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Preface

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Preface

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PREFACE

*Robert B. Keiter**

Little did I know when I first visited Yellowstone National Park during a 1967 summer cross-country trip with a college buddy that the park would occupy such a significant role in my professional and personal life. Nor did I know that we were experiencing the end of an era when my buddy pulled into a turn-off to see why several cars were gathered there. It quickly became obvious when the bear ambled up to our top down convertible and reared up against my passenger-side door, meeting me face to face, by which time we were encircled by other cars filled with curious onlookers. The brief yet jolting encounter—accentuated by the outsized claws extending across the car door—ended without incident when I realized the bear was after food and tossed some leftover popcorn to it. But the incident left a lasting impression, one that was only enhanced when the next morning we were regaled at our campsite by a loquacious forest ranger about the dangers posed by the region's grizzly bears.

Of course, much has transpired since then, just as much occurred before then to bring the bear to the park roadside as a tourist attraction. My own personal journey eventually took me to the University of Wyoming College of Law, where I had the opportunity to study Yellowstone and other national parks in an effort to understand how the law might be employed to protect these special places from an outside world that was rapidly closing in, even on a park as large and remote as Yellowstone.¹ Since then, Yellowstone has continued to evolve in response to changing conditions, new knowledge, and emerging values. Annual visitation has climbed from 2.2 million in 1967 to more than 4.8 million in 2021.² After

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¹ See, e.g., Robert B. Keiter, *On Protecting National Parks from the External Threats Dilemma*, 20 LAND & WATER L. REV. 355 (1985); Joseph L. Sax & Robert B. Keiter, *Glacier National Park and Its Neighbors: A Study of Federal Interagency Relations*, 14 ECOLOGY L.Q. 207 (1987); Robert B. Keiter, *Taking Account of the Ecosystem on the Public Domain: Law and Ecology in the Greater Yellowstone Region*, 60 U. COLO. L. REV. 923 (1989).

² *Park Reports: Annual Park Recreation Visits (1904–Last Calendar Year)*, NAT'L PARK SERV.,

plummeting, grizzly bears numbers have rebounded,³ wolves are once more roaming the park,⁴ and bison are plentiful, though, like the wolves, not warmly welcomed when migrating outside the park.⁵ These changes, however, are but part of the larger arc of change that Yellowstone has experienced during its 150-year history.

Indeed, what would the 42nd Congress of the United States and President Ulysses S. Grant think today of the Yellowstone public park that they enshrined in law 150 years ago? Could they have imagined that their actions setting aside nearly two million acres in the Wyoming Territory as a “public park or pleasuring ground” would spawn a world-wide movement to establish similar parks designed to conserve the natural world for the enjoyment of present and future generations? Or that the Yellowstone legislation was the first step in the establishment of an American national park system that now numbers 423 units, spans all 50 states, and covers more than 85 million acres?⁶ And would they have believed that the Yellowstone of 1872 would still appear, a century and a half later, much as it did in their day, harboring the same suite of wildlife that roamed the landscape then? Or that millions of people would annually visit the park, many coming from outside the United States?

On March 1, 1872, President Ulysses S. Grant signed the bill that created the nation’s—and the world’s—first national park, establishing a conservation legacy that endures today and continues to expand as we edge deeper into the 21st century.⁷ Though much has changed in the interim, Yellowstone National Park continues to stand as a testament to the foresight and wisdom of our forebears, who dared to preserve from settlement this unique and spectacular landscape at a time when the nation was rushing westward intent on taming the wilderness. To ensure preservation, the establishment of Yellowstone not only ignored, but displaced the region’s native inhabitants,⁸ putting a moral stain on what was otherwise

<https://irma.nps.gov/STATS/Reports/Park/YELL> [<https://perma.cc/GY4A-8W74>] (last visited Apr. 29, 2022).

³ See *Crow Indian Tribe v. United States*, 965 F.3d 662, 669–70 (9th Cir. 2020).

⁴ See THOMAS McNAMEE, *THE RETURN OF THE WOLF TO YELLOWSTONE* (1997); HANK FISCHER, *WOLF WARS: THE REMARKABLE INSIDE STORY OF THE RESTORATION OF WOLVES TO YELLOWSTONE* (1995).

