpose can result in an inability to achieve the others when the use and enjoyment of wilderness takes place absent careful consideration of the nature of the wilderness.

Within the current statutory scheme, preserving wilderness as conceived in wilderness law largely depends on the planning activities of forest and wilderness managers. Only through thoughtful and comprehensive management can all three of the Wilderness Act's purposes be achieved simultaneously. The Wilderness Act itself identifies the appropriateness of a management plan or use activity in terms of its compatibility with the preservation of both the intrinsic and instrumental character of wilderness.

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131. *See* 16 U.S.C. § 1131(a).

132. *See* 16 U.S.C. § 1131(c).

133. Sierra Club v. Block, 622 F. Supp. 842, 850 (D. Colo. 1985) (quoting 110 Cong. Rec. 174,448) (statement of Rep. Cleveland).

134. *See* 16 U.S.C. § 1133(d); 36 C.F.R. § 293.3(a) (1997); 43 C.F.R. § 8560.3 (1997); *see also* discussion *infra* Part II.A.

135. *See* Rohlf & Honnold, *supra* note 4, at 258.

136. *See id.* Rohlf and Honnold note that local and commercial interests lobbied diligently against wilderness legislation. The Act attempted to account for their influence and the values these interests found in wild lands by including provisions to allow for mining, water and power development, grazing, and the control of fire and insect pests within wilderness boundaries. *See id.*; *see also* 16 U.S.C. § 1133(d)(2)-(6). These uses however, must comply with the general substantive requirement that they be conducted in a manner that is compatible with the preservation of the wilderness character of an area. *See id.*

Herein lies the challenge: can these seemingly antagonistic goals be simultaneously achieved in designated areas?[137] Are the wilderness values inherent in these goals commensurable?

Part III suggests that this challenge can be met by clarifying or creating a relationship between the divergent purposes and goals of wilderness preservation and the character of wilderness. Part III offers principles of ecosystem management as possible tools to unify wilderness preservation efforts at a conceptual level in order that competing uses and values of wilderness may become commensurable with a goal to achieve the comprehensive and meaningful protection of wild lands.

III. ECOSYSTEMS AND ACCOUNTABILITY IN WILDERNESS LAW

If utilitarianism and preservationism are pushed to their extremes as mutually exclusive goals for wilderness preservation—each only pursuing its particular type of value in efforts to protect and manage wilderness—maximizing wilderness use and enjoyment and preserving wilderness character cannot be achieved simultaneously. In such an oxymoronic representation of wilderness value, commensurability of wilderness values is not likely to be achieved. Can utilitarian and preservationist values be reconciled? If the antagonism between preserving and using wilderness is insisted upon, only one question remains: who or what loses the war over the wilderness?

The key to the unification of the utilitarian/anthropocentric and the preservationist/intrinsic values of wild lands (and to the overall preservation of wild lands) lies in an ecological approach to wilderness law and management. Both the utilitarian and the preservationist can "converge" around this approach.[138] This approach is grounded in principles of ecosystem management and biodiversity protection. Under these principles, the dichotomy between the human community and wild nature is dissolved,[139] and long-term assessment of human, biological, and ecosystem needs occurs in terms of what is best for the particular ecosystem.[140]

At a normative and conceptual level, ecosystem management is founded upon the following principle: human use, enjoyment, and planning decisions regarding wild nature must be harmonized with the survival and integrity of

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137. *See* Rohlf & Honnold, *supra* note 4, at 258.

138. Keiter, *supra* note 23, at 297.

139. *See id.* at 300.

