Protecting America's Wilderness Heritage:  
Reclaiming Our Wild Public Lands from Sacrifice  
to Off-road Vehicle Use

A Utah Wilderness Case Study

by

Jeremy Lite

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Udall Center for Studies in Public Policy  
803 E. First St.  
The University of Arizona  
Tucson, AZ  85719  
Tel. (520) 884-4393  Fax (520) 884-4702  
Email: udallctr@u.arizona.edu  
Web site: udallcenter.arizona.edu

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The geographies of North America, the myriad small landscapes that make up the national fabric, are threatened – by ignorance of what makes them unique, by utilitarian attitudes, by failure to include them in the moral universe, and by brutal disregard. Barry Lopez.¹

I. INTRODUCTION

The wilderness of Utah contains the sandstone cliffs, red and orange mesas, steep canyons, and silent expanses embraced by Edward Abbey as “the space and light and clarity and piercing strangeness of the American West.”² On the other hand, the region is also characterized as an off-road driving mecca, a draw for off-road vehicle (ORV) enthusiasts who are ignorant of the wilderness quality of the land.³ The conflict between ORV use and landscape preservation in the West has crescendoed in recent years as ORV riders clash with wilderness advocates over the status of the West’s public lands. Nowhere is the problem more visible and contentious than in Utah’s diminishing wilderness.⁴

¹BARRY LOPEZ, ABOUT THIS LIFE 141-42 (1998).

²EDWARD ABBEY, DESERT SOLITAIRE 13 (1968).

³Barry Burkhart, Moab Area Beckons Off-Road Enthusiasts, ARIZ. REPUBLIC, Feb. 1, 1998, at C15. See also T.H. Watkins, One Man’s Recreation Is Another’s Desecration, WASH. POST, Dec. 13, 1998, at C1 (Off-road enthusiasts “claim an absolute right to use the land” and “clamor for access to more and more areas, never mind the ecological damage that too often results.”).

⁴See Brent Israelsen, Road Warriors At Odds Over Monument, SALT LAKE TRIB, Dec. 9, 1998, at B1. At a public open house held in Salt Lake City, “wilderness advocates and ORV enthusiasts voiced vastly divergent opinions . . . “Id.
Despite marketing by vehicle manufacturers and promotion of this activity by ORV clubs, ORV riders continue to be far outnumbered by hikers and cyclists. Of all those who visited public lands in Utah last year, only 13 percent were ORV users.5 This disparity is particularly apparent, for example, in southern Utah’s Moquith Mountain wilderness study area (WSA), where only 5% of the visitors to the Coral Pink Sand Dunes are ORV users.6 Off-road vehicle use is currently allowed in the dunes despite the hundreds of thousands of ORV-use areas in the vicinity on lands ineligible for wilderness designation.7 With the number of ORV trips nationwide projected to increase to 130 million a year by 2040, a 61% increase from 1987, the problems created by ORVs will not be diminished without confronting and resolving their inherent conflict with wilderness preservation.8

5 ORVs Threaten the Future of Utah Wilderness, SOUTHERN UTAH WILDERNESS ALLIANCE, Fall/Winter 1998, at 5 (hereinafter “SUWA Newsletter, Fall/Winter 1998”).

6 Moquith Mountain Needs Your Help, ALERT LIST (Southern Utah Wilderness Alliance, Salt Lake City, Ut.), Oct. 21, 1998 (hereinafter “SUWA AlertList”).

7 Id. Land eligible for wilderness designation is defined by the Wilderness Act of 1964 to include “undeveloped Federal land retaining its primeval character and influence . . . “. 16 U.S.C. § 1131(c) (1982).

This essay examines the laws and regulations governing the designation of ORV-use areas on public lands, focusing on how the courts have interpreted various requirements. The growing conflict surrounding ORV use on lands eligible for wilderness designation in Utah provides a focus for discussing use-area designations and legal strategies for controlling ORV use. Section II familiarizes the reader with the effects ORV users have on public lands in the West. It also introduces some of the philosophical differences that divide ORV users from those advocating the preservation of wilderness. Section III provides an overview of the laws and regulations directly applicable to defining ORV-use areas. Section IV evaluates the potential for using these laws to protect wilderness-eligible lands from ORV impacts, considering how the agencies and courts have interpreted the laws and how negative precedent might be distinguished. Section V discusses the protection of archaeological sites, and section VI examines other legal avenues for protecting the land and its resources. Finally, in section VII, the essay concludes that under current management schemes and demonstrated agency propensity, litigation is necessary to protect undesignated wilderness from the damages of ORV use.

II. THE EFFECTS OF OFF-ROAD VEHICLES ON PUBLIC LAND VALUES AND RESOURCES

As a category, off-road vehicles include motorbikes, four-wheel drive trucks, jeeps, dune buggies, and other self-propelled vehicles that allow for travel through the unpaved, often rugged back country that defines much of the West. These vehicles were widely introduced in the 1960s and gained popularity among certain segments of American society for their intrinsic recreational value, presumably the thrill of steering an expensive truck over rocks, vegetation, and archaeological sites. As a method of travel that is loud and damaging to the land, ORVs provide their riders with a very different wilderness experience than the experience felt by other users of public lands, many of whom recognize the scenic and spiritual values inherent in the

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9 See infra notes 15-54 and accompanying text.

