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Rekindling Yellowstone's Early History: 150 Years Later

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Rekindling Yellowstone's Early History: 150 Years Later

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REKINDLING YELLOWSTONE'S EARLY HISTORY: 150 YEARS LATER

*Sam Kalen**

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I. INTRODUCTION

A “land of burning ground” or “vapors” are both apt names today for what we call Yellowstone National Park (YNP).¹ Twenty-seven Indigenous peoples have ancestral connections to this majestic region,² part of the approximately 20 million acre Greater Yellowstone Ecosystem (GYE),³ rising over 7,500 feet in elevation and spanning lands in Wyoming, Montana, and Idaho.⁴ This vast expanse is the home not only of YNP, but also Grand Teton National Park (GTNP), five national forests—some designated as wilderness areas or wilderness study areas—three national wildlife refuges, notably including the National Elk Refuge, designated

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¹ Ken Sims & Cole Messa, “*Land of the Burning Ground*”: *The History and Traditions of Indigenous People in Yellowstone*, U.S. GEOLOGICAL SURV. (July 25, 2021), <https://www.usgs.gov/observatories/yvo/news/land-burning-ground-history-and-traditions-indigenous-people-yellowstone> [<https://perma.cc/473X-GB9X>]; see also BRUCE T. GOURLEY, HISTORIC YELLOWSTONE NATIONAL PARK: THE STORIES BEHIND THE WORLD'S FIRST NATIONAL PARK 26 (2022).

² *Yellowstone: Associated Tribes*, NAT'L PARK SERV., <https://www.nps.gov/yell/learn/historyculture/associatedtribes.htm> [<https://perma.cc/YBM5-ZYCY>] (last visited Apr. 23, 2022).

³ NAT'L PARK SERV., YELLOWSTONE RESOURCES AND ISSUES HANDBOOK 54 (2019) <http://npshistory.com/publications/yell/handbook/2019.pdf> [<https://perma.cc/K7DJ-CJSX>].

⁴ *Yellowstone: Greater Yellowstone Ecosystem*, NAT'L PARK SERV., <https://www.nps.gov/yell/>

wild and scenic rivers, Bureau of Land Management (BLM) lands, along with state, local, and private lands.⁵ In 2022, the YNP celebrates its sesquicentennial birthday. It is, after all, our nation's prototypal national park; 150 years later seems like an opportune moment to recall some of its history.

Yellowstone and the larger GYE, after all, exemplify some of the modern challenges confronting public land management. Yellowstone and other parks emerged as recreation sites for travelers seeking an escape from the bustling urban, industrial life.⁶ And now visitorship in national parks is overwhelming the National Park Service (NPS).⁷ Within the GYE, and at Yellowstone specifically, the constant flow of human traffic is at all-time highs.⁸ This symposium presents some of those issues and modern challenges.

My goal here, however, is slightly different. It is to look back on the park's early years, what led to its creation and expansion, and visiting some of the principal issues and concerns. This history is not intended to be comprehensive, but instead is geared toward offering at least a sufficient story of YNP's illustrious history. Hopefully, the references to the sources will afford the interested reader insights into where to search for additional information. Part I of the article, therefore, briefly reviews the human landscape surrounding what would become Yellowstone, while Part II moves beyond the human landscape and into the exploration of that landscape that eventually led to the park's creation. Part III then describes some of the park's early challenges, including the efforts to expand protections around the park.

learn/nature/greater-yellowstone-ecosystem.htm [https://perma.cc/XN69-EC54] (last visited Apr. 23, 2022).

⁵ For an excellent examination of the various aspects of the GYE, see 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 (2020); Tara Righetti, Robert B. Keiter, Jason Robison, Temple Stoellinger, Sam Kalen, *Unbecoming Adversaries: Natural Resources Federalism in Wyoming*, 21 WYO. L. REV. 289, 293–308, 316 (2021).

⁶ See *infra* notes 55–107 and accompanying text.

⁷ Prior to the pandemic, visitorship in parks declined somewhat in 2018, but attendance nevertheless was the third highest record year since 1904. *Yellowstone: 2018–Visitation Statistics*, NAT'L PARK SERV. (Feb. 6, 2019), <https://www.nps.gov/yell/learn/news/19001.htm> [https://perma.cc/6EFY-F37P]. Previously, 2016 was a record-breaking year for national parks. Corbin Hiar, *It's Official—A Record Breaking Year for Park Visits*, E&E NEWS (Feb. 17, 2016, 4:17 PM), <https://subscriber.politicopro.com/article/eenews/2016/02/17/its-official-a-record-breaking-year-for-park-visits-080698>. Visitation during the pandemic in 2020 declined from the prior year. Rob Hotakainen, *National Park Attendance Took a Big Hit in 2020*, E&E NEWS (Feb. 25, 2021, 4:20 PM), <https://subscriber.politicopro.com/article/eenews/2021/02/25/national-park-attendance-took-a-big-hit-in-2020-004952>.

⁸ Many expected that 2021 would shatter earlier records. Rob Hotakainen, *Yellowstone's 2nd COVID Summer: "Maybe the Busiest Year"*, E&E NEWS (Mar. 22, 2021, 1:41 PM), <https://subscriber.politicopro.com/article/eenews/2021/03/22/yellowstones-2nd-covid-summer-maybe-the-busiest-year-004028>; *Yellowstone Sets Tourism Record for May*, E&E NEWS (June 14, 2021, 1:31 PM), <https://subscriber.politicopro.com/article/eenews/2021/06/14/yellowstone-sets-tourism-record-for-may-000778>. Nearby, Grand Teton too experienced record numbers. *Grand Teton Joins Yellowstone in Breaking Tourism Records*, AP NEWS (Oct. 20, 2021), <https://apnews.com/article/lifestyle-travel-environment-and-nature-wyoming-parks-37b194ff9d6a22492d695ca451857f82>.

II. THE HUMAN LANDSCAPE

Professors Stark, Bernhardt, Mills, and Robison describe the relationship between Indigenous peoples and the GYE, portraying their connection to the landscape.⁹ After all, prior to colonization, Indigenous peoples naturally interacted with the landscape surrounding today's YNP. Unfortunately, we sometimes too easily ignore how many groups actively engaged in activities that protected or transformed the landscape, whether through farming, fire practices, or mining. Emma Harris, for instance, notes how Indigenous practices included “prescribed burns,” or how hunting and harvesting managed a landscape.¹⁰ In Yellowstone, Indigenous groups took advantage of the resources, whether its mountains, rivers, lakes, or geysers. Indeed, historical records reveal that mining obsidian from Yellowstone dates back centuries.¹¹ Karl Jacoby describes how Yellowstone was “part of a preexisting native world,” with a “network of Indian trails lacing” what would become a national park.¹² Several Tribal Nations, for example, used the Bannock Trail to move between the Snake River region to eastern bison hunting grounds.¹³ As archeologist Douglas MacDonald notes, not visible to modern Yellowstone

⁹ Kekek Stark et al., *Re-Indigenizing Yellowstone*, 22 WYO. L. REV. 397 (2022).

¹⁰ EMMA MARRIS, *WILD SOULS: FREEDOM AND FLOURISHING IN THE NON-HUMAN WORLD* 63 (2021). Marris further suggests that the portrayal of Indigenous groups as having no impact on the landscape and, as such, were simply existing in a “virgin wilderness,” “has been used around the world to deny Indigenous people rights to their land.” *Id.* at 64. Shephard Krech III attempts to explore how some indigenous groups interacted with the landscape and resources, in SHEPARD KRECH III, *THE ECOLOGICAL INDIAN: MYTH AND HISTORY* (1999), while Adam R. Hodge chronicles the history of the Shoshones. ADAM R. HODGE, *ECOLOGY AND ETHNOGENESIS: AN ENVIRONMENTAL HISTORY OF THE WIND RIVER SHOSHONES, 1000–1868* (2019). See also TORY TAILOR, *ON THE TRAIL OF THE MOUNTAIN SHOSHONE SHEEP EATERS: A HIGH ALTITUDE ARCHEOLOGICAL AND ANTHROPOLOGICAL ODYSSEY* (2017). Karl Jacoby notes how “Native Americans used fire for multiple purposes: to keep down underbrush, facilitating travel; to rid camping areas of insect pests; and to aid in hunting.” KARL JACOBY, *CRIMES AGAINST NATURE: SQUATTERS, POACHERS, THIEVES, AND THE HIDDEN HISTORY OF AMERICAN CONSERVATION* 86 (2001).