140. Julie B. Bloch, *Preserving Biological Diversity in the United States: The Case for Moving to an Ecosystem Approach to Protect the Nation's Biological Wealth*, 10 PACE ENVTL. L. REV. 175, 219 (1992).

wild lands themselves, because "the raw wilderness gives definition and meaning to the human enterprise."[141] Fundamental principles of ecological science—for example, sustainability, carrying capacity, and resource finitude—similarly demonstrate the interdependence that characterizes the relationship between humans and their natural environment.[142] According to ecosystem management, the biological system must be the reference point for use in developing and evaluating public lands management policies pursuant to this principle of interdependence.[143] The key to conflict resolution with respect to both value and use of the wilderness, then, is that costs and benefits associated with a particular planning or use decision are weighed according to the impact of a desired activity on the system in addition to impacts on a discrete unit, quality, or species within that system. The Gestalt shift from unit to system is the significant change.[144]

An ecological approach can begin to remove the disjunctive from wilderness preservation: the wilderness can be protected both as a valuable resource and as a place with intrinsic, natural value as a primeval, biological system.[145] It is inappropriately, and only temporarily, protected when either

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141. LEOPOLD, *supra* note 88, at 279. *See generally* Kuhlmann, *supra* note 14 (discussing the legal impact of Ecosystem Management's emphasis on the interaction between ecological ideas and the role or place of human beings in ecosystems and noting the policy dangers—in terms of public lands law—that arise when human beings are relocated into their natural ecological "home").

142. *See generally* DAVID B. FIRESTONE & FRANK C. REED, ENVIRONMENTAL LAW FOR NON-LAWYERS 1-17 (2d ed. 1993).

143. See Darryll R. Johnson & James K. Agee, *Introduction to Ecosystem Management* 4-7, *in* ECOSYSTEM MANAGEMENT FOR PARKS AND WILDERNESS (Darryll R. Johnson & James K. Agee eds., 1988).

144. Walter Kuhlmann has insightfully noted that there *are* dangers attending ecosystem management with respect to maintaining a necessary priority of preservation principles in public lands planning. *See* Kuhlmann, *supra* note 14, at 154-65. Where human social and economic activities enter into the basic policy definition of "ecosystem," and management attentions center on deconstructing philosophical barriers between human culture and the natural environment to legally capture notions of interdependence and mutual causation, the justification for granting priority to the preservation of non-human, biological and systemic nature vanishes: we lose necessary normative distinctions "between those actions which are introduced by large scale human cultural forces and those which are indigenously present by . . . ecological or evolutionary forces." *Id.* at 155-56. To avoid this result, Kuhlmann insists that "the law [must have] language and concepts . . . which are not, *ab initio*, defined in such an anthropocentric manner that the application of the law inevitably leads to outcomes that consistently favor short term human needs in preference to long term ecosystem needs." *Id.* at 162. In terms of maintaining the priority of preserving wilderness and wilderness values for their own sake, this Note suggests a similar solution. *See* discussion *infra* Part III.

145. Stephen Mealey notes that the "unstated congressional challenge" to federal land managers (as a result of the internally inconsistent definition of wilderness contained in the Wilderness Act) is "to provide the least possible human interference or restraint . . . to provide . . . levels of naturalness and human use and enjoyment which maintain the highest wilderness quality possible with the least possible human interference." Stephen Mealey, *U.S. Forest Service Wilderness Management: Challenge and Opportunity*, *in* ECOSYSTEM MANAGEMENT FOR PARKS AND WILDERNESS 197 (Darryll R. Johnson & James K. Agee eds., 1988). "Acceptable solutions will represent optimal levels for both naturalness and human use rather than maximums for either." *Id.* This Note intends to suggest that the explicit incorporation of an ecosystem

of the two objectives—the utilitarian or the preservationist—is pursued at the expense of the other. Most importantly, through an ecological lens it becomes clear that if the objectives of the Wilderness Act are to be achieved, even before assimilation of the instrumental and intrinsic values of wilderness occurs, wild lands must be conceived as systems whose wilderness character is not subject to the constructs of designated boundaries. On the contrary, wilderness is defined in biological terms and often threatened by management and use activities taking place on adjacent lands.[146]

Finally, only where objectives are pitted as antagonists does legislation such as the Salvage Timber Rider enter—through the back door—to expel preservation goals and intrinsic value from public lands law and management altogether by precluding any consideration of the character of the land and suspending all otherwise applicable environmental legislation.[147] The Salvage Timber Rider is a prime example of essentialist public land law that places wild lands in direct opposition to human use activities. The resulting antagonism causes forced reliance on the discretion and conscience of agency administrators to look beyond the letter of the law and protect land and its character and value from *fully lawful* demise.[148] When ecosystems are the focus, a larger number of interests can be accommodated because management and use are guided by concepts of "mutual responsibility" rather than competition.[149] When appropriateness is couched in ecological terms, multiple uses of wild lands and their wilderness character can be preserved. Management of wilderness for use and enjoyment is contingent upon the preservation of the wilderness value and character of a particular area only insofar as human uses and instrumental goals are understood to rely on this value and character for their own success.[150]

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management perspective into both the Wilderness Act and wilderness management policies can assist federal lands managers in meeting this challenge.