10 See infra notes 55-84 and accompanying text.

11 See infra notes 85-143 and accompanying text.

12 See infra notes 144-60 and accompanying text.

13 See infra notes 161-206 and accompanying text.

14 See infra notes 207-12 and accompanying text.


16 Id. at 161
West’s remaining wilderness. Riding across the land in ORVs necessarily causes a detachment among ORV users from the solitude of wilderness. This detachment contrasts sharply and irreconcilably with the meaningful connection with the land felt by environmentally-minded users, who are characterized by some ORV enthusiasts as “extremists” and “eco-Nazis.”

A. Damage to the Environment

Off-road vehicle use causes tremendous damage to dry, fragile western lands, interfering with ecosystem health and aesthetic values, particularly within wilderness areas.\(^{18}\) Off-road vehicles routinely run over ecologically important soils, plants, and other aspects of the landscape, even in areas closed to ORV use, with many consequences.\(^{19}\) The most frequently noted impacts are significant surface erosion;\(^{20}\) soil compaction and moisture loss;\(^{21}\) destruction of plant life, including threatened species and vegetation necessary to ecosystem health;\(^{22}\) and disturbances to wildlife.\(^{23}\)

\(^{18}\)See generally D. SHERIDAN, OFF-ROAD VEHICLES ON PUBLIC LANDS (1979); Bleich, supra note 15, at 162-63. *See also* Sierra Club v Clark, 756 F.2d 686, 688 (9th Cir. 1985) (describing the “severe environmental damage” caused by ORVs within the California Desert Conservation Area); SUWA Newsletter, Fall/Winter 1998, supra note 5; SUWA Newsletter, Summer 1998, supra note 17 (noting the signature scars of ORVs in Wilderness Study Areas).

\(^{19}\)See Tom Metcalf, *Trashing the Wilderness*, SALT LAKE TRIB., March 25, 1998, at A10, for a description of ORV damage on a remote plateau in southern Utah designated off-limits to ORVs.

\(^{20}\)MARK K. BRIGGS, RIPARIAN ECOSYSTEM RECOVERY IN ARID LANDS 37 (1996) (discussing the “considerable damage” caused by ORVs). Erosion from off-road driving can significantly alter sediment and water runoff characteristics of the land. *Id.* *See also,* Sierra Club, 756 F.2d at 688; Bleich, supra note 15, at 162.

\(^{21}\)SUWA Newsletter, Fall/Winter 1998, supra note 5, at 6.

\(^{22}\)See, e.g., Southern Utah Wilderness Alliance v. Smith, 110 F.3d 724, 725 (10th Cir. 1997) (ORV use destroys Welsh’s Milkweed, listed as threatened under the Endangered Species Act); Southern Utah Wilderness Alliance v. Dabney, 7 F. Supp.2d 1205, 1207 (D.Utah 1998) (vegetation in riparian area suffered greatly from ORV use); *Suit Seeks Protection of Rare Utah Cactus: Arizona Group Claims Agency Stonewalls on Endangered Species*, ROCKY MTN. NEWS, Jan. 20, 1998, at A26 (the Southwest Center for Biological Diversity opposes the destruction of the Winkler cactus by ORVs and other causes). To protect vegetation, it is important to keep recreational vehicles away from sensitive areas. BRIGGS, supra note 20, at 38.

\(^{23}\)See, e.g., United States v. Town of Plymouth, 6 F. Supp.2d 81, 83 (D.Mass. 1998) (ORVs on beach disturbing behavior and habitat of endangered shore birds); SUWA Newsletter, Fall/Winter 1998, supra note 5, at 6 (ORV disturbance can alter the feeding and behavior patterns of reptiles, birds, and mammals, including deer).
Many of the effects are less obvious. Recent studies have documented the role ORVs play in destroying cyanobacteria, a one-celled organism that produces nitrogen in the soil essential for plant growth,24 which can take up to 2,000 years to recover from ORV impacts.25 In streams near ORV-use areas, pollution from vehicles can create water-quality problems,26 and fish can be killed by increased sedimentation from ORV-caused erosion.27

In addition, ORV use diminishes visual qualities of open space and scenic landscape by smashing vegetation, collapsing stream banks, and leaving tire tracks as scars on the desert.28 In order to preserve the scenic values of pristine landscapes, ORV use is banned in federally designated wilderness areas, a fact explained by the incompatibility of ORVs with landscape integrity.29 In wilderness study areas and additional lands in Utah being considered for wilderness designation under America’s Redrock Wilderness Act,30 ORV users present one of