¹¹ DOUGLAS H. MACDONALD, *BEFORE YELLOWSTONE: NATIVE AMERICAN ARCHAEOLOGY IN THE NATIONAL PARK* 4, 14, 83 (2018); see also PAUL SCHULLERY, *SEARCHING FOR YELLOWSTONE: ECOLOGY AND WONDER IN THE LAST WILDERNESS* 15 (1997) (dating obsidian trade back to “more than 10,000 years”); W. ANDREW MARCUS ET AL., *ATLAS OF YELLOWSTONE* 15–17 (2012) (noting well-organized trade between 1,800 and 2,200 years ago); MARK DAVID SPENCE, *DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS* 43–44 (1999). An official guide for Grand Teton National Park dates obsidian mining and campfires back to at least eight thousand years ago. CHARLES CRAIGHEAD, *HISTORY OF GRAND TETON NATIONAL PARK: PEOPLE IN THE LANDSCAPE* 6 (2006).

¹² JACOBY, *supra* note 10, at 83. Although contemporary park proponents would diminish the relationship of Indigenous peoples to the landscape, “[p]erceptive nineteenth-century observers found the Yellowstone landscape saturated with traces of these Indian groups,” such as with “abandoned Indian shelters.” *Id.* at 84. Jacoby posits that, because “[n]either the Bannock, the Shone, the Crow, nor the Blackfeet practiced agriculture, and seeing no landscapes in the Yellowstone region that had been ‘improved’ through farming, many Euro-Americans conveniently concluded that the area’s Indians” lacked a connection to the landscape. *Id.* at 85.

¹³ MACDONALD, *supra* note 11, at 11. Some 26 Tribal Nations generally are considered as “traditionally associated” to the Yellowstone region. MARCUS ET AL., *supra* note 11, at 17.

tourists are “hundreds of camps and other sites that were used by Native Americans over the past 11,000 years.”¹⁴

By the post-Civil War period, a group of Blackfoot people lived north of the Yellowstone River, while the Crows populated areas around the Yellowstone River and into Wyoming near the Powder River and the Absaroka-Wind River mountain range.¹⁵ To the west were the Shoshonis, who shared areas going south into Utah with the Bannocks.¹⁶ The Indigenous people often discussed as residing on the Yellowstone Plateau were the *Tukudikas*, a group of Shoshone commonly referred to as the Sheep Eaters.¹⁷ This group maintained its old lifestyle, less influenced by the use of horses and guns.¹⁸ Somewhat further from the area, were the Flatheads and the Nez Perce Indians. Sadly, the government never acknowledged any claims to the land for those who lived on the plateau, and so the Sheep Eaters were left with an unratified treaty in 1868.¹⁹ They, along with other groups, were removed to reservations, primarily to either Fort Washakie on the Wind River Reservation or to the Fort Hall Reservation on the Snake River Reservation, while other Bannocks and Idaho Sheep Eaters went to the Lemhi Reservation.²⁰

The presence of Indigenous groups would necessarily become one of the principal “issues” surrounding the establishment of the nation’s first national park. Jacoby’s history suggests that “[t]he vision of nature that the park backer’s sought

¹⁴ MACDONALD, *supra* note 11, at 23.

¹⁵ *Yellowstone: Associated Tribes*, *supra* note 2.

¹⁶ A number of distinct indigenous groups inhabited the region, today many of these groups often are broadly identified as Shoshones. See HODGE, *supra* note 10, at 162–63. A Forest Service commissioned history also discusses, along with a history of the region, early interactions between settlers and Tribal Nations. ESTHER B. ALLAN, HISTORY OF TETON NATIONAL FOREST (1973), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd534131.pdf [<https://perma.cc/936L-XQ6E>].

¹⁷ See HODGE, *supra* note 10, at 158–59 (noting debate about whether this group of Shoshones were permanent residents); MARCUS ET AL., *supra* note 11, at 18–19.

¹⁸ Philip Burnham writes how, as Yellowstone’s attractiveness increased, this group “moved from being a curiosity to a nuisance to an impediment.” PHILIP BURNHAM, INDIAN COUNTRY, GOD’S COUNTRY: NATIVE AMERICANS AND THE NATIONAL PARKS 22 (2000); see also SPENCE, *supra* note 11, at 108 (discussing Indian removal at Yellowstone). In 1876, for instance, Congress established military posts at certain points in Yellowstone. Act of July 22, 1876, ch. 223, 19 Stat. 95.

¹⁹ Lori Ann Edmo, *Tribal Members Learn About Unratified Virginia City Treaty*, SHO-BAN NEWS, http://shobannews.com/local_sb0722a01wd.html [<https://perma.cc/G582-BFLH>] (last visited Mar. 23, 2022). Professor Orlan Svingen and others have identified and examined the history surrounding this unratified treaty, with the mixed band of “Shoshones, Bannacks [sic], and Sheepeaters,” which would have relinquished all claims in exchange for land at the “Point of Rocks,” on the north of the Salmon River, about twelve miles above Fort Lemhi.” Treaty with Shoshones, Bannacks, and Sheepeaters, September 24, 1868 (unratified), in 5 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 707–08 (1941). For this history, see Naka Productions, *In Good Faith*, VIMEO (Aug. 23, 2018), <https://vimeo.com/286414136>.

²⁰ AUBREY L. HAINES, THE YELLOWSTONE STORY: A HISTORY OF OUR FIRST NATIONAL PARK, VOL. ONE 29 (rev. ed. 1996); see also BURNHAM, *supra* note 18, at 22–24.

to enact—nature as pre-human wilderness—was predicated on eliminating any Indian presence from the Yellowstone landscape.”²¹

III. ESTABLISHING A NATIONAL PARK AROUND THE LANDSCAPE

Against this background, Yellowstone’s principal historian, Aubrey Haines, describes how fur trappers began exploring and constructing outposts in the Yellowstone region following the Lewis and Clark Expedition, but active engagement with the region started roughly during the 1820s.²² This ostensibly is when the first account of Yellowstone reached eastern readers.²³ It also marked the initial principal interactions between new westerners and the Indigenous groups. As the fur trade dissipated by the 1840s, the allure of mining gold later attracted miners to the region, roughly around the 1860s,²⁴ but “[t]he prospectors and miners of the 1860s formed a transient population, forever on the go. Converging upon each new discovery in great numbers, they overtaxed both the source of mineral wealth and the available supplies, so that the lack of income and ruinous prices soon forced the majority to move on.”²⁵ Though riches from gold mining proved elusive, the stories about the Yellowstone region circulated widely.²⁶ One of the first significant mining expeditions, led by Walter Washington de Lacy in 1863, mapped part of the region and spread the word about the region’s topography and hot springs—but no gold.²⁷ That same year, another expedition explored further downstream of the headwaters where de Lacy navigated, precipitating a later gold strike at Alder Gulch.²⁸ Soon thereafter, prospecting moved farther away from Yellowstone plateau and into other areas in Montana. While David E. Folsom, an employee of a hydraulic mining company, did take a small crew into the region in 1869, there was only a limited circulation of the expedition’s account to the lay public, but it

²¹ JACOBY, *supra* note 10, at 87; *see also* Rob Hotakainen, *Tribes Hope for a ‘Reboot’ as Yellowstone Marks 150 Years*, E&E NEWS (Mar. 1, 2022, 1:31 PM) (describing the history and current efforts “to do ‘bigger and better things together’ with local tribes in the future”).

²² HAINES, *supra* note 20, at 34–44; *see also* AUBREY L. HAINES, *THE YELLOWSTONE STORY: A HISTORY OF OUR FIRST NATIONAL PARK, VOL. TWO* (rev. ed. 1996). For other accounts of this early period, *see* ROBERT B. BETTS, *ALONG THE RAMPARTS OF THE TETONS: THE SAGA OF JACKSON HOLE, WYOMING* 31–76 (1978); MARK H. BROWN, *THE PLAINSMEN OF THE YELLOWSTONE: A HISTORY OF THE YELLOWSTONE BASIN* 19–40, 58–109, 125–39 (1961); SCHULLERY, *supra* note 11; *see also* GOURLEY, *supra* note 1. For the first principal book recounting the history of Yellowstone, *see* HIRAM MARTIN CHITTENDEN, *THE YELLOWSTONE NATIONAL PARK: HISTORICAL AND DESCRIPTIVE* (1895). Coulter Bay is named after trapper John Colter, who travelled through the region between 1806 and 1808, while Jackson Lake is named after David Jackson who reportedly camped along the lake in 1829.

²³ HAINES, *supra* note 20, at 41.

²⁴ *Id.* at 9, 62.

²⁵ *Id.* at 62.

²⁶ *Id.* at 62–65.

²⁷ *Id.* at 65.