146. Well known examples of this principle occur with respect to the protection of species within park boundaries. One difficulty faced by wildlife managers in Yellowstone National Park lies in the fact that species (say, wolves or bison) migrate, feed, even reproduce based on principles of biology. They do not respect "lines drawn in the sand" by public lands officials. Their well-being is affected by the behavior of all residents, both human and non-human, of the entire Yellowstone ecosystem. *See generally* Keiter, *supra* note 98 (discussing the importance of a "transboundary" approach to public lands management, derived in large part from this notion that biological systems and species do not respect boundaries, and management must allow for their systemic character to succeed).

147. *See* Keiter, *supra* note 23, at 325 ("current law" is often "contradicted or compromised by other mandates or through perennial appropriations riders, which collectively send confusing congressional signals to the land management agencies").

148. *See* Mueller, *supra* note 111, at 10,066-67.

149. Keiter, *supra* note 23, at 297 ("modern ecology, with a history rooted in moral philosophy (or values) as well as quantitative science, provides a unifying framework for this philosophical convergence").

150. Philosopher Bryan Norton refers to this "conflict" between the use interests of individuals and the interest in preserving the "intrinsic" value of the natural environment as "the problem of parts and

A. Systems Accountability Within Existing Law

Systems accountability in wilderness law is premised on cooperation and interdependence in wild nature.[151] While principles of systems accountability can be extrapolated or inferred from various provisions of existing wilderness and environmental legislation, "few, if any, of the principal laws governing public land management are modeled upon contemporary ecological principles . . . [,] (and) Congress has incorporated often conflicting substantive goals into the organic laws governing the public domain."[152] Further, as noted with respect to current legal recognition of biodiversity: "[s]ince current laws were not designed to protect biodiversity, it is not surprising that they fail to adequately achieve that goal."[153] Substantive systems accountability to wilderness is an idea—grounded in science, philosophy, and policy—whose time has come. To the extent that ecosystem protection continues to be relegated solely to administrative and procedural discretion, agencies can be expected to continue to reach virtually any decision they wish within the bounds of their discretion.[154] This affords little guarantee of meaningful, lasting wilderness protection. Within the existing legal framework there is room for the enactment of a systems-oriented approach to wilderness preservation that would increase substantive ecological accountability to wild lands among those whose actions and decisions affect them. With some reorientation, the law can successfully accommodate this conceptual shift in policy principles.

Achieving systems accountability by simply redrawing the boundaries that segregate wilderness from the rest of the public domain is a strict

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wholes." Bryan Norton, *Change, Constancy and Creativity: The New Ecology and Some Old Problems*, 7 DUKE ENVTL. L. & POL'Y F. 49, 63 (1996). In ecology, this same problem is called "the problem of scale." *Id.* Its resolution, Norton suggests, lies in the recognition that "[h]uman individuals actually exist within ecosystems." *Id.* at 62. "Damage to ecosystems is . . . the cumulative damage of whole cultures and civilizations—it is a responsibility at the community level . . . ." *Id.* Norton suggests that "correction of these communal threats," lies in an understanding of the inherent interrelatedness of parts and whole—individuals and their natural environment. *Id.* at 62-65. When the framework for individual action is thus conceived, "individuals . . . will act in ways that contribute to, rather than destroy, the values that emerge on the larger, ecosystem scale." *Id.* at 62.