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24Hal Bernton, *West is Trampling a Key Asset Into Dust*, PORTLAND OREGONIAN, July 26, 1998, at D1. Cyanobacteria are elements of a fragile “skin” of soil especially important to the maintenance of healthy grassland communities in the arid West. *Id.* Researchers from the Bureau of Land Management have found that cyanobacteria and a healthy skin actually inhibit the growth of cheatgrass, an invasive weed that is highly fire-prone and is a particularly dangerous threat to healthy range conditions throughout much of the West. *Id.* At the same time, ORV use can transport the seeds of noxious weeds to new areas. Matthews, *supra* note 8. Meanwhile, in Utah, the BLM offered to destroy vast tracts of pinon-juniper woodland by dragging down trees with a huge anchor chain to prevent the spread of cheatgrass without considering limiting ORV use. *RICHFIELD DISTRICT, U.S. BUREAU OF LAND MANAGEMENT, RICHFIELD DISTRICT NORMAL YEAR FIRE REHABILITATION PLAN AND EMERGENCY FIRE REHABILITATION ENVIRONMENTAL ASSESSMENT J-050-097-072 EA (May 13, 1998)* (hereinafter “BLM ENVIRONMENTAL ASSESSMENT”).


26See Lindsay Kate Shaw, Comment, *Land Use Planning at the National Parks: Canyonlands National Park and Off-Road Vehicles*, 68 U. COLO. L. REV. 795, 811 n.109; Southern Utah Wilderness Alliance v. Dabney, 7 F. Supp.2d 1205, 1207 (Vehicles leaked transmission, engine, and crankcase fluids into the water of a creek).


28SUWA Newsletter, Summer 1998, *supra* note 17, at 37. The considerable damage caused by ORVs occurs much more quickly than impacts from non-motorized land users, producing environmental changes even after just one pass. BRIGGS, *supra* note 20, at 37.


30H.R. 1732 / S. 861, 106th Cong. (1999). This bill reflects a citizens’ inventory of wilderness-eligible BLM lands in Utah lead by the Utah Wilderness Coalition.
the greatest threats to wilderness.\textsuperscript{31}

\textsuperscript{31}SUWA Newsletter, Summer 1998, \textit{supra} note 17, at 36.
Prehistoric archaeological sites constitute another important public land value commonly disturbed or destroyed by ORVs.\textsuperscript{32} For example, in several canyons and on mesas throughout San Juan County, Utah, ORVs are causing heavy damage to archaeological sites by repeatedly running over them.\textsuperscript{33} ORVs are also used to access sites and facilitate vandalism.\textsuperscript{34} Archaeological resources are particularly susceptible to permanent damage because once site integrity is disturbed, important information is irrecoverably lost.

\textbf{B. User Conflict}

A fundamental conflict exists between ORV enthusiasts and those who advocate the preservation of Utah’s remaining wilderness. At a very basic level, ORVs threaten the safety of other visitors, inhibiting enjoyment of the land by forcing non-riders to avoid certain areas or risk injury.\textsuperscript{35} For example, in the Coral Pink Sand Dunes within the Moquith Mountain WSA, ORV riders may not be able to detect the presence of sightseers or hikers exploring the landscape.\textsuperscript{36} The displacement of other visitors may also have the effect of exaggerating the popularity of ORV use, confusing land managers so that they allocate more lands to riders.\textsuperscript{37}


\textsuperscript{33}Interview with Phil Gazon, BLM Wilderness Coordinator, and Dale Davidson, BLM Archaeologist, at the BLM office in Monticello, Utah (July 23, 1998).

\textsuperscript{34}SUWA Newsletter, Fall/Winter 1998, supra note 5, at 6. The looting of archaeological sites is facilitated by ORVs, which are used to transport digging equipment into the back country and to haul artifacts out. \textit{Id}.

\textsuperscript{35}Bleich, supra note 15, at 163.

\textsuperscript{36}SUWA AlertList, supra note 6.

\textsuperscript{37}Bleich, supra note 15, at 163, citing Badaracco, \textit{ORVs: Often Rough on Visitors}, \textit{PARKS AND RECREATION} (Sept. 1976). In catering to ORV users, confused land managers may in fact be reducing the amount of land available to traditional users, rewarding the more intrusive and destructive off-roaders based on a misunderstanding of land use preferences. \textit{Id}.
User conflict is specifically addressed in federal regulations. Both the Bureau of Land Management (BLM) and Forest Service are required to minimize conflict between off-road drivers and other public land users when designating areas open to ORV use. Several cases have given effect to the minimization requirement, concluding that federal land-management agencies are obligated to take measures to reduce conflicts among users. Comments from hikers and other public land users constitute an important element in determining the existence of conflict.