²⁸ *Id.* at 67, 73.

was in time to inform General Henry D. Washburn's 1870 expedition.²⁹ Thus, by 1870, "[t]he Yellowstone region was . . . explored quite thoroughly"³⁰ and had been reasonably described for would-be visitors.³¹

The 1870 Washburn party would set in motion the events that triggered the park's creation. When the expedition members returned from their journey, the ensuing articles garnered a following. Indeed, the renowned artist Thomas Moran was enticed to visit the region.³² One member of the party, Nathaniel P. Langford, also began lecturing about the region and, while controversy surrounds exactly what he advocated, some have suggested that he floated the idea of preserving the area. He purportedly proposed that Congress ought to "secure" "its future appropriation to the public use."³³ Later, in 1905, Langford would publish his *Discovery of Yellowstone Park*.³⁴ Some of those who attended Mr. Langford's lecture in Washington, D.C. included Speaker of the House, James G. Blaine, and the head of the U.S. Geological Survey, Ferdinand V. Hayden, although they did not attend the lecture when the idea of preserving the area was floated.³⁵ The

²⁹ *Id.* at 91–103; see also KIM ALLEN SCOTT, *YELLOWSTONE DENIED: THE LIFE OF GUSTAVUS CHEYNEY DOANE* (2007) (describing the life of one of the party's military participants and later acting superintendent of the park); Letter from the Sec'y of War, Communicating the Report of Lieutenant Gustavus C. Doane upon the So-Called Yellowstone Expedition of 1870, in S. Exec. Doc. No. 41-51 (1871) (report of expedition); W. Turrentine Jackson, *The Washburn-Doane Expedition into the Upper Yellowstone, 1870*, 10 PAC. HIST. REV. 189, 206 (1941) (reporting on the expedition, the Helena Herald published accounts alerting not only Montanans but the "reading public throughout the country" of the valley's wonders); *The Falls and Geysers of the Yellowstone River*, DAILY CENTRAL CITY REGISTER, Nov. 30, 1870. See generally, M. MARK MILLER, *REDISCOVERING WONDERLAND: THE EXPEDITION THAT LAUNCHED YELLOWSTONE NATIONAL PARK* (2022).

³⁰ HAINES, *supra* note 20, at 82, 84.

³¹ *Id.* at 91.

³² *Id.* at 137.

³³ *Id.* at 134–38.

³⁴ NATHANIEL PITT LANGFORD, *THE DISCOVERY OF YELLOWSTONE PARK* (1905) (reproduced in 1972 with a foreword by Aubrey Haines). Langford's interest in Yellowstone reportedly was piqued by an article by David E. Folsom, from the earlier expedition. DENNIS DRABELLE, *THE POWER OF SCENERY: FREDERICK LAW OLDMSTED AND THE ORIGIN OF NATIONAL PARKS* 121, 129–33 (2021) (describing the likely history about when the notion of Yellowstone as a national park first surfaced). Langford posits that the first germination of the national park idea occurred with Judge Cornelius Hedges, from Montana, who published articles advocating for protection. LANGFORD, *supra* note 34, at xliii. Langford suggests he repeated that plea during his Washington, D.C. lecture before Hayden's involvement, and offers a purported letter supporting his claim from the principal drafter of the park's legislation. *Id.* at xlv–xlviii. Aubrey Haines, however, intimates otherwise. HAINES, *supra* note 20, at 138.

³⁵ HAINES, *supra* note 20, at 138. Hayden was a scientist capable of translating scientific discoveries into politically understandable language. DRABELLE, *supra* note 34, at 142. But the famed explorer and geologist John Wesley Powell disliked Hayden's apparent pandering. See *id.* at 162 (noting Donald Worster's assessment); *cf. id.* (as did Harvard President Charles William Elliot). Hayden reportedly first became interested in the Yellowstone region in the 1850s, while he was exploring the upper Missouri region. U.S. GEOLOGICAL SURV., FERDINAND VANDIVEER HAYDEN AND THE FOUNDING OF THE YELLOWSTONE NATIONAL PARK 5 (1973) [hereinafter U.S.G.S. Hayden]; see also Dennis Drabelle, *The Man Who Put Yellowstone on the Map*, THE PENN. GAZETTE (Aug. 25, 2016), <https://thepenngazette.com/the-man-who-put-yellowstone-on-the-map/> [https://

description of the region intrigued Hayden and, with the support from those who favored the Northern Pacific Railroad, he received \$40,000 from Congress to explore Yellowstone.³⁶ Hayden's 1871 expedition had the full support of the bustling railroad industry and Congress, and his party was joined by Omaha photographer William H. Jackson and the painter Thomas Moran.³⁷ The railroad interests were so excited that, upon Hayden's return to Washington, D.C. on October 27, 1871, a letter awaited his arrival suggesting that the area be reserved similar to Yosemite Valley.³⁸ Two days later, the idea of creating a national reserve was officially launched.³⁹ Hayden, along with a group of influential people in Montana and the railroad surrogates, worked collectively to create a tourist destination that would be protected from private exploitation.⁴⁰

The notion of "reserves," or what we now label as parks, surfaced at least as early as the artist George Catlin painted vivid scenes of the west and Indigenous groups, pleading through his words and art that the nation reserve these lands as a park for both the Native Nations and the wildlife.⁴¹ The torch passed to literary artists such as Ralph Waldo Emerson and Henry David Thoreau, whose transcendentalists

perma.cc/8V6A-6MXQ]. For the report of the upper Missouri and Yellowstone River exploration, see Report of the Sec'y of War, Communicating, In compliance with a Resolution of the Senate of February 13, 1866, the Report of Brevet Brigadier General W. F. Raynolds, on the Exploration of the Yellowstone and the Country Drained by that River, *in* S. Exec. Doc. No. 40-77 (1867).

³⁶ HAINES, *supra* note 20, at 141.

³⁷ *Id.* at 142, 153. To learn more about Hayden's relationship with Jackson and Moran, and his support for promoting the railroad, see DRABELLE, *supra* note 34, at 142–57, 158. Pictures of Yellowstone helped Hayden's entreaty to Congress, *id.* at 154, and accounts of his expedition were widely circulated. See, e.g., *News from Professor Hayden's Expedition*, UNION AND DAKOTAIAN, Sept. 20, 1871; *The Hayden Geological Survey: Wonderful Geysers—Great Falls, Beautiful Yellowstone*, WISC. STATE REGISTER, Oct. 14, 1871; *The Yellowstone*, CLEVELAND MORNING DAILY HER., Apr. 15, 1871; Henry W. Elliott, *The Yellowstone Expedition*, CLEVELAND MORNING DAILY HER., Aug. 31, 1871. A report of the journals and letters surrounding the expedition has since been published. *YELLOWSTONE AND THE GREAT WEST: JOURNALS, LETTERS, AND IMAGES FROM THE 1871 HAYDEN EXPEDITION* (Marlene Deahl Merrill ed., 1999). According to some, William H. Jackson's photographs were invaluable in furthering the cause. U.S.G.S. Hayden, *supra* note 35, at 29.

³⁸ HAINES, *supra* note 20, at 155, 164.

³⁹ *Id.* at 164.

⁴⁰ *Id.* at 165. Hayden produced a "500-page report" that detailed "the findings of his party" and "presented this report, Jackson's photos and Moran's sketches and paintings to Senators, Congressmen, his superiors in the Interior Department and nearly anyone else who could possibly influence the founding of a park." U.S.G.S. HAYDEN, *supra* note 35, at 17.

⁴¹ HAINES, *supra* note 20, at 161; see also DOUGLAS BRINKLEY, *THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA* 4 (2009). As Sarah Krakoff notes, Catlin and transcendentalists "aligned Native people with wilderness and uncivilized nature, and saw parks as a way to preserve both." Sarah Krakoff, *Public Lands, Conservation, and the Possibility of Justice*, 53 HARV. C.R.-C.L. REV. 213, 231 (2018). In the early 1800s, for instance, Congress reserved certain timber resources for the Navy. Act of Mar. 1, 1817, ch. 22, 3 Stat. 347. In 1832, Congress reserved the Hot Springs Reservation, which later became a park in 1921. Act of Mar. 4, 1921, ch. 161, 41 Stat. 1407 (codified as amended at 16 U.S.C. §§ 361–374). When Congress was considering Yellowstone legislation, Catlin's vision surfaced as something to consider. See *The Proposed National Park in the Yellowstone Country*, FRANK LESLIE'S ILLUS. NEWS., Mar. 2, 1872, at 398.

writings poetically moved the nation's appreciation for nature or "wilderness" a bit further away from its formerly utilitarian, Lockean roots.⁴² But those utilitarian roots remained strong with Frederick Law Olmstead, the landscape architect who engineered New York City's City Park and then traveled to California to champion protecting Yosemite's scenery.⁴³ In 1864, Congress ceded the Yosemite land to California to protect the area for its public enjoyment in perpetuity.⁴⁴

The Yosemite model could not be replicated, however, because much of the Yellowstone land was in Wyoming, which had become a territory in 1868; this meant following the Yosemite model, but with the twist that the land would be in federal ownership.⁴⁵ Kansas Senator Samuel Clarke Pomeroy introduced the first bill to establish the park in December 1871.⁴⁶ As one news account claimed, he sought "to have this region of unparalleled wonders dedicated to the nation at once, to prevent it falling into the hands of squatters and unscrupulous land speculators."⁴⁷ Meanwhile, Hayden sought to attract support by displaying artifacts and photographs, along with Thomas Moran's sketches, at the Capitol.⁴⁸ Only California Senator Cornelius Cole objected, questioning the need for the legislation and favored allowing private appropriation by settlers. His objection became muted, however, once the other side assured him its creation could always be rescinded if it later became problematic.⁴⁹ It is clear that railroad interests promoted the reserve for traffic along its route to get would-be tourists to use, resort, and recreate. And with the assurance that the park's creation would not cost the federal government any money for at least several years,⁵⁰ the legislation passed and was signed into

⁴² JOHN CLAYTON, *NATURAL RIVALS: JOHN MUIR, GIFFORD PINCHOT, AND THE CREATION OF AMERICA'S PUBLIC LANDS* 21 (2019) (explaining how "[t]ranscendentalists believed in the inherent goodness of people and nature, the corrupting influence of society, and thus the need for individuals to be self-reliant to achieve purity").