⁵ See KURT REPANSHEK, *RE-BISONING THE WEST: RESTORING AN AMERICAN ICON TO THE LANDSCAPE* 119 (2019).

⁶ *National Park System*, NAT’L PARK SERV., <https://www.nps.gov/aboutus/national-park-system.htm#:~:text=The%20National%20Park%20Service%20manages,of%20Columbia%2C%20and%20US%20territories> [<https://perma.cc/YL98-T9ES>] (last visited Apr. 29, 2022).

⁷ Act of Mar. 1, 1872, ch. 24, § 2, 17 Stat. 32 (codified as amended at 16 U.S.C. §§ 21–22).

⁸ ROBERT H. KELLER & MICHAEL F. TUREK, *AMERICAN INDIANS AND NATIONAL PARKS* 22–25 (1998); MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* 57–60, 64, 68 (1999); PHILIP BURNHAM, *INDIAN COUNTRY, GOD’S COUNTRY: NATIVE AMERICANS AND THE NATIONAL PARKS* 21–26 (2000).

a farsighted act of forbearance and a profound commitment to protecting the nation's natural splendor.

It is hard to imagine that the three states bordering Yellowstone today—Wyoming, Montana, and Idaho—were remote, little-known territories in 1872. Or that few Euro-Americans had ever set foot in this land of geysers, thermal pools, elk, and grizzly bears. The new congressionally defined boundaries initially did little, however, to deter local residents from intruding into the park to poach wild game or to stop curious visitors from degrading the park's thermal features.⁹ But after the U.S. Cavalry arrived in August 1886, the soldiers soon secured the park from such trespasses and began the process of establishing roads for the expected visitors, who initially arrived by railroad and toured the park on horseback or wagons.¹⁰ The new park's military caretakers not only provided protection for the park's resident wildlife, but are credited with saving the plains bison from extinction.¹¹

Fifty years later, by the early 1920s, much had changed in Yellowstone but the basic commitment to preservation remained firm. In 1916, Congress adopted the National Parks Organic Act,¹² both establishing the national park system and creating the National Park Service (NPS) to oversee Yellowstone and a handful of other national parks that Congress had legislated during the intervening years.¹³ This new organic legislation instructed the NPS to manage the national parks “to conserve the scenery, the natural and historic objects, and wild life in the System units and to provide for the enjoyment of the [same] . . . by such means as will leave them unimpaired for the enjoyment of future generations.”¹⁴ Under the inaugural leadership of Stephen Mather, the new NPS extended a welcoming hand to visitors, eager to bring people into the national parks. Soon many were arriving in the increasingly popular automobile, placing new demands on the nascent park system.¹⁵ To accommodate its visitors, Yellowstone constructed hotels, upgraded roads, and built campgrounds, often without much knowledge or regard for the environmental or aesthetic impact.¹⁶ To safeguard the scenic setting, the NPS

⁹ AUBREY L. HAINES, *THE YELLOWSTONE STORY: A HISTORY OF OUR FIRST NATIONAL PARK*, VOL. ONE 301–03 (1977).

¹⁰ PAUL SCHULLERY, *SEARCHING FOR YELLOWSTONE: ECOLOGY AND WONDER IN THE LAST WILDERNESS* 112–18 (1997); *see also* H. DUANE HAMPTON, *HOW THE U.S. CAVALRY SAVED OUR NATIONAL PARK* 81–94 (1971).

¹¹ HAMPTON, *supra* note 10, at 165–67.

¹² National Park Service Organic Act, ch. 408, 39 Stat. 535 (1916) (codified as amended at 54 U.S.C.).

¹³ ALFRED RUNTE, *NATIONAL PARKS: THE AMERICAN EXPERIENCE* 43–45, 76 (4th ed. 2010).

¹⁴ 54 U.S.C. § 100101 (formerly codified at 16 U.S.C. § 1).

¹⁵ ROBERT B. KEITER, *TO CONSERVE UNIMPAIRED: THE EVOLUTION OF THE NATIONAL PARK IDEA* 42–47 (2013). *See generally* PAUL S. SUTTER, *DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT* (2002).