C. The Access Myth and Differing Philosophies

Off-road vehicle enthusiasts often defend their excursions into wilderness by claiming that preservationists are denying the elderly and disabled access to wilderness. This argument is problematic because it is seldom made by the elderly themselves but is instead used by ORV riders who are unwilling, rather than unable, to walk. Complaints that access to public lands would be unreasonably restricted in general if federal agencies begin protecting wilderness-eligible areas in Utah from ORV use are similarly disingenuous. Within the small portion of Utah’s public lands preservationists want to see protected from ORVs, almost half are within two miles of a road, and 90% are within three miles of a road due to the practice of “cherry-stemming,” or the technique of mapping wilderness-eligible areas with boundaries drawn to exclude existing roads.

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38 See infra notes 115-16 and accompanying text.

39 43 CFR §8342.1(c); 36 CFR §295.2 (1998).

40 See Northwest Motorcycle Ass’n v. U.S. Dep’t of Agriculture, 18 F.3d 1468, 1475 (9th Cir. 1994). See infra notes 115-43 and accompanying text, discussing this and other cases of user conflict.

41 Northwest Motorcycle Ass’n, 18 F.3d at 1479. See infra notes 117-27 and accompanying text for an in depth discussion of the importance of user comments.

42 See Matthews, supra note 8; Shaw, supra note 26, at 822.

43 Shaw, supra note 26, at 822.

44 Kevin Walker, Coalition Claims It Has Cleared Up All the Old Anti-Wilderness Myths, SALT LAKE TRIB., August 2, 1998, at AA2.

45 “Cherry-stemming” allows large tracts of land to be designated as wilderness while maintaining the ability of drivers to view the land.
Although these assertions can be refuted, they nonetheless serve to illustrate the fundamentally different land-use philosophies that divide off-road drivers from wilderness advocates. The myth embraced by ORV enthusiasts that designating wilderness unreasonably restricts access to public lands is an outgrowth of their utilitarian approach to public land management. The connection of ORV groups to a utilitarian philosophy is evidenced by the fact that “motorized recreation advocacy” is an element of the wise-use movement associated with extractive industries on federal public lands. A basic tenet of the wise-use movement shared by ORV enthusiasts is rigid opposition to the preservation of public lands, which adherents describe as “lock[ing] up use” of the land. Just as the wise-use movement is supported by pro-development groups and industries, ORV-advocacy groups such as the outspoken Blue Ribbon Coalition are directly supported by industrial corporations vehemently opposed to wilderness preservation, including many logging and mining companies and overseas vehicle manufacturers.

In contrast to these utilitarian beliefs, preservationists recognize ideological and often spiritual significance in protecting what remains of America’s wilderness heritage. Dismissed by ORV users as “elitist,” those who advocate limiting ORV use on pristine roadless lands

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48Id. at 23.


50See, e.g., TESTIMONY: WRITERS OF THE WEST SPEAK ON BEHALF OF UTAH WILDERNESS (Stephen Trimble and Terry Tempest Williams eds., 1996); MAX OELSCHLAEGER, THE IDEA OF WILDERNESS 281-353 (1991) (discussing the philosophy of wilderness from a variety of perspectives, including deep ecology and eco-feminism); Watkins, supra note 3.

51Shaw, supra note 26, at 819. The attempt to characterize hikers and campers as elitist and ORV riding as the natural pursuit of the common man is further complicated by the image of expensive new high-powered trucks hauling trailers full of all-terrain vehicles and other equipment while less intrusive users make do with significantly less equipment and expense. In fact, since many ORVs are manufactured overseas, their purchase in the United States contributes billions of dollars a year to the balance of trade deficit. HELVARG, supra note 49, at
seek to secure for future generations of Americans a fragment of original landscape and the experiences that traveling there with respect for the land can provide. As expressed by western writer Wallace Stegner, “[w]e simply need that wild country available to us, even if we never do more than drive to its edge and look in. For it can be a means of reassuring ourselves of our sanity.” These preservationist values stand in fierce contrast to off-road driving, where the thrill is in riding rather than connecting to scenery, and they clash most definitively within potential wilderness areas.

III. LAND MANAGEMENT FRAMEWORKS:
MULTIPLE USE AND OFF-ROAD VEHICLES

83. There can be little doubt that, as a financial matter, hiking is accessible to more Americans than off-road driving.

52 See generally TESTIMONY, supra note 50.


54 See, e.g., HELVARG, supra note 49, at 86; Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric., 18 F.3d 1468, 1477 (9th Cir. 1994) (noting the “philosophical struggle occasioned by incompatible desires and aims” between ORV riders and environmentalists).
The multiple use mandates imposed on the BLM and the Forest Service by several governing acts, including the Federal Land Policy Management Act,55 the Multiple Use and Sustained Yield Act,56 and the National Forest Management Act,57 require sometimes difficult management decisions. The agencies are directed by statute to manage their lands for “recreation, range, timber, minerals, watershed, wildlife, fish” and other non-economic values,58 and are commanded not to automatically consider financial profit as the ultimate goal.59 The modern guidelines represent a dramatic departure from the pre-1960s commitment to the disposal of federal public lands and the management of the forests on a primarily utilitarian basis.60 Nonetheless, federal land-management agencies, especially the BLM, appear to remain beholden to extractive and utilitarian interests.61

A. Executive Orders


59The Multiple Use and Sustained Yield Act states that in land management decisions, consideration should be “given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return.” 16 U.S.C. § 531(a) (1985).