⁴³ HAINES, *supra* note 20, at 162. For descriptions of Olmsted's influence, see DRABELLE, *supra* note 34; WITOLD RYBCZYNSKI, *A CLEARING IN THE DISTANCE: FREDERICK LAW OLNSTED AND AMERICA IN THE NINETEENTH CENTURY* (1999).

⁴⁴ Act of June 30, 1864, ch. 184, 13 Stat. 325 (codified as amended at 16 U.S.C. § 48); *see also* DRABELLE, *supra* note 34, at 61–114; *HANDBOOK OF YOSEMITE NATIONAL PARK* (Ansel F. Hall ed., 1921) (collecting early articles about Yosemite). Though the land surrounding Yosemite had not been surveyed by the 1860s and, consequently, had not become available under the preemption law, an attempt to obtain title to lands in the valley produced an opinion by the Court rejecting the notion of acquiring vested rights upon mere occupation and improvement of public lands. *Hutchings v. Low (The Yosemite Valley Case)*, 82 U.S. (15 Wall.) 77 (1872). *See generally* ROBERT O. BINNEWIES, *YOUR YOSEMITE: A THREATENED PUBLIC TREASURE* (2015) (former Yosemite superintendent describing the park's history and challenges).

⁴⁵ HAINES, *supra* note 20, at 166. The twist of federal ownership then triggered early dialogues about the need to do the same with Yosemite. *See The Impending Doom of Yosemite*, WISC. STATE REG., Mar. 2, 1872 (reproducing *New York Times* article).

⁴⁶ DRABELLE, *supra* note 34, at 155.

⁴⁷ *Senator Pomeroy's Proposed National Park—The Wonders of the West* (reproduced from the *New York Herald*), WISC. STATE REGISTER, Feb. 24, 1872.

⁴⁸ HAINES, *supra* note 20, at 169.

⁴⁹ *Id.* at 169–70; *see also* DRABELLE, *supra* note 34, at 156.

law on March 1, 1872.⁵¹ It not only generally garnered praise, but also reflected the power of “market capitalism.”⁵² The first Superintendent, Langford, would soon report “[o]ur Government, having adopted [Yellowstone] should foster it and render it accessible to the people of all lands, who in the future will come in crowds to visit it.”⁵³ The Act’s language provided that this new place, Yellowstone, would be “dedicated and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people; and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom.”⁵⁴

IV. MANAGING AND ENLARGING THE LANDSCAPE

The park’s early years centered around efforts to promote tourism as it confronted a lack of funding, struggles surrounding the railroad industry and concessioners, occasional poor management, and a lack of adequate supervision and protection of resources, particularly the bison.⁵⁵ Hayden had promised Congress that the park would be financially supported by the railroads and its customer tourists—a veiled promise.⁵⁶ Instead, federal dollars ultimately rolled in and Montanans successfully lobbied for more roads through the park, such that in roughly a decade the area

⁵⁰ HAINES, *supra* note 20, at 179.

⁵¹ H.R. REP. NO. 42-26, at 1–2 (1872) (“In a few years this region will be a place of resort for all classes of people from all portions of the world.”). It would be “a great national park or pleasure-ground for the benefit and enjoyment of the people.” U.S.G.S. HAYDEN, *supra* note 35, at 20, 25. And for the first five years Congress was assured it would cost nothing. CLAYTON, *supra* note 42, at 106–07.

⁵² DRABELLE, *supra* note 34, at 158.

⁵³ HAINES, *supra* note 20, at 192. A 1930s history of the park would emphasize the park’s role as a pleasure (recreational) ground. LOUIS C. CRAMTON, EARLY HISTORY OF YELLOWSTONE NATIONAL PARK AND ITS RELATION TO NATIONAL PARK POLICIES 3 (1932) (written by the Special Attorney to the Secretary of the Interior).

⁵⁴ Act of Mar. 1, 1872, ch. 24, § 1, 17 Stat. 32 (codified as amended at 16 U.S.C. § 22).

⁵⁵ See DRABELLE, *supra* note 34, at 165–77. The park’s first appropriation occurred in 1878. *Id.* at 169. During the early years, the Yellowstone Park Improvement Company maintained a prized ten-year lease for some of the “park’s signature features,” which Congress diminished with the 1884 park appropriations language. *Id.* at 170, 172. Some of the early park superintendent reports addressed negotiations with the surrounding indigenous peoples, as well as the lack of adequate funding. P. W. NORRIS, ANNUAL REPORT OF THE SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR FOR THE YEAR 1880, at 1, 6, 7 (1881) [hereinafter, all annual reports for Yellowstone National Park are cited as [Author], [Year] SUPERINTENDENT’S REPORT]. Superintendent Norris, moreover, feared the prospect of continued vandalism, as nearby lands witnessed increased population growth. *Id.* at 52. Subsequent reports, once the park began to receive funds, focused on roads, housing, facilities in the park, and preventing fires. See, e.g., D. W. WEAR, REPORT OF THE SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 4 (1886). For a description of the park’s early years by two park historians, see KIKI LEIGH RYDELL & MARY SHIVERS CULPIN, YCR-2006-03, MANAGING THE “MATCHLESS WONDERS”: A HISTORY OF ADMINISTRATIVE DEVELOPMENT IN YELLOWSTONE NATIONAL PARK, 1872–1965 (2006), <https://www.nps.gov/yell/learn/historyculture/upload/MatchlessWonders.pdf> [<https://perma.cc/PKW3-ETDL>].

went from 32 miles of roads and 108 miles of trails to 153 miles of roads and 204 miles of trails.⁵⁷ By the turn of the century, enough privately operated transportation companies could accommodate all those who sought to travel through the park.⁵⁸ But to facilitate construction of park facilities and to manage the protection of park resources, Congress in 1883 enlisted the U.S. Army with supervising the struggling park.⁵⁹ The park's early years were further marred by what Aubrey Haines describes as “the First Yellowstone war,” with the railroads and the “commercial enterprises they spawned” as the protagonists.⁶⁰ Hiram Chittenden's 1895 book on Yellowstone

⁵⁶ DRABELLE, *supra* note 34, at 165. While the park experienced incidents with a group from the non-treaty Nez Perce Nation, *id.* at 166–67, early observers noted how the Native Americans and their culture were threatened with extinction. With the Shoshones on the Wind River Reservation dependent upon the Indian Service as the wildlife population (buffalo, elk, deer or antelope) had become severely depleted, and the “Sheep Eater” band of the Snakes along with the Bannocks had been relocated to reservations near the Salmon River and the Snake River—with “no game in their country except a few mountain sheep . . .” The Nez Perce, Crow, Blackfeet and others seemed to be doing better. *The Indian Tribes: Their Numbers, Wealth and Power—Present Condition, Prospects., etc.*, DAILY EVEN. BULL., Sept. 28, 1871. Native American incursions into the park, according to Jacoby, also left Yellowstone managers concerned with the Native American presence. JACOBY, *supra* note 10, at 88–92.

⁵⁷ HAINES, *supra* note 20, at 214, 243, 246. Prior to 1877, there were no more than five hundred visitors annually. *Id.* at 196. Of course, the railroad industry, particularly the Union Pacific Railway (and Jay Cooke & Co.), had financial troubles that delayed additional construction of railway lines for potential visitors, but those troubles eased by the end of the 1870s. *Id.* at 194; *see also* DRABELLE, *supra* note 34, at 159–61. Indeed, lower visitation rates in 1887 than the previous year were attributed to issues with the railroads. MOSES HARRIS, REPORT OF THE SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 5 (1887). And the desire to construct more roads reflected the sentiment that the park was to be “open and render[ed] accessible to all.” *Id.* at 10; *see also* GEORGE S. ANDERSON, REPORT OF THE ACTING SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 3–4, 7 (1895) (discussing increase in the road system). Later lower visitation rates than expected were attributed to increased American recreation abroad and lack of awareness. GEORGE S. ANDERSON, REPORT OF THE ACTING SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 5 (1896). And the Park continued to complain of inadequate funding for road construction and maintenance. *Id.* at 8. Visitation rates increased in 1897. JAMES B. ERWIN, REPORT OF THE ACTING SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 5 (1898).