151. As a general concept, "systems accountability" is intended to refer to the notion that, once wild lands are redefined according to principles of ecology, the objects of legal concern with respect to wild lands are those biological and ecological characteristics (and processes) that the ecological sciences have revealed as inherent in the natural world. Cooperation and interdependence are just two among these ecologically-recognized characteristics and processes. *See* Martin H. Belsky, *Using Legal Principles to Promote the "Health" of an Ecosystem*, TULSA J. COMP. & INT'L. L. 183, 185 (1996) (quoting EUGENE P. ODUM, FUNDAMENTALS OF ECOLOGY 8 (2d ed. 1959)).

152. Keiter, *supra* note 23, at 314.

153. Bloch, *supra* note 140, at 199.

154. *See* Keiter, *supra* note 23, at 313.

preservationist solution to wilderness issues and is not a feasible method of pursuing systems recognition in wilderness law.[155] This solution would urge sacrifice on wilderness users, perhaps on society as a whole, and would likely not be a palatable mechanism to achieve wilderness accountability.[156] The proposed Northern Rockies Ecosystem Protection and Restoration Act (NREPA)[157] seeks this sort of statutory proposal for the enactment of ecosystem management principles into substantive law.[158] It "proposes a multi-million acre wilderness designation based on ecological considerations encompassing public lands in five different states," and through an expansive re-classification scheme, it attempts to protect the integrity of the region's biological community by completely curtailing—in many cases shutting out—certain activities perceived to be ecologically harmful.[159]

Systems-level protection for wilderness will likely prove difficult to achieve in this way. Enactment of this type of essentialist legislation, particularly at the federal level, is politically problematic from the perspective of those whose uses of land in the re-designated areas are curtailed by new boundary markers.[160] In addition, such a statutory scheme may not extend the comprehensive level of protection to the public domain that could be achieved by a reorientation of wilderness legislators, managers, and users to the ecological value of our wild lands.[161] From a policy perspective, any increasing entrenchment and posturing that might result from a "pure" essentialist approach should be mitigated by alternative approaches to conceptual and legal change.

As such an alternative to an essentialist redrawing of lines on the landscape, systems accountability could be proposed within the existing scheme of legislative and regulatory wilderness law as a way to ease the transition toward more meaningful protection of wild lands. As an initial step, grounding systems accountability to wilderness within the current legal framework will require that substantive ecosystem management directives be "squared" with the organic mandates currently in place for the four

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155. *See id.* (citing NEPA as one example of a statute that allows agency discretion to, within the requirements of the Act, authorize projects or activities that are substantively at odds with statutory intent but satisfy procedural requirements).

156. *See id.*

157. Northern Rockies Ecosystem Protection Act (NREPA), H.R. 2638, 103d Cong., 1st Sess. (1993).

158. *See* Keiter, *supra* note 23, at 327. For arguments in support of congressional enactment of NREPA, see *generally* Tara K. Weinman, *The Northern Rockies Ecosystem Protection Act: In Support of Enactment*, 5 B.U. PUB. INT. L.J. 287 (1996).

159. Keiter, *supra* note 23, at 327-28 (remarking that the NREPA proposal faces challenge from the perspective of political feasibility).

160. *See id.* at 328.

161. *See id.*

implementing agencies: the Forest Service, the National Park Service, BLM, and Fish and Wildlife.[162] Multiple use principles contained in MUSYA (BLM) and FLPMA/NFMA (Forest Service) must be reconceived to ground resource production uses such as mining, timber, and grazing within an ecologically-oriented scheme.[163]

In other words, use and enjoyment activities would be appropriate only insofar as the integrity and wilderness character of the wilderness system was preserved. Customary uses will be accommodated, subject to the requirement that an area's wilderness character be preserved.[164] The scope of affected wilderness character will simply be enlarged. A substantive ecosystems approach would require that the agencies construe wilderness character in broader terms and that they consider wilderness character with respect to activities undertaken on adjacent lands. Again, the relationship between wilderness uses and values should be viewed in terms of necessary interrelation for mutual benefit, not in terms of competitiveness.