60Charles Davis, Introduction: The Context of Public Lands Policy Change, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 1, supra note 47, at 1, 2-3.

61ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 1121 (2d ed. 1998). The authors describe the BLM’s “political capture” by industrial corporations and ORV enthusiasts. Id.
Off-road vehicle use has been addressed in the modern management framework, brought into focus by a 1972 Executive Order. Executive Order 11644 was issued by President Nixon in recognition of “frequent conflict” between ORVs and “wise land and resource management practices, environmental values, and other types of recreational activity.” The Order contains a directive to federal agencies to develop regulations for designating specific areas where ORV use is permitted and prescribes certain criteria that have been described as “unambiguous and mandatory.” The criteria for designating lands with respect to ORV use are based on protection of public land resources and the minimization of conflicts between land uses. Executive Order 11644 also forbids the use of ORVs in wilderness areas and primitive areas, and limits ORV use in national parks to those circumstances in which it “will not adversely affect their natural, aesthetic, or scenic values.” Agency regulations must provide for public participation and enforcement measures, and each agency is directed to monitor the effects of ORV use and to amend designations in light of on-the-ground effects.


63Id.


65Exec. Order No. 11,644, supra note 62. Since these criteria are important for discerning the guidelines for federal agency policy toward ORV use, they are worth reviewing. The Executive Order mandates that use-area designation be made in accordance with the following:

(1) Areas and trails shall be located to minimize damage to soil, watershed, vegetation, or other resources of the public lands;
(2) Areas and trails shall be located to minimize harassment of wildlife or significant disruption of wildlife habitats;
(3) Areas and trails shall be located to minimize conflicts between off-road vehicle use and other existing or proposed recreational uses of the same or neighboring public lands . . . taking into account noise and other factors. . . . Id.

66Id. The closure of Wilderness Areas to ORV use is repeated in the Wilderness Act of 1964. 16 U.S.C. § 1133(c) (1982).

67Exec. Order No. 11,644, supra note 62.
Executive Order 11644 was supplemented in 1977 by Executive Order 11898, which added a new section protecting public lands. Under the added section, federal land-management agencies “shall” close areas and trails to ORV use when it “will cause or is causing considerable adverse effects on the soil, vegetation, wildlife, wildlife habitat, or cultural or historic resources.” Together, these orders form the basis for federal land-management agency regulations regarding ORV use.

B. Federal Agency Regulations

In response to Executive Order 11644, the BLM promulgated regulations that were initially found to be inadequate. After judicial prodding, the BLM adopted ORV-use area designation criteria in line with the executive orders. Wilderness suitability is specifically protected, as are cultural resources. These regulations have been interpreted as “legislative” rather than “interpretive” and thus binding on the BLM.

The Forest Service has also produced regulations, encoding the requirements of the executive orders at 36 C.F.R. § 295.2(a). Taken to be binding, these regulations “command” the Forest Service to restrict ORV use in the face of considerable adverse effects.


69 Id. This language has been interpreted with such deference to agency construction that it does violence to the goal of protecting public lands. See Sierra Club v. Clark, 756 F.2d 686 (9th Cir. 1985). For a discussion, see infra notes 96-111 and accompanying text.

70 National Wildlife Federation v. Morton, 393 F. Supp. 1286 (D.D.C. 1975). The regulations were ruled inadequate because they did not incorporate the criteria dictated by Executive Order 11644. Id. at 1292. See infra notes 86-95 and accompanying text (discussing the case in detail).

71 43 C.F.R. § 8342.1 (1998). See also, 43 C.F.R. § 8341.2 (requiring areas to be closed to ORV use if necessary to prevent “considerable adverse effects”).

72 43 C.F.R. § 8341.2(a) (1998) (requiring the closure of areas to ORV use when ORVs are causing or will cause considerable adverse effects to wilderness suitability); 43 C.F.R. § 8342.1(a) (1998) (ORV use-areas “shall be located . . . to prevent impairment of wilderness suitability”) (emphasis added); 43 C.F.R. § 8342.1(d) (1998).


75 See Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric., 18 F.3d 1468 (9th Cir. 1994).

76 Id. at 1476.
the Forest Service is directed to manage ORV use to protect the land and its resources and to minimize conflicts.\textsuperscript{77}

C. Federal Land-Management Statutes

\textsuperscript{77}36 C.F.R. § 219.21(g) (1998).
The Federal Land Policy Management Act of 1976 (FLPMA) gives little specific direction to the BLM regarding its regulation of ORVs. Beyond its discussion of the California Desert Conservation Area, FLPMA directs the BLM to “provide [for] . . . outdoor recreation uses, including the use, where appropriate, of off-road recreational vehicles.”78 This directive does not exist in a void, however, since Executive Order 11644 had been issued five years earlier, and today, binding regulations help to determine how the BLM is to manage ORV use-areas.79

Other portions of FLPMA not dealing specifically with ORVs nonetheless provide the BLM some direction in managing ORV use. The purpose of the Act requires multiple use “without permanent impairment of . . . the quality of the environment,”80 and the Secretary of Interior must prevent “unnecessary and undue degradation” of the public lands.81 Since the Wilderness Act requires “an area where the earth and its community of life are untrammeled by man” as a condition for wilderness eligibility,82 FLPMA’s non-degradation standard should be construed stringently for lands being managed as wilderness, including wilderness study areas.