¹⁶ RICHARD WEST SELLARS, *PRESERVING NATURE IN THE NATIONAL PARKS* 19–20, 29 (1997).

extinguished wildfires and sought to make the park's wildlife available for public viewing, fencing the park's bison at the Buffalo Ranch, eradicating wolves that were deemed a menace to the "good animals" that visitors preferred, and providing nightly bear-viewing spectacles at hotel garbage dumps.¹⁷

Fast forward another 50 years, and profound changes were afoot across the national park system. Having endured the Great Depression and World War II, Yellowstone and other parks were soon awash in visitors. As families began flooding the parks while the nation recovered from the war effort, the NPS undertook Mission 66 to mark its 50-year anniversary.¹⁸ Congress appropriated the necessary funds to enable the agency to construct and upgrade visitor facilities across the system, helping spur visitation to the point that some decried the advent of "industrial tourism."¹⁹ At the same time, Congress was rapidly adding new units to the system to accommodate the burgeoning public demand for outdoor recreational opportunities.²⁰ Moreover, the environmental movement emerged with the inaugural Earth Day celebration and an array of new, science-based environmental laws that have forever changed the way that the NPS and other federal agencies conduct themselves.²¹

During this same period, events at Yellowstone prompted a fundamental shift in national park resource management policies. In response to the public outcry over Yellowstone's practice of dispatching park rangers to annually cull (or shoot) its excess elk to prevent overgrazing on the northern range, Secretary of Interior Stewart Udall enlisted a group of distinguished scientists to review wildlife management policy in the national parks.²² Their groundbreaking report—dubbed the Leopold Report after A. Starker Leopold, the group's chair—recommended that the NPS begin allowing nature to take its course in the national parks with minimal human intervention.²³ The report argued that the parks should represent "a vignette of primitive America," where dynamic natural processes like fire and predation were generally unimpeded.²⁴ The report also admonished the NPS to employ scientific knowledge to manage wildlife and other resources, rather than

¹⁷ KEITER, *supra* note 15, at 176; SELLARS, *supra* note 16, at 82–84.

¹⁸ SELLARS, *supra* note 16, at 180–91. *See generally* CONRAD L. WIRTH, PARKS, POLITICS, AND THE PEOPLE (1980).

¹⁹ EDWARD ABBEY, DESERT SOLITAIRE: A SEASON IN THE WILDERNESS 39–59 (1968).

²⁰ KEITER, *supra* note 15, at 237–40; SELLARS, *supra* note 16, at 205.

²¹ SELLARS, *supra* note 16, at 233–43.

²² KEITER, *supra* note 15, at 148–52; SELLARS, *supra* note 16, at 195–201, 214–17.

²³ A. S. LEOPOLD ET AL., ADVISORY BD. ON WILDLIFE MGMT., WILDLIFE MANAGEMENT IN THE NATIONAL PARKS 6 (Mar. 4, 1963), http://npshistory.com/publications/leopold_report.pdf [<https://perma.cc/PJV7-BN9R>]

²⁴ *Id.* at 3, 4.

continue its practice of maintaining an attractive but static scenic setting,²⁵ which the agency's own historian later derisively labelled "façade management."²⁶

As the next 50 years rolled by, Yellowstone regularly found itself on the front line in the transition to this new, science-based resource management paradigm. The challenges have been daunting and inevitably controversial. By the time the NPS published its 1980 *State of the Parks* report,²⁷ it was evident that even our large national parks were not islands and could not be separated from the surrounding landscape.²⁸ In fact, the report found that Yellowstone and other parks faced an array of threats—logging, mining, energy exploration, and road construction—to its wellbeing emanating from outside the park's boundaries.²⁹ And it was evident that the park formed the core of a larger wildland complex that soon became known as the Greater Yellowstone Ecosystem (GYE), which now encompasses at least 20 million acres of intermixed federal, state, tribal, and private lands extending across three states and still in a relatively natural condition.³⁰ Not only has the GYE idea taken hold, but the related ecosystem management concept has been effectively embraced within the region's federal agencies, helping to curtail extractive resource development activity in the region's national forests.³¹ The park's elk, bison, and grizzly bears roam widely across this larger landscape, following seasonal migration patterns and dispersal instincts, confirming just how interconnected the landscape is while presenting difficult resource management coordination questions.