⁵⁸ S. B. M. YOUNG, ANNUAL REPORT OF THE SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 9 (1907). Most of the visitors entered through the main gate, on the north, at the Gardiner station, with the second most by the Madison River, to the west, at the Riverside station, the latter was expected to increase with the addition of a railroad spur. *Id.* at 10. 1902 witnessed the first automobile in the park. SCHULLERY, *supra* note 11, at 134. Yet, the first officially allowed car did not enter the park until 1915. DRABELLE, *supra* note 34, at 174; *see also* HAINES, *supra* note 22, at 267, 269 (noting April 1915 communication authorizing cars in the park); ROBERT SHANKLAND, STEVE MATHER OF THE NATIONAL PARKS 64–66 (3d ed. 1970) (describing how Mather set up a commission to examine motorized use and that Yellowstone was the last park to allow motorized vehicles, initially opposed by threatened concessioners).

⁵⁹ Act of Mar. 3, 1883, ch. 143, 22 Stat. 603, 626–27. (“The Secretary of War . . . is hereby authorized and directed to make the necessary details of troops to prevent trespassers or intruders from entering the park for the purpose of destroying the game objects of curiosity therein . . .”). The Army could protect park resources against poachers as well as construct and refine the park infrastructure and roads. SCHULLERY, *supra* note 11, at 108–18. John Muir reportedly “rejoiced” at having the Army become involved. JACOBY, *supra* note 10, at 99. The Army also could channel tourists by controlling entrances and managing trails. *Id.* at 107–08.

warned about the evil that would accompany allowing one railroad inside the park, and emphasized the urgency of protecting park resources.⁶¹ The railroads wanted lines in the park and concessioners joined with the railroads in promoting tourism (and securing leases). Park supporters conversely wanted enlarged park boundaries, and by 1883, a crusade to protect threatened wildlife resources began to blossom.⁶²

Protecting wildlife, though, became problematic. Surrounding states allowed killing wandering wildlife that left the park's boundaries.⁶³ When, for instance, Wyoming entered the union, its laws could not protect the bison because the federal government retained exclusive jurisdiction over wildlife resources.⁶⁴ Not until 1894 would Congress pass the Yellowstone Game Protection Act (1894 Lacey Act), prohibiting killing bison in the park.⁶⁵ Indeed, the bison that had once numbered roughly 60 million head had dwindled to under 600 by 1886, with roughly 22 head in 1893—later increased to about 273 head in 1916, primarily as a consequence of concerted efforts.⁶⁶ During Langford's tenure as park superintendent, Interior Secretary Delano championed protecting the large ungulates in the park.⁶⁷ But little progress occurred during Langford or his successor Philetus W. Norris's supervision, although Norris promoted having the park serve as a center for wildlife.⁶⁸ Yet,

⁶⁰ HAINES, *supra* note 22, at 30. On August 3, 1894, Congress passed legislation authorizing the issuances of ten-year term leases in the park and allowing existing lessees to convert their leases under the new legislation. Act of Aug. 3, 1894, ch. 198, 28 Stat. 222, *amended* by Act of June 4, 1906, ch. 2570, 34 Stat. 207, Act of Mar. 2, 1907, ch. 2518, 34 Stat. 1219 (increasing term to twenty years).

⁶¹ CHITTENDEN, *supra* note 22, at 270–84.

⁶² HAINES, *supra* note 22, at 30–99. Many of these issues remained into the next century, while additional ones surfaced, such as Park Service Director Steve Mather's fight against the use of the water in Yellowstone for irrigation. *See* SHANKLAND, *supra* note 58, at 212–15; *see also id.* at 114–27 (discussing issues with concessioners in Yellowstone).

⁶³ Montana, in 1901, passed a temporary measure to prevent killing antelope. HAINES, *supra* note 22, at 83. An 1883 Order prohibited killing some park wildlife, although not wolves or bears, and there was little ability to enforce regulatory prohibitions. *Id.* at 80, 97.

⁶⁴ An Act to Provide for the Admission of the State of Wyoming into the Union, ch. 664, § 2, 26 Stat. 222 (July 10, 1890). In 1884, Wyoming's territorial assembly had “place[d] the park under Wyoming jurisdiction, an action that gave the Department of the Interior's regulations at Yellowstone the force of law in Wyoming”, but this was insufficient to address poaching. JACOBY, *supra* note 10, at 97.

⁶⁵ Act of May 7, 1894, ch. 72, 28 Stat. 73 (codified as amended at 16 U.S.C. §§ 24–30a). The bill easily passed Congress once senators became assured that the legislation did not address park boundaries or railroads. 26 CONG. REC. 4315 (1894). After 1894 when Congress passed the legislation prohibiting killing animals in the park, reportedly this “had a most healthy effect upon the poachers who surround and prey on the Park.” ANDERSON, 1895 SUPERINTENDENT'S REPORT, *supra* note 57, at 11.

⁶⁶ DRABELLE, *supra* note 34, at 175. The story of the near extinction of the buffalo on the western range is well documented. Yet, in articles by David Smits and William Dobak, the two debate whether the loss of the buffalo resulted from a deliberate policy “to subjugate the Plain Indians.” David D. Smits, *The Frontier Army and the Destruction of the Buffalo, 1865–1883*, 25 W. HIST. Q. 313 (1994); William A. Dobak, *The Army and the Buffalo: A Demur: A Response to David D. Smits's “The Frontier Army and the Destruction of the Buffalo: 1865–1883”*, 26 W. HIST. Q. 197

once the Smithsonian and others began to recognize the need for action to protect the bison, park management (starting principally with its 1899 superintendent Captain Frazier Boutelle) lamented the need for increased funding and protection of park resources.⁶⁹ The channel between Yellowstone and the Smithsonian, by the 1890s, resulted in a sort of wildlife reserve, albeit limited, in Yellowstone, with animals arguably awaiting shipment back east.⁷⁰ “After 1894, those seeking American wildlife specimens would have to look elsewhere or, for the first time, face stiff penalties and some real time in the Fort Yellowstone jail, built later that year for that specific purpose.”⁷¹

(1995). Dobak seems correct that hunting and innovations in tanning (and possibly sport) rather than a deliberate policy drove the decimation. See M. Scott Taylor, *Buffalo Hunt: International Trade and the Virtual Extinction of the North American Bison*, 101 AM. ECON. REV. 3162 (2011); BROWN, *supra* note 22, at 362–69. A similar fate confronted the pronghorn, with an 1880 report observing “[n]o other animal has suffered such severe slaughter, not alone within the Park, but upon the great plains, below the Gate of the Mountains, and upon the Yellowstone, where in their migrations they were wont to winter.” NORRIS, 1880 SUPERINTENDENT’S REPORT, *supra* note 55, at 40. Oddly, the report of the bison omitted such a lament. *Id.* at 38; cf. WEAR, 1886 SUPERINTENDENT’S REPORT, *supra* note 55, at 4 (suggesting “more game in the Park now of every kind than was ever known before”), at 8 (suggesting an abundance of game). By 1895, however, with the nearby state of Idaho allowing hunting bison, the Park reported on the “now so nearly extinct” bison and urgency of “game protective measures.” ANDERSON, 1895 SUPERINTENDENT’S REPORT, *supra* note 57, at 12. In 1897, the Park estimated that there were only twenty-four buffalo left in the park. S. B. M. YOUNG, REPORT OF THE ACTING SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 8 (1897). That number increased to fifty the next year. ERWIN, 1898 SUPERINTENDENT’S REPORT, *supra* note 57, at 11. The following year the Park lacked information on the number and whether they were increasing. OSCAR J. BROWN, REPORT OF THE ACTING SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 7 (1899); cf. GEORGE W. GOODE, REPORT OF THE ACTING SUPERINTENDENT OF THE YELLOWSTONE NATIONAL PARK TO THE SECRETARY OF THE INTERIOR 8 (1900) (suggesting possibly thirty-nine head of buffalo, in 1900). See generally HAINES, *supra* note 22, at 59–60 (noting differing numbers and suggesting they effectively were guesses); SCHULLERY, *supra* note 11, at 220–27, 232 (noting difficulty with scientific research surrounding ungulates pre-twentieth century).