If we optimistically construe the Glickman Mandate and its limitation of the Salvage Timber Rider, systemically defined wilderness character might not, if substantively enacted, be perceived as a threat to administrative discretion and authority. Also important as a gauge for receptivity to wilderness values and ecosystem management principles are the Forest Service's own proposed regulations which specifically seek to promote ecosystem management in the administration of National Forest Lands.[165] Still, the key to success within existing law is for the Wilderness Act to prescribe an ecological definition and value of wilderness and clarify agency responsibilities with respect to it in order to vitiate the power of procedural discretion to override substantive intent. The organic responsibilities of Fish and Wildlife and the National Park Service to provide for recreational and hunting needs must similarly reorganize for the concurrent accommodation of the instrumental and intrinsic value of the wild lands.[166]

In the same sense in which wilderness legislation accommodates multiple uses consistent with the nonimpairment requirement, the Wilderness Act also allows for affirmative health and emergency measures to preserve endangered

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162. *Id.* at 318.

163. *See* discussion *supra* Parts I.A., II.A. Administrative agencies are "constrained by their organic mandates." Keiter, *supra* note 99, at 15. Keiter notes that this is particularly the case when confronted with the desire or challenge to implement ecosystem management principles within the current structure of public lands law and management regulations. *See generally* Keiter, *supra* note 23.

164. *See* 16 U.S.C. § 1133(b) (1994).

165. *See* Proposed Rule for National Forest System Land and Resource Management Planning, 60 Fed. Reg. 18,886 (1995) (to be codified at 36 C.F.R. § 219, subpt. A) (proposed April 13, 1995). *But see* Kuhlmann, *supra* note 14.

166. *See* Keiter, *supra* note 23, at 318.

areas or human lives within them.[167] This affirmative management would be appropriate to ecosystemic wilderness preservation. Clarification of terms such as emergency and health, in the context of the ecology of an affected wilderness area, would assist in distinguishing genuine efforts to improve and preserve wilderness character from those attempting to circumvent the nonimpairment requirements. Particularly, the Salvage Timber Rider may have a potentially detrimental impact on the wilderness character and value of areas located near or adjacent to roaded or developed forest land. Thus, recasting the concept of a forest health emergency in terms of ecosystem needs is strongly suggested.

B. Wilderness Reconceived

There are several varieties of, and elemental steps for, substantive systems accountability to wilderness within existing wilderness law.[168] Among these is a "transboundary" approach that draws from a traditional administrative notion that holds that (legally drawn) boundary lines define the scope of jurisdiction and influence[169] to effect the goals of ecosystem management by simply reconceiving the legal boundaries drawn on the public lands landscape in ecological terms.[170] This approach seeks to implant recognition of the value of wilderness as an ecosystem within the existing mechanisms for wilderness preservation and is a viable alternative. It would protect wilderness as a biological system, not necessarily by moving or extending the parameters of designated areas, but by accounting for processes and values occurring within the boundaries when making management and use decisions beyond them. Because ecosystems "do not respect property and jurisdictional lines[,]" the transboundary approach would set the parameters for wilderness management "*by reference to ecology, not politics.*"[171]

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167. *See* 16 U.S.C. § 1133(c).

168. Bloch, *supra* note 140, at 188-89, 206-22. The forms available for systems accountability to wilderness are essentially the same as those being explored by proponents of biodiversity legislation because the underlying premise is the same: wilderness, like biological life, is organized and functions according to ecological principles. *See generally* Bloch, *supra* note 140. The ecological sciences indicate that systems integrity is threatened when the interdependence, dynamism, and multiplicity of life are ignored through management practices and uses of land and natural resources that ignore systemic needs in order to selectively protect particular areas, animals, species. *See generally id.* Bloch explores four forms of biological diversity legislation to conclude that an Ecosystems Protection Act is the most viable choice for preserving biological diversity on our federal lands. *See id.* at 214-25.

169. *See* Keiter, *supra* note 23, at 320.

170. *See id.* at 303.

171. Reed F. Noss, *Some Principles of Conservation Biology, As They Apply to Environmental Law*, 69 CHI.-KENT L. REV. 893, 905 (1994).