Within Yellowstone, park officials have faced a series of issues that have tested the limits of the agency's revised resource management policies. The 1988 fires, some of which were initially allowed to burn unchecked under the new policy, severely tested the park's evolving natural process management approach, which was ultimately reconfirmed after emotions cooled and political recriminations faded.³² In 1995, following a lengthy political-legal struggle, the extirpated wolf was reintroduced into Yellowstone, restoring an apex predator to the ecosystem, but also riling relations with nearby landowners.³³ A lengthy and intense battle

²⁵ *Id.* at 3.

²⁶ SELLARS, *supra* note 16, at 4–5, 90.

²⁷ NAT'L PARK SERV., STATE OF THE PARKS, 1980: A REPORT TO CONGRESS, <http://npshistory.com/publications/management/state-of-the-parks-1980.pdf> [<https://perma.cc/TXU3-DDUW>].

²⁸ KEITER, *supra* note 15, at 203–15.

²⁹ *Id.*; see also RICK REESE, GREATER YELLOWSTONE: THE NATIONAL PARK AND ADJACENT WILDLANDS 79–99 (1984).

³⁰ Robert B. Keiter, *The Greater Yellowstone Ecosystem Revisited: Law, Science, and the Pursuit of Ecosystem Management in an Iconic Landscape*, 91 U. COLO. L. REV. 1, 8–21, 170 (2020) [hereinafter Keiter, *The Greater Yellowstone Ecosystem Revisited*].

³¹ *Id.* at 96–124.

³² ROCKY BARKER, SCORCHED EARTH: HOW THE FIRES OF YELLOWSTONE CHANGED AMERICA (2005); MICAH MORRISON, FIRE IN PARADISE: THE YELLOWSTONE FIRES AND THE POLITICS OF ENVIRONMENTALISM (1993).

³³ MCNAMEE, *supra* note 4, at 106; HANK FISCHER, *supra* note 4, at 157.

over unregulated snowmobile access to the park and related environmental impacts brought into focus the question of appropriate recreational activity in the national park setting.³⁴ The recent upsurge in visitation is squarely raising the question whether the NPS should consider limiting or regulating visitor numbers or automobiles, particularly in heavily trafficked areas.³⁵ Notwithstanding these often heated controversies, the park remains generally healthy and ecologically intact, though still confronting an array of internal and external pressures.

As we settle into the 21st century, Yellowstone faces several new as well as lingering challenges as it moves inexorably forward toward its 2072 bicentennial year. Wildlife concerns involving grizzlies, wolves, and migratory ungulates continue to bedevil Yellowstone officials, who must coordinate their management goals and strategies with agencies and landowners outside the park whose interests may not align with the park's preservation agenda.³⁶ Rising visitation numbers show no sign of receding soon, which calls upon the NPS to consider ways to alleviate crowding and related environmental damage.³⁷ Having been originally excluded from the park, Native American tribes have begun actively invoking their sovereign status to seek meaningful input into park management matters to safeguard sacred sites, acknowledge their historic presence on the landscape, and press lingering grievances. Overshadowing these matters is the threat posed by climate change, which may well require significant adjustments to current national park resource management policies.³⁸

The articles in this *Wyoming Law Review* issue celebrating Yellowstone National Park's sesquicentennial anniversary address several of these challenges, not only bringing much-needed attention to them but also presenting potential solutions. Professor Sam Kalen's article sketching Yellowstone's early history reminds us that the park landscape was originally utilized by various Native American tribes who were not part of the decision-making process that led to the park's establishment. He reviews the early Euro-American connections with the park landscape and the principal events proceeding Congress's 1872 decision to establish the park. His narrative also describes early efforts to promote park visitation and to manage the new park's wildlife and other resources. Notably, he highlights early proposals to

³⁴ MICHAEL J. YOCHIM, *YELLOWSTONE AND THE SNOWMOBILE: LOCKING HORNS OVER NATIONAL PARK USE* 72–74 (2009).

³⁵ Keiter, *The Greater Yellowstone Ecosystem Revisited*, *supra* note 30, at 44–46.

³⁶ *Id.* at 169–75.