Forest Service regulations concerning ORVs are supplemented little by governing statutes. National parks, on the other hand, operate under a clear directive to ensure that current use will leave scenery and other parkland resources “unimpaired for the enjoyment of future generations,” as required by the Organic Act of 1916.83 In addition, each park’s enabling legislation may contain specific management prescriptions.84

IV. APPLYING LAND-MANAGEMENT LAWS TO PROTECT WILDERNESS: AN EXERCISE IN DISTINGUISHING NEGATIVE PRECEDENT


79 See supra notes 71-77 and accompanying text.


81 Id. § 1732(b). These arguments were made unsuccessfully in Sierra Club v. Clark, 756 F.2d 686, 691 (9th Cir. 1985), but not in a wilderness context. See infra notes 96-111 and accompanying text for a discussion of the case.


84 In Southern Utah Wilderness Alliance v. Dabney, 7 F. Supp.2d 1205, 1211 (D.Utah 1998), the court draws upon the 1916 Organic Act and enabling legislation for Canyonlands National Park in concluding that ORV use cannot be permitted in a unique riparian area.
Once wilderness has been congressionally designated under the Wilderness Act of 1964, statutory protections are clearly in place.\textsuperscript{85} It is before this designation that lands eligible to be included in the national wilderness preservation system face threats from poorly controlled ORV use. The executive orders, federal statutes, and agency regulations dealing with the designation of ORV-use areas have not been consistently applied by federal agencies to protect wilderness from damage.

A. Giving Force to Federal Regulations

There are several cases where courts have interpreted the requirements imposed by the orders and regulations in the face of agency resistance, beginning with \textit{National Wildlife Federation v. Morton}.\textsuperscript{86} This important 1975 case involved a challenge to the BLM’s initial regulations adopted in response to Executive Order 11644.\textsuperscript{87} The regulations adopted by the BLM designated all land not specifically restricted or closed as officially open to ORV use,\textsuperscript{88} thereby creating “a subtle, but nevertheless real, inertial presumption in favor of ORV use.”\textsuperscript{89} The court rejected these regulations as “a wholesale, blanket designation of ‘open’ lands,” violating the express requirements of Executive Order 11644 to consider various environmental and social criteria in determining which ORV trails and areas should be open to use.\textsuperscript{90} The court went on to further invalidate the BLM’s regulations, which they did not provide adequate opportunity for public participation in the designation of areas and trails, as required by Section 3(b) of Executive Order 11644.\textsuperscript{91}

\textsuperscript{85}16 U.S.C. §§ 1131-1135 (1982). To protect the land, the Wilderness Act prohibits commercial development, road-building, and motor vehicle use within designated wilderness areas. \textit{Id}. § 1133(c).


\textsuperscript{87}\textit{Id}. at 1288.

\textsuperscript{88}39 Fed. Reg. 13612 (April 25, 1974).

\textsuperscript{89}\textit{National Wildlife Fed.}, 393 F. Supp. at 1292.

\textsuperscript{90}\textit{Id}. at 1292. The criteria that must be considered include damage to soil and vegetation, wildlife, and other recreational users. Exec. Order No. 11,644, \textit{supra} note 62. \textit{See supra} note 65 (listing the specific considerations).

\textsuperscript{91}\textit{National Wildlife Fed.}, 393 F. Supp. at 1293. The court reasoned that the public was cut out of the process because the BLM determined all unrestricted land to be open for ORV use without opportunity for public participation regarding specific areas. \textit{Id}.
In the aftermath of *National Wildlife Federation*, the BLM promulgated regulations for determining ORV-use areas in line with the requirements of Executive Order 11644. However, this decision did not become moot when the BLM adopted new regulations. To the contrary, the language interpreting Executive Order 11644 has great potential for application today, especially in light of an agency “backslide” into leaving areas open to ORV use unless designated closed. In addition to defining the language of Executive Order 11644 as “unambiguous and mandatory,” and accusing the BLM of significantly diluting the required standards, the court offered the following salient language that could be applied in litigation challenging ongoing blanket designations:

> [T]he Order manifestly contemplates evaluation of the land not only for purposes of restricting ORV use but also for designation of areas “on which the use of off-road vehicles may be permitted.” . . . Moreover, the Order speaks of designating “specific areas and trails on public lands” for use or non-use of ORVs.