⁶⁷ See DIANE SMITH, *YELLOWSTONE AND THE SMITHSONIAN: CENTERS OF WILDLIFE CONSERVATION* 31 (2017) [hereinafter *Yellowstone and the Smithsonian*]. The first game keeper (often called a ranger) in the park was in 1880. *Id.* at 36. In 1880, he pleaded for establishing a small police force to protect the park’s wildlife from tourists and mountaineers, and to enforce the park’s regulations. NORRIS, 1880 SUPERINTENDENT’S REPORT, *supra* note 55, at 50. A few years later, the superintendent would report on the “entire inadequacy of the laws to provide punishment for violations of the regulations for the protection of the Park.” WEAR, 1886 SUPERINTENDENT’S REPORT, *supra* note 55, at 4.

⁶⁸ *YELLOWSTONE AND THE SMITHSONIAN*, *supra* note 67, at 32–33. Though it never gained traction, the idea for the center, in the words of Diane Smith, was “that visitors would see living specimens of the same animals that the Smithsonian exhibited in its museum in Washington.” *Id.* at 34. Norris favored privatization of work inside the park. *Id.* at 39.

⁶⁹ *Id.* at 74–82.

⁷⁰ *Id.* at 92–93; see also ANDERSON, 1895 SUPERINTENDENT’S REPORT, *supra* note 57, at 13–14 (noting the Park’s receipt of three thousand dollars from the Smithsonian to help build an inclosure [sic] for a “small herd” to “keep them nearly in a state of nature” and for shipment to Washington, D.C.); HAINES, *supra* note 22, at 68–69 (discussing the Smithsonian project).

⁷¹ *YELLOWSTONE AND THE SMITHSONIAN*, *supra* note 67, at 101.

By the end of the century, however, the park was at a crossroads: Americans had to decide whether to protect the bison in a wildlife reserve, promote the bison to support the desire of the surrounding states for food and sport, or utilize the bison as a source of wildlife to support the Smithsonian or other institutions.⁷² Some in Washington, D.C. even considered Yellowstone as a possible zoological park.⁷³ The new superintendent in the 20th century choose the first option.⁷⁴ In the mold of Olmsted, he sought to create a manicured landscape,⁷⁵ even with “tame” wildlife readily observable.⁷⁶ And he “used patrols, supplemental feeding, and other management techniques to increase the park’s wildlife populations.”⁷⁷ Eventually, combined efforts to restore the bison population brought the species back from near extinction.⁷⁸ Of course, preservation and management of the bison remains a critical issue today in the GYE.

The nascent decades of the new century witnessed marketing efforts to attract tourists, the emergence of management planning and enhancing the park’s roads and facilities, along with plans for protecting wildlife and resources by expanding protected areas around Yellowstone. One of the park’s pre-eminent early superintendents, Horace Albright, echoed the importance of enhancing tourism and would later write that the park was “the world’s greatest museum of natural history,” welcoming travelers to explore “its roads, trails and paths; to its public automobile camp grounds, hotels and permanent camps.”⁷⁹ The railroad even published park tourism brochures.⁸⁰ “Roads,” though, Albright lamented, “were a constant source of exasperation to us at Yellowstone” as it sought to promote tourism.⁸¹ When he first arrived at Yellowstone, as a new superintendent for the

⁷² *Id.* at 115.

⁷³ *Id.* at 131.

⁷⁴ *Id.* at 116. The park began a captive breeding program, with “an overarching goal of transforming Yellowstone into a public pleasure ground with wildlife displays. Bison not corralled for public viewing would roam freely but only within the partially fences confines of the park.” *Id.* at 119. The notion of “corralling the remaining buffalo” lost favor by the end of the century. See YOUNG, 1897 SUPERINTENDENT’S REPORT, *supra* note 66, at 9.

⁷⁵ YELLOWSTONE AND THE SMITHSONIAN, *supra* note 67, at 121.

⁷⁶ *Id.* at 123.

⁷⁷ *Id.* at 125.

⁷⁸ Efforts included a bison restoration project, allowing Yellowstone managers to purchase and raise bison from private ranchers. See MARCUS ET AL., *supra* note 11, at 155 (discussing bison); SCHULLERY, *supra* note 11, at 120–21 (discussing saving the bison). For a history, see *History of Bison Management in Yellowstone*, NAT’L PARK SERV., <https://www.nps.gov/articles/bison-history-yellowstone.htm> [<https://perma.cc/LL3F-CCJP>] (last visited Apr. 15, 2022).

⁷⁹ J. E. HAYNES, HAYNES (NEW) GUIDE AND MOTORISTS COMPLETE ROAD LOG OF YELLOWSTONE NATIONAL PARK 5 (35th ed. 1923). Schullery describes this guide as “the park’s most famous, best loved guidebook.” SCHULLERY, *supra* note 11, at 141; see also HAINES, *supra* note 22, at 100 (discussing tourism).

⁸⁰ *E.g.*, Northern Pacific Railroad, Yellowstone National Park (1923–1928) (on file with author).

⁸¹ HORACE ALBRIGHT AS TOLD TO ROBERT CAHN, THE BIRTH OF THE NATIONAL PARK SERVICE: THE FOUNDING YEARS, 1913–33, at 195 (1985) [hereinafter Albright & Cahn].

park, he even touted tourism and the economic benefits of the park and possibly increasing park acreage—not appreciating how many in Jackson Hole apparently feared, in his words, “tourists cluttering up the area.”⁸²

But it would be precisely that, the area surrounding Yellowstone, that would capture considerable attention. The desire to expand park boundaries or at least establish buffer zones to protect wildlife animated many park supporters.⁸³ *Forest and Stream* ran an article in 1882 highlighting General Philip Sheridan’s proposal to expand the park to the east and south.⁸⁴ A Senate bill the next year proposing an expansion went nowhere, however.⁸⁵ Shortly thereafter, Yale educated United States Geological Survey geologist Arnold Hauge visited Yellowstone and he too began a campaign to expand the park. And by the 1890s, the “idea of a Grand Teton National Park surfaced with a burst of conservation energy.”⁸⁶ Following the 1891 passage of the General Revision Act (Forest Reserve Act),⁸⁷ Hauge, along with an attorney colleague, drafted a proposed presidential proclamation to create the 1.2 million acre Yellowstone Park Timber Land Reserve, with boundaries similar to those floated during the early 1880s.⁸⁸ Pursuant to Section 24 of the Act,⁸⁹ Presidential Proclamation 303 established the Yellowstone Park Timberland Reserve, establishing a buffer around part of the park.⁹⁰ Paul Schullery observed that, while the idea of having a greater Yellowstone surfaced in 1917, in the years following the Timberland Reserve “it was unclear whether these areas would become

⁸² *Id.* at 98. The surrounding areas in the 1890s had witnessed the rise of “discernable settlements” “at Jackson, Moose, Moran, Wilson, and Kelly.” ROBERT W. RIGHTER, *CRUCIBLE FOR CONSERVATION: THE STRUGGLE FOR GRAND TETON NATIONAL PARK* 6 (1982). Park visitation jumped from fifty-two thousand visitors in 1915 to roughly half a million by 1940, and well over a few million by the end of the century. SCHULLERY, *supra* note 11, at 135. And just between 1922 and 1923, visitorship rose from 98,223 to 138,352. RIGHTER, *supra* note 82, at 34.

⁸³ Robert Righter suggests that General Philip Sheridan first promoted a “Greater Yellowstone” in 1882. RIGHTER, *supra* note 82, at 22.

⁸⁴ CLAYTON, *supra* note 42, at 134.

⁸⁵ *Id.*

⁸⁶ RIGHTER, *supra* note 82, at 22.

⁸⁷ Act of Mar. 3, 1891, ch. 561, 26 Stat. 1095 (repealing Timber Culture Laws).

⁸⁸ CLAYTON, *supra* note 42, at 134–35, 138–39. A preservationist like John Muir, Hague “very much envisioned the reserve as a temporary status for land that needed to be included in the national park.” *Id.* at 139.

⁸⁹ 26 Stat. at 1108 (“That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.”).