³⁷ Todd Wilkinson, *Booming Tourism Becomes a Stress Test for Yellowstone*, NAT'L GEOGRAPHIC (May 2016), <https://www.nationalgeographic.com/magazine/article/yellowstone-national-parks-tourism> [<https://perma.cc/5ASY-WZX3>]; Keiter, *The Greater Yellowstone Ecosystem Revisited*, *supra* note 30, at 44–46.

³⁸ STEVEN HOSTETLER ET AL., *GREATER YELLOWSTONE CLIMATE ASSESSMENT: PAST, PRESENT, AND FUTURE CLIMATE CHANGE IN GREATER YELLOWSTONE WATERSHEDS* (2021), <https://gyclimate.org/> [<https://perma.cc/839A-XKTJ>]; NAT'L PARK SERV. ADVISORY BD. SCI. COMM., *REVISITING LEOPOLD: RESOURCE STEWARDSHIP IN THE NATIONAL PARKS* 4–5 (2012), https://www.nps.gov/calltoaction/PDF/LeopoldReport_2012.pdf [<https://perma.cc/82EN-Q3ML>].

expand Yellowstone to address wildlife habitat concerns, an effort that represents the origins of our current understanding that the park sits at the vital core of the GYE. Professor Kalen supports his summary account of these critical events in Yellowstone's evolution with extensive references containing a wealth of sources to consult for additional historical detail about the park.

Professors Arthur Middleton, Temple Stoellinger, and their coauthors explore the multifaceted issues involved in conserving Yellowstone's migratory wildlife as they annually move from the park onto private lands following ancestral migration patterns. The article begins by describing land ownership patterns and trends in the GYE, explaining that recent changes have brought a new type of landowner to the area, one who is attracted to its wildlife and recreational values. Using the grizzly bear and elk as examples, the article examines the complex legal regime governing wildlife management in the GYE, highlighting the principal laws applicable to private landowners as well as their ethical responsibilities toward wildlife. After outlining the federal and state regulatory constraints imposed upon the GYE's ranchers and other landowners, the authors review an array of voluntary approaches available to promote wildlife conservation on private lands, including such new concepts as habitat leases and occupancy agreements—both designed to compensate landowners for making their property available to area wildlife. The article concludes by reinforcing the need for greater coordination across the GYE to meet the needs of the park's migratory and dispersing animals.

Former University of Wyoming law professor Bob Keiter—also the author of this preface—addresses the heated controversies involving Yellowstone's grizzly bears and wolves, two charismatic animals originally regarded as predators but today the objects of major federal ecological restoration efforts. The article first describes how federal law governing wildlife has evolved, highlighting the Endangered Species Act of 1973, which gave the federal government responsibility over wildlife facing extinction, effectively displacing the states from their traditional management role for those species. It then reviews the federally overseen efforts to recover Yellowstone's dwindling grizzly population and to reintroduce long-extirpated wolves to the park. Although the region's grizzly population has rebounded, the courts have rebuffed efforts to return management of the bears to the states, which are again pressing to delist the Yellowstone area bears. Wolves, however, have been returned to state management, but recent changes to Montana and Idaho state law governing wolf hunting and trapping have raised serious concerns not only about the wolf's future but also about the future of the grizzly bear were it returned to state control. Of particular concern is the lack of meaningful coordination and the states' unwillingness to limit hunting adjacent to Yellowstone and Grand Teton National Parks, where both animals are primary attractions for park visitors.

Professor Sharon Buccino seeks to reinvigorate park planning through use of the Master Plan process in Yellowstone and elsewhere. The article focuses on visitation at Yellowstone and the need to bring broader demographic diversity to Yellowstone, one reflecting the racial characteristics of the nation today. At the same time, the author acknowledges the need to regulate visitation to prevent overcrowding in key locations as well as environmental harm. Describing Yellowstone's earlier Master

Plans in some detail, she argues that these plans provide a succinct roadmap for how the park should address today's intertwined visitor experience and environmental degradation problems. She envisions a simpler, NEPA-based planning process that includes public involvement and results in more flexible plans that can be adapted to changing conditions. To illustrate Yellowstone's planning challenges and opportunities, she reviews the park's experience with the snowmobiling and cell tower planning processes, encouraging park officials to learn from these experiences when confronting the park's imminent visitor issues.