Because wilderness is an ecosystem, its boundaries are permeable, biological, and dynamic, constantly changing to accommodate the needs of component species.[172] When wilderness is thus conceived, the logic of current wilderness management is defied. As it stands, wilderness preservation conveys "the unfortunate implication that, once wilderness areas are set aside, nonwilderness areas [and adjacent roaded areas] can be degraded without worry."[173]

The omission in either federal or state wilderness law of buffer zones or corridors to provide for the legal recognition of values in species migration, habitat, or biodiversity, and to facilitate their protection in addition to that of the designated area whose parameters they transcend is—from a transboundary perspective—a fatal flaw.[174] Buffer zones and corridors seek to give legal effect to the fundamental principle of transboundary approaches: actions taking place beyond wilderness perimeters affect the wilderness within them. Wilderness is affected by the degradation of nonwilderness because the systems that define its integrity and character transcend boundaries as do habitat, biodiversity, and migration patterns.

Given the patchwork organization of the wilderness system,[175] an approach that includes adjacent wilderness in management and use decisions is essential to achieving ecological accountability for wild lands. A buffer zone requirement would mitigate adverse impacts on wilderness resulting from activities and development pursued on adjacent undesignated or nonwilderness lands. It succeeds in such mitigation because it conceives and represents wilderness character in ecological or systemic terms. Even though buffer zones require that additional lines be drawn on the landscape, without substantive guarantees of systems-oriented protection for wilderness that include a mandate to consider wilderness character and value when pursuing uses and activities beyond wilderness parameters, they may be necessary to

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172. *See* Keiter, *supra* note 23, at 328-30. A "new ecosystem management mandate" requires extensive coordination of management activities due to the transboundary issues that necessarily arise when wild lands are reconceived according to their ecological character. *Id.* at 328-31. Keiter states: "Responsible ecosystem management proposals, therefore, must effectively merge . . . concerns [such as aesthetic and amenity considerations and economic and social concerns, all of which are 'closely tied' to public preferences] with contemporary scientific knowledge . . . ." *Id.* at 324.

173. Eric T. Freyfogle, *The Ethical Strands of Environmental Law*, U. ILL. L. REV. 819, 839 (1994).

174. "The Wilderness Act imposes no specific constraints on the use or management of lands adjacent to designated wilderness areas. Nor does it explicitly provide agency officials responsible for wilderness management with any authority to regulate adjacent lands, even contiguous public lands that [the agency officials] may otherwise manage under multiple-use principles." Keiter, *supra* note 99, at 21. Consideration of the wilderness character and value of these areas must come from other public lands management statutes, such as NFMA and NEPA. *See id.*

175. *See* Rohlf & Honnold, *supra* note 4, at 272. Rohlf and Honnold characterize designated areas as essentially "'islands' surrounded by lands that frequently have been radically altered both physically and ecologically." *Id.*

ensure the evolution of ecosystems management principles into wilderness law and policy.

This extension of the notion of wilderness value to lands not meeting the technical criteria for wilderness designation does not devalue the concept of wilderness. In a transboundary or ecosystems approach, wild lands are systemically and inclusively defined in a manner essential for meaningful and effective wilderness preservation. Allowing wilderness values and wilderness-inspired protection to extend to informal wild lands simply expands both instrumental and intrinsic value schemes, further integrating them, and allows for a more comprehensive legal recognition of natural value.

An ecological approach for systems accountability to wilderness seeks to rid wilderness law of the notion that specific inclusion of one particular area necessitates exclusion of others in management decisions. To reject an ecosystems approach because it devalues wilderness is to fail to understand the conceptual shift necessary to preserve the wilderness, character, and values that justify its preservation. In addition, wilderness value and protection extended to adjacent lands will be particularly useful in preserving designated wilderness where these areas are small (such as in the East), and where wilderness demarcation is located at tree line, segregating the sublime from the contiguous forested landscape. Wilderness areas, particularly in the West, are alpine, surrounded by heavily impacted multi-use forest districts. The inclusion of these surrounding areas within a comprehensive plan for wilderness management is required when the wilderness ecosystem, not a wilderness island, is the object of the legal protection of wilderness.