⁹⁰ Proclamation 303—Withdrawal of Yellowstone Park Lands for Forest Reserve, Wyoming (Mar. 30 1891), <https://www.presidency.ucsb.edu/documents/proclamation-303-withdrawal-yellowstone-park-lands-for-forest-reserve-wyoming> [<https://perma.cc/98HK-CYZ7>]; Proclamation No. 17, 26 Stat. 1565 (Mar. 30, 1891). The name was changed to Yellowstone Forest Reserve.

part of the park.⁹¹ In 1898, however, park officials recommended legislation that would reserve areas toward the south to protect wildlife.⁹² As all this was occurring, elk wintering near Jackson Hole surfaced as a matter of concern, and a now century-old story would begin to unfold about how to best manage the elk population, both before and since the establishment of the National Elk Refuge in 1912.⁹³

Additional measures would further adjust park boundaries and lay the foundation for the eventual establishment of Grand Teton National Park in 1929.⁹⁴ At a conference in Yellowstone in 1915, Albright expressed his desire to protect the Tetons.⁹⁵ This, of course, was the year before Congress passed the National Park Service Organic Act. During the years following the Organic Act, Albright and others worked to expand Yellowstone.⁹⁶ Those who opposed the expansion, according to Righter, were mostly dude ranchers, livestock interests, and members of the Forest Service.⁹⁷ Things changed by the early 1920s, when conversations

Proclamation 473—Establishment of the Yellowstone Forest Reserve and the Teton Forest Reserve (May 22, 1902), <https://www.presidency.ucsb.edu/documents/proclamation-473-establishment-the-yellowstone-forest-reserve-and-the-teton-forest-reserve> [https://perma.cc/P4VV-UR2L]; Proclamation No. 19, 32 Stat. 1999 (May 22, 1902); *see also* HAINES, *supra* note 22, at 99. A 1905 proclamation further reserved lands around Yellowstone. Proclamation 559—Enlargement of the Yellowstone Forest Reserve, Wyoming, Montana, and Idaho (May 22, 1905), <https://www.presidency.ucsb.edu/documents/proclamation-559-enlargement-the-yellowstone-forest-reserve-wyoming-montana-and-idaho> [https://perma.cc/6R4H-ZYQM]; Proclamation, 34 Stat. 3049 (May 22, 1905).

⁹¹ SCHULLERY, *supra* note 11, at 200–02.

⁹² ERWIN, 1898 SUPERINTENDENT'S REPORT, *supra* note 57, at 10 (“I would also recommend that the necessary legislation be enacted, bringing the forest reserves bordering the park under the provision of the National Park protective Act, approved May 7, 1894, to preserve and protect the game.”).

⁹³ Act of Aug. 10, 1912, ch. 284, 37 Stat. 293 (codified as amended at 16 U.S.C. § 673); *see also* RIGHTER, *supra* note 82, at 8–9. The need for a coordinated unit management of elk surfaced during the early decades. HAINES, *supra* note 22, at 78. Having a park that would include Jackson Hole surfaced in 1897, as well, when “Colonel S. B. M. Young proposed extending the authority of the military to cover the migratory routes of the elk in Jackson Hole.” JOHN DAUGHERTY ET AL., A PLACE CALLED JACKSON HOLE: A HISTORIC RESOURCE STUDY OF GRAND TETON NATIONAL PARK, at ch. 17 (1999), <http://www.npshistory.com/publications/grte/hrs/chap17.htm> [https://perma.cc/7X8W-RL4X].

⁹⁴ At the start of the new century, public lands in the region were beginning to be removed from disposition. In 1902, President Roosevelt expanded protecting nearby lands by establishing the Yellowstone Forest Reserve. Proclamation No. 19, 32 Stat. 1999 (May 22, 1902); Proclamation No. 23, 32 Stat. 2006 (June 13, 1902). *See generally* DAUGHERTY ET AL., *supra* note 92, at prologue, https://www.nps.gov/parkhistory/online_books/grte2/hrs0c.htm [https://perma.cc/B8W9-CZLR]; *cf.* Pickett Act of 1910, ch. 421, 36 Stat. 847 1910 (“That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of . . . Wyoming . . . except by Act of Congress.”), *amended* by Act of Aug. 24, 1912, ch. 360, 37 Stat. 497.

⁹⁵ RIGHTER, *supra* note 82, at 27.

⁹⁶ *Id.* at 28.

⁹⁷ *Id.* at 29. According to the National Park Service, Horace “Albright’s papers from the early

surfaced about the possible use of the Antiquities Act to establish a monument.⁹⁸ In 1928, NPS Director Mather testified that extending the park's boundaries "has been a matter of study of at least 10 years."⁹⁹ Horace Albright, as well, would later reflect back on how "during 1927 and 1928, a great deal of my time had to go into the behind-the-scenes work on acquiring the lands for the proposed Grand Teton National Park."¹⁰⁰ The following year Congress responded and established Grand Teton National Park as a small 96,000 acre park.¹⁰¹

The next several decades would witness forces aligning to expand the park. "For 18 years," as reported in 1950, "recurrent efforts have been made to settle the matter to the satisfaction of the people of Teton County, Wyo., the people of the State of Wyoming, the State government, agencies of the Federal Government administering lands within Teton County" and to "settle[] a controversy which first arose late in the 1920's when John D. Rockefeller, Jr., sponsored the purchase in the name of the Snake River Land & Livestock Co." for eventual donation to the federal government for the park.¹⁰² Robert Righter's masterful book, *Crucible for Conservation*, chronicles how the Rockefeller Foundation (through the Snake River Land Company), Congress, and the Executive branch, worked alongside key players toward what would become the Jackson Hole plan, which culminated in expanding Grand Teton National Park.¹⁰³ President Roosevelt, for instance, propelled the issue when, on March 15, 1943, he issued Executive Order 2578 establishing the

1920s contain numerous letters concerning the economic dilemma of ranchers in Jackson Hole." DAUGHERTY ET AL., *supra* note 92, at ch. 17 (describing the forces for and against expansion).

⁹⁸ RIGHTER, *supra* note 82, at 104. In 1925, a special park service commission recommended establishing a small Grand Teton National Park and extending the "eastern boundary of Yellowstone to follow the crest of the Absaroka Mountains, including the land around the headwaters of the Yellowstone River." ALBRIGHT & CAHN, *supra* note 81, at 189.

⁹⁹ *Establishment of and Revision of Boundaries of Certain National Parks: Hearing Before the S. Comm. on Pub. Lands and Survs., Pursuant to S. Res. 237, 70th Cong. 5 (July 19, 1928)* (statement of Stephen T. Mather, Dir., Nat'l Park Serv.).

¹⁰⁰ ALBRIGHT & CAHN, *supra* note 81, at 214. "Beginning in 1927," according to a Park official guide, "several congressional acts began to close off homesteading, and by 1930, it was over." CRAIGHEAD, *supra* note 11, at 28. For a discussion of homesteading around Yellowstone, see DAUGHERTY ET AL., *supra* note 92, at ch. 8, https://www.nps.gov/parkhistory/online_books/grte2/hrs8.htm [<https://perma.cc/7KB4-UXUU>]. For a similar and detailed history of what occurred during this period, see *id.* at ch. 17, <http://www.npshistory.com/publications/grte/hrs/chap17.htm> [<https://perma.cc/7X8W-RL4X>].

¹⁰¹ Act of Feb. 26, 1929, ch. 331, 45 Stat. 1314 (repealed 1950); see also RIGHTER, *supra* note 82, at 33–40; ALBRIGHT & CAHN, *supra* note 81, at 215–17. The 1929 legislation applied the Park Service's Organic Act to the newly established park. § 2, 45 Stat. at 1316. It would be "dedicated and set apart as public park or pleasure ground for the benefit and enjoyment of the people of the United States." *Id.* § 1. The legislation also limited any new hotels, camps, or roads, except those pursuant to congressional appropriations. *Id.*

¹⁰² S. Report No. 81-1938, at 1 (1950); see also H.R. REPORT NO. 81-2910 (1950).

¹⁰³ RIGHTER, *supra* note 82, *passim*.

Jackson Hole National Monument.¹⁰⁴ After unsuccessful congressional efforts to overturn the designation, Wyoming challenged the designation in court. That challenge proved unsuccessful in *Wyoming v. Franke*.¹⁰⁵ And when Congress passed the park legislation in 1950,¹⁰⁶ President Truman remarked how “[t]he legislation provides a practical and equitable solution of the controversial issues which, in the past, have impeded effective use of the lands incorporated in the new Grand Teton National Park.”¹⁰⁷

V. CONCLUSION

Bernard DeVoto wrote a series of articles in the 1950s about how the national parks were plagued by too many visitors and not enough resources, suggesting the solution of possibly closing Yellowstone temporarily.¹⁰⁸ As Paul Schullery explains, management plans and policies had to be constantly adjusted to respond to these challenges.¹⁰⁹ The NPS would implicitly respond to DeVoto’s plea with the NPS’s Mission 66 program, and specifically for Yellowstone having a management staff with the goal of “effective presentation, interpretation, and protection of the resources.”¹¹⁰ The NPS would soon begin critically examining its management plans and analyzing how best to protect the park’s iconic resources and wildlife. For instance, should the NPS take seriously journalist Robert Cahn’s portrayal of Yellowstone with fewer roads and cars, and instead shuttle visitors by electric minibuses whose overnight stays at campgrounds might then be limited?¹¹¹

¹⁰⁴ Proclamation No. 2578, 8 Fed. Reg. 3277–79 (Mar. 18, 1943).