With this language, *National Wildlife Federation* continues to be relevant in modern cases where the BLM and other agencies fail to apply the relevant criteria when making “open” use area designations.

**B. Requiring Closures to Prevent Considerable Adverse Effects**

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93 *Plater*, supra note 61, at 1124. For example, portions of Utah BLM land in the San Juan Resource Area contain a blanket open designation despite the failure of the BLM to apply the criteria outlined by the executive orders and even by its own conforming regulations. Interview with Phil Gazon and Dale Davidson, *supra* note 33.


95 *Id.* at 1292.
Ten years after National Wildlife Federation, the Ninth Circuit Court of Appeals decided
Sierra Club v. Clark,96 which has been considered heavily damaging to the protection of
wilderness in the Western states.97 In its suit, the Sierra Club was concerned about ORV
damage in Dove Springs Canyon within the California Desert Conservation Area, a unit of the
Mojave Desert set aside from development under FLPMA for its abundant and diverse fauna and
flora.98 In the face of what the court itself recognized to be severe environmental impacts,
including major surface erosion and vegetation loss, the Sierra Club fought to close the area to
ORVs.99 For its argument, the Sierra Club relied on language within the BLM regulations,
adopted to comply with Executive Order 11989, requiring the BLM to immediately close
affected areas where “off-road vehicles are causing or will cause considerable adverse
effects.”100 In seeking to halt the sacrifice of Dove Springs Canyon, the Sierra Club also noted
FLPMA’s mandated principle of multiple use “without permanent impairment of the
productivity of the land and the quality of the environment.”101

These arguments failed. Despite its conclusion that ORV use in Dove Springs Canyon
amounted to “the virtual sacrifice” of the area,102 the court in Sierra Club held that determining
“considerable adverse effect” allows the agency to assess what is “considerable” in the context
of the desert conservation area as a whole, not necessarily on a parcel-by-parcel basis.103 The
court also revealed its fear that ORV use would have to be banned everywhere if it was banned
in this instance “because it is doubtful that any discrete area could withstand unrestricted ORV
use without considerable adverse effects.”104 In its decision, the court bowed to agency support
for ORV use, presumably weakening the provisions of Executive Order 11989.105

An argument can be made, however, that Sierra Club, which did not deal specifically
with a wilderness area, is not as damaging to efforts to protect wilderness-eligible lands as it
might at first seem. First, addressing the court’s fear that a total prohibition of ORV use would

96Sierra Club v. Clark, 756 F.2d 686 (9th Cir. 1985).

97CHUCK COTTRELL, TRAILS OF DESTRUCTION 28-29 (advance copy, 1997).


99Sierra Club, 756 F.2d at 688.

100Id. at 689-90 (citing 43 C.F.R. § 8341.2(a)).

101Id. at 691 (citing 43 U.S.C. § 1702(c)).

102Id. at 691.

103Id. at 690.

104Id. at 691.

105COTTRELL, supra note 97, at 29.
ensue from a ruling to close a certain area, it is essential to point out that in the wilderness debate, there is relatively little land that remains eligible for wilderness designation.\textsuperscript{106} Prohibiting ORV use on pristine land within areas determined to be eligible for wilderness classification would not set the slippery slope precedent the court predicts. This is because there is a finite, limited, and ever-diminishing quantity of land suitable for wilderness protection, and even if no potential wilderness area could withstand unrestricted ORV use without considerable adverse effects, the rest of the public domain could be excluded from this interpretation.

\textsuperscript{106}After the latest wilderness inventory of Utah’s national parks, national recreation areas, national monuments, BLM and Forest Service land, the portion of the state that is eligible for wilderness designation but has not yet designated amounts to less than 25 percent of its total area. SUWA Newsletter, Summer 1998, \textit{supra} note 17 at 12.
Second, the court’s interpretation that “considerable” can be understood to relate to the management unit as a whole does not preclude a more restrictive application of the same standard within potential wilderness. Wilderness is defined in the Wilderness Act of 1964 as an area “where the earth and its community of life are untrammeled by man . . . protected and managed so as to preserve its natural conditions.” Wilderness Study Areas are to be managed in such a way that these wilderness values are not threatened, and the BLM in Utah has indicated its intention to manage wilderness-eligible lands included in America’s Redrock Wilderness Act with a heightened degree of care. In fact, BLM regulations specifically state that considerable adverse effects on “wilderness suitability” must result in the immediate closure of the area to ORV use.

With such a strict standard of land protection in mind, it is clear that the threshold for “considerable adverse effects” is reached earlier in a wilderness context. Since the entire potential wilderness unit is to be managed so that it retains its wilderness values, the adverse effects of ORV damage in a particular area cannot reasonably be said to be inconsiderable in relation to the area as a whole. If any portion of an area being considered for wilderness designation is disturbed by ORV use, there is a reduction in the pristine character of the whole tract, which is inconsistent with the overseeing agency’s management regime. Therefore, an adverse effect that is considerable within a portion of a potential wilderness area must be interpreted to have a considerable overall effect. Based on this understanding, a ruling could be made consistent with Sierra Club that requires a wilderness-eligible area to be closed to ORV use upon evidence that any portion has suffered “considerable adverse effects” from ORVs. Thus, Sierra Club could be removed as an obstacle to reclaiming wilderness lands from ORV use without asking the court to overturn the case or to risk a circuit split.