The multi-authored article—*Re-indigenizing Yellowstone*—explores the long relationship between Native American tribes and the park, arguing for a stronger association between the two.³⁹ The authors describe the historical connections between Indigenous people and the Yellowstone landscape, as well as the treaties and other legal relationships that have since defined the tribes' relationship with the park. Taking a broad perspective, the article sets forth several examples of how national park-tribal relationships have evolved in recent years, highlighting collaborative management examples that have afforded Native Americans a more significant role in park programs and resource management. It then describes how Yellowstone's relationship with tribes connected to the park have evolved during the past 150 years, concluding by promoting the need for mutual trust and meaningful partnership opportunities. Such an approach, the authors argue, is not only a matter of social justice but would also help improve park management through the use of traditional ecological knowledge.

The next article, by Travis Jordan, a Wyoming senior assistant attorney general, details the history surrounding Yellowstone's unique federal court. The park's earliest caretakers recognized the need for a legal system designed to protect the park's wildlife, thermal features, and visitors. That vision mostly languished until Wyoming secured statehood in 1890, when Congress vested exclusive jurisdiction over the park in the federal government, which was followed by appointment of a U.S. Commissioner to administer justice there. Since then, the commissioners, followed in 1968 by U.S. Magistrate Judges, have overseen misdemeanor cases in the park involving poaching, traffic offenses, and park regulation violations, while felony cases have been transferred to the U.S. District Court in Cheyenne. While reviewing this judicial history, the article recounts some of the colorful and unusual legal cases that have arisen in the park. In a twist of fate, Iowa judge John Lacey, after being victimized during a 1887 stagecoach robbery in Yellowstone, was elected a few years later to Congress, where he first sponsored the Yellowstone Game Protection Act of 1894 and then the Lacey Act of 1900, which criminalized the possession and transport of illegally taken wildlife, fish, and plants. What emerges from the article is a clear sense that the traditions established by the park's early judicial officials have largely persisted over time as Yellowstone prepares to welcome its first female magistrate judge.

³⁹ The authors for *Re-indigenizing Yellowstone* are: Kekek Jason Stark, Autumn L. Bernhardt, Monte Mills, and Jason Robison.

This Yellowstone issue of the Wyoming Law Review concludes with an insightful article by UW student Jenna VonHofe exploring the legal liabilities associated with national park search and rescue operations. The topic is particularly timely given the growing number of visitors seeking recreational opportunities and adventure in the national parks. The NPS routinely performs search and rescue operations to aid visitors in distress, annually undertaking more than 4,000 such missions at an average annual cost of nearly four million dollars. Courts have generally relieved the NPS of tort liability when performing search and rescue operations, while also rarely imposing costs on those being rescued. That is changing, however, as reflected in a recent Tenth Circuit decision holding that visitors engaging in “reckless behavior” can be held accountable for rescue operation costs.⁴⁰ After surveying how various states address search and rescue costs, the article endorses a narrow application of disorderly conduct liability for search and rescue missions in national parks.

Taken together, the articles capture Yellowstone’s ongoing evolution as a national park, including several challenges confronting the park in today’s world. It is doubtful that those who conceived and established Yellowstone in 1872 could imagine what the park has become or its extraordinary national and international impact. They would surely be pleased that it remains in relatively sound ecological health and attracts legions of visitors drawn to the unique features and abundant wildlife that compelled them to protect it as a “public park.” Although park management policies have sparked controversy and change over the years, few have questioned the wisdom of the initial designation or bemoaned the national park movement it spawned. As is evident from the articles here, Yellowstone has never existed in isolation; rather, it is properly regarded as part of a larger geographic and historic landscape. Simply put, the extended GYE landscape has become the focus for ongoing conservation efforts, which require a heightened commitment to social justice as well as coordination at all levels. To meet the challenges ahead, we must thus demonstrate the same level of commitment, foresight, and adaptability as those who have bequeathed us this remarkable natural and cultural landscape.

⁴⁰ United States v. Lantis, 17 F.4th 35 (10th Cir. 2021).



Stream Winding Back Toward Geyser, "Central Geysers Basin, Yellowstone National Park," Wyoming, *in* Ansel Adams Photographs of National Parks and Monuments, 1941–1942 (National Archives and Records Administration).