"[C]urrent environmental policy is approaching a crisis of vision and imagination."[176] An approach to wilderness preservation that seeks to establish substantive legal accountability is a response to this crisis of vision. It recognizes the importance of competing attributions of value and meaning to the wilderness and seeks to accommodate both instrumental and intrinsic, utilitarian and preservationist, by reconceiving the character of the thing protected in terms of its ecological nature. Because wilderness is a system, its aspects are multifarious. If its aspects are many, then it should follow that the wilderness can accommodate many uses. This it can do, but only through the satisfaction of one major premise: the wilderness system is what counts in the decisions that are made with respect to wilderness management and use. This significance, pursuant to an ecosystems or transboundary approach, can and should be written into substantive wilderness law.

The systemic preservation of wild lands, like the preservation of biodiversity and general trends in ecosystem management of nonwilderness

176. Freyfogle, *supra* note 173, at 840.

public lands, incorporates and depends on the principle of the mutual responsibility of all whose actions and decisions affect wild lands.[177] Through responsibility to wilderness systems which are by their nature unconfined by the artificial boundaries placed around them, uses and development in adjacent areas may be pursued to the extent that the wilderness character of the area on the inside of the line remains unimpaired.

IV. CONCLUSION

> In his association with the wilderness he spent three centuries taming, the [modern] American grew accustomed to being close to nature. Now that he has tamed so much of it, he misses it.[178]

The paradox that is the modern American has given rise to the conflicting values that are embodied in wilderness law. Having outgrown, to a certain extent, notions that wild nature exists solely as something to be conquered, we encouraged our leaders to preserve what we once freely enjoyed, because after having enjoyed so much of it, we were loath to watch it disappear.

The Wilderness Act manifests this reluctance. It provides for selection and designation of wilderness and for a National Wilderness Preservation System, intended to protect wild lands so that they may be used and enjoyed by present and future generations, subject only to one overriding requirement: their wilderness character may not be degraded or impaired. What the Wilderness Act did not do, however, was to consider the systems-character of the wild lands it set aside. It failed to give substantive legal recognition to the principle that wilderness character cannot be compartmentalized or preserved within boundaries superimposed on the landscape of wild nature by the law. It failed to comprehend that its own intended purpose could not be achieved according to its mechanisms for the use and control of wild lands.

Despite its flaws, the passage of the Wilderness Act is an enormous step in an insightful direction because it succeeds in preserving designated areas of wild, pristine nature in their primeval state. Thus, despite internal statutory ambiguity and inconsistency, that we have wild lands at all is attributable to the Wilderness Act. Just as the Wilderness Act was a response to a concern that wild nature was receiving insufficient protection from encroaching human society, the time is ripe, again, for legislative rejuvenation. The Act itself provides grounds to sharpen its substantive provisions in light of scientific advances and an emerging trend toward the recognition of an expanded human obligation to the natural world. With a shift in perspective, wilderness law

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177. *See* Keiter, *supra* note 23, at 330.
178. McCloskey, *supra* note 7, at 292.

and its administrators can move in the direction of ecosystems protection. Its defining terms can be unified through basic ecological principles. Its management provisions can be reformulated to reflect this conceptual shift. Multiple uses and natural value *can* co-exist in wilderness law.

An ecosystems or transboundary approach to wilderness preservation through which systems accountability to wild lands is achieved will likely not pass quietly into law. At the time of its initial enactment the Wilderness Act was a battle hard won.[179] Similarly, in enacting newly conceived systems accountability to the wilderness, interest groups and legislators will again stand in opposition, pitting wilderness values and wilderness uses against each other. Yet, accountability to wild lands as biological systems fits within existing wilderness law and is required if the law is to achieve its primary objective: the preservation of an enduring resource of wilderness.

> Planning to ensure nonimpairment of ecosystems is directly related to sustainability and community stability; without healthy, functioning ecological systems as the resource base, public land communities cannot hope to achieve long term stability.[180]

Leann Foster

179. *See generally* ALLIN, *supra* note 5 (discussing the legislative history of the Wilderness Act).
180. Keiter, *supra* note 23, at 331 n.213.