¹⁰⁵ 58 F. Supp. 890 (D. Wyo. 1945).

¹⁰⁶ Act of Sept. 14, 1950, ch. 950, 64 Stat. 849 (codified as amended at §§ 406d-1–406d-5). Notably, Congress also prohibited any further use of the Antiquities Act in Wyoming, and added lands to the National Elk Refuge and to the Teton National Forest.

¹⁰⁷ Statement by the President upon Signing Bill Establishing a New Grand Teton National Park (Sept. 14, 1950), <https://www.presidency.ucsb.edu/documents/statement-the-president-upon-signing-bill-establishing-new-grand-teton-national-park> [<https://perma.cc/264L-2SL8>]. For some subsequent legislation, see Grand Teton National Park Extension Act of 2007, Pub. L. 110-47, 121 Stat. 241; Grand Teton National Park Land Exchange Act, Pub. L. 108-32, 117 Stat. 779 (2003).

¹⁰⁸ See SCHULLERY, *supra* note 11, at 174–75 (describing the articles).

¹⁰⁹ *Id.* at 177, 180–87, 191.

¹¹⁰ *Id.*; see also RICHARD WEST SELLARS, PRESERVING NATURE IN THE NATIONAL PARKS: A HISTORY 180–203 (1997) (discussing Mission 66 and Park Service management issues during the post WWII period).

¹¹¹ SCHULLERY, *supra* note 11, at 191. Cahn’s articles appeared after the 1963 published Leopold Report. See A. S. LEOPOLD ET AL., ADVISORY BD. ON WILDLIFE MGMT., WILDLIFE MANAGEMENT IN THE NATIONAL PARKS (Mar. 4, 1963), http://npshistory.com/publications/leopold_report.pdf [<https://perma.cc/PJV7-BN9R>]; NAT’L PARK SYS. ADVISORY BD. SCI. COMM., REVISITING LEOPOLD: RESOURCE STEWARDSHIP IN THE NATIONAL PARKS (2021), https://www.nps.gov/calltoaction/PDF/LeopoldReport_2012.pdf [<https://perma.cc/L6NR-7CFN>]. For discussion of the Leopold Report, see SCHULLERY, *supra* note 11, at 168–71; SELLARS, *supra* note 110, at 214–17.

History, of course, does not answer these questions. It does not tell us how to resolve today's challenges: climate change, overcrowding, enhanced recreational opportunities, or wildlife management—whether for elk,¹¹² bison,¹¹³ grizzly bears,¹¹⁴ or wolves.¹¹⁵ This short foray back into the early history of Yellowstone, if anything, reflects a shining vision that has remained strong and evolved for 150 years. It can, as well, inform how we proceed by illustrating the persistency of some of its challenges. Overcrowding, for instance, was a concern during the pre-WWII period; it surfaced again during the post-WWII period; and it was a principal issue addressed during the Park's 75th anniversary and later with the development of the Vail Agenda.¹¹⁶ Overcrowding remains a dominant systemic problem today, exacerbated by the effects of climate change on the park's resources.¹¹⁷

As the Park's centennial approached, Yellowstone would be heralded by those in Congress as having “advance[d] a new concept of land use in setting aside an outstanding natural area in perpetuity for the benefit and enjoyment of the

¹¹² See generally BRUCE L. SMITH, *WHERE ELK ROAM: CONSERVATION AND BIOPOLITICS OF OUR NATIONAL ELK HERD* (2012); BRUCE SMITH ET AL., *IMPERFECT PASTURE: A CENTURY OF CHANGE AT THE NATIONAL ELK REFUGE IN JACKSON HOLE, WYOMING* (2004). In response to a critique of Park Service management regarding wildlife in Yellowstone by Alston Chase, a former NPS director observed that “Mr. Chase [was] hunting the wrong rabbits; they are not in Yellowstone. There were in Washington,” intimating that the issue is a political one. GEORGE B. HARTZOG, JR., *BATTLING FOR THE NATIONAL PARKS* 254 (1988); see also ALSTON CHASE, *PLAYING GOD IN YELLOWSTONE: THE DESTRUCTION OF AMERICA'S FIRST NATIONAL PARK* (1987).

¹¹³ In January 2022, a district court ordered the USFWS to reexamine whether the bison ought to be protected under the Endangered Species Act. *Buffalo Field Campaign v. Williams*, No. 20-798 (D.D.C. Jan. 12, 2022); see also Michael Doyle, *Judge Orders Do-Over on Yellowstone Bison Protections*, E&E NEWS (Jan. 13, 2022, 1:25 PM), <https://www.eenews.net/articles/judge-orders-do-over-on-yellowstone-bison-protections/>; *Neighbors Against Bison Slaughter v. Nat'l Park Serv.*, No. 19-128-BLG, 2021 WL 717094 (9th Cir. appeal filed Feb. 23, 2021); *Cottonwood Env't L. Ctr. v. Bernhardt*, 796 F. App'x 368 (9th Cir. 2019) (involving challenge to bison management plan).

¹¹⁴ E.g., *Crow Indian Tribe v. United States*, 965 F.3d 662 (9th Cir. 2020); see also Mead Gruver, *Wyoming Tries Again to Remove Yellowstone Grizzly Protection*, AP NEWS (Jan. 12, 2022), <https://apnews.com/article/travel-lifestyle-wyoming-animals-environment-and-nature-650842d34d01e7d18aa90537135bc9c7>; Laura Zuckerman, *Groups Plan to Sue to Prevent Killing of Grizzlies in Wyoming*, NAT'L PARKS TRAVELER (Jan. 22, 2020), <https://www.nationalparkstraveler.org/2020/01/groups-plan-sue-prevent-killing-grizzlies-wyoming> [<https://perma.cc/VG7G-S3JH>].

¹¹⁵ See generally THOMAS MCNAMEE, *THE RETURN OF THE WOLF TO YELLOWSTONE* (1997); MICHAEL K. PHILLIPS & DOUGLAS W. SMITH, *THE WOLVES OF YELLOWSTONE* (1996). A former director of the NPS aptly noted how wolves in Yellowstone were an issue when he started in 1989 and when he left in 1993. JAMES M. RIDENOUR, *THE NATIONAL PARKS COMPROMISED: PORK BARREL POLITICS AND AMERICA'S TREASURES* 157 (1994).

¹¹⁶ NAT'L PARK SERV., D-726, *THE VAIL AGENDA, NATIONAL PARKS FOR THE 21ST CENTURY: REPORT AND RECOMMENDATIONS TO THE DIRECTOR OF THE NATIONAL PARK SERVICE* (1991).

¹¹⁷ Adam Popescu, *Yellowstone and Warming: An Iconic Park Faces Startling Changes*, YALE ENVIRONMENT 360 (June 23, 2021), <https://e360.yale.edu/features/yellowstone-and-warming-an-iconic-park-faces-major-change> [<https://perma.cc/2LLV-KGA7>].

people.”¹¹⁸ And shortly thereafter the park would explain how this would mean “perptuat[ing] the natural ecosystems within the park in as near pristine conditions as possible for their recreational, education, cultural, and scientific values for this and future generations,” and that it would require coordinated planning within the GYE.¹¹⁹ Much would happen in the years since, but hopefully this brief rekindling of the park’s history illustrates that the park’s challenges today are capable of being navigated when enough people coalesce around an idea—like a vision for protecting an iconic landscape that in the 18th century was referred to by some as *Roche Jaune*,¹²⁰ or today Yellowstone.

¹¹⁸ *Commemoration of Yellowstone National Park: Hearings Before the Subcomm. No. 4 of the Comm. on the Judiciary on H.J. Res. 309 and H.J. Res. 546, Authorizing the Secretary of the Interior to Provide for the Commemoration of the 100th Anniversary of the Establishment of Yellowstone National Park, and for Other Purposes*, 91st Cong. 1 (1969). Wyoming Congressman John S. Wold commented that “these are the times when man’s technology and greed threaten his environment. The point has been reached where we can no longer classify any natural resource as infinite,” further adding that the anniversary “can be used as a time of rededication of the concept inherent in Yellowstone—the setting aside in perpetuity of an outstanding natural area for the enjoyment of every citizen.” *Id.* at 3–4.

¹¹⁹ NAT’L PARK SERV., FES 74-31, FINAL ENVIRONMENTAL IMPACT STATEMENT: YELLOWSTONE MASTER PLAN YELLOWSTONE 4 (1974), <http://npshistory.com/publications/yell/master-plan-final-1974.pdf> [<https://perma.cc/AKS6-VBQ2>].

¹²⁰ See CHITTENDEN, *supra* note 22, at 2.



“Castle Geyser Cove, Yellowstone National Park,” Wyoming, *in* Ansel Adams Photographs of National Parks and Monuments, 1941–1942 (National Archives and Records Administration).