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110 It is the policy of the Utah BLM to “pay careful and particular attention to development proposals that could limit Congress’ ability to designate . . . [wilderness-eligible lands within H.R. 1500 / S. 773] as wilderness . . . “ BLM ENVIRONMENTAL ASSESSMENT, supra note 24, at 9.

In support of this argument, it is instructive to note a recent decision of the Snake River Basin Adjudication Court regarding federal reserved water rights within designated wilderness areas. In this case, the adjudication court determined that the water right by implication to the federal government when a wilderness area is congressionally designated is the total amount of unappropriated water flowing across the wilderness area. In making its determination, the court reasoned that the wilderness character Congress sought to preserve only exists “where man’s influence does not,” and that maintaining the status quo is the precise purpose of protecting wilderness. Applied to Sierra Club, this reasoning supports the notion that considerable adverse effects caused by ORV use in one portion of a potential wilderness area should indeed be characterized as considerable in relation to the parcel as a whole, for the wilderness quality of the land is no longer status quo ante.

Legal challenges seeking to require agencies like the BLM to close wilderness-eligible areas to ORV use when there are considerable adverse impacts have potential for success, although it will be necessary to distinguish Sierra Club along the lines suggested above.

C. Minimizing User Conflict

Conflict between ORV enthusiasts and non-motorized public land users has provided another, more successful avenue for challenging ORV use. Executive Order 11644 provides specific directives regarding conflict with ORV riders, calling upon federal land-management agencies to promote the safety of all users and to minimize conflicts between ORV use and other recreational uses. These requirements have been codified in regulations for both the BLM and the Forest Service.

112 Idaho: Snake River Basin Adjudication Court Grants/Denies Federal Reserved Rights, W. WATER L. AND POL’Y REP., February 1998, at 92. The article describes the unpublished “Order Granting and Denying United States’ Motions for Summary Judgement on Reserved Water Rights Claims,” issued on Dec. 18, 1997 by the Adjudication Court. The jurisdiction of this court is limited to water rights claimants along the Snake River in Idaho, but the adjudication court’s conclusions are nonetheless worth noting.

113 Id. at 94.

114 Id. at 93.

115 Exec. Order No. 11,644, supra note 62.

116 Forest Service regulations regarding user conflict are codified at 36 C.F.R. § 295.2 (1998) (use of trails by ORVs that will cause conflicts with other forest visitors will be restricted until the conflict can be eliminated). The BLM has incorporated language similar to that in Executive Order 11,644 at 43 C.F.R. § 8342.1 (1998).
A case involving user conflict on the Wenatchee National Forest in Washington is particularly instructive. In *Northwest Motorcycle Ass’n v. U.S. Department of Agriculture*,117 the Ninth Circuit Court of Appeals upheld a district-court decision, nearly word for word, declaring user conflict to be a valid basis for closing a certain area to ORV use.118 In order to examine and document possible conflicts between ORV use and other recreational uses, the Forest Service solicited comments from National Forest visitors. The responses received by the Forest Service overwhelmingly expressed concerns that the noise, dust, trail damage, exhaust, and safety concerns caused by ORVs are adverse to the experience most visitors seek while in the forest.119 The court held that these comments described “user conflict” even if they did not explicitly use that term.120

In upholding the Forest Service decision to close the North Entiat area to ORVs, the court rejected arguments offered by the Northwest Motorcycle Association that user conflict was not sufficiently documented and that the Forest Service assessment of the problem was otherwise flawed.121 The opinion in *Northwest Motorcycle Ass’n* asserts that informal, unverified public comment is an acceptable method of determining whether potential conflict exists, emphasizing that such conflict cannot be numerically calculated.122 In strong language, the court rejects the ORV users’ argument that public comments should be discounted because they come from “interested parties,” saying “Individual comment is a very persuasive indicator of ‘user conflict’. . . The court can envision no better way to determine the existence of actual past or likely future conflict between two user groups than to hear from members of those groups.”123

Very importantly, the court also holds that no actual conflict needs to be documented before closure of a particular area is required.124 The directives to minimize conflict and to restrict ORV use when there is a future likelihood of conflict mean that the managing agency’s role is not strictly reactive. If the Northwest Motorcycle Association’s position was accepted, the court reasons, actual physical altercations between ORV riders and hikers would be required before the Forest Service would be forced to close a certain area, inconsistent with governing

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117 *Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric.*, 18 F.3d 1468 (9th Cir. 1994).


119 *Northwest Motorcycle Ass’n*, 18 F.3d at 1476.

120 *Id.* at 1475-76.

121 *Id.* at 1475-78.

122 *Id.* at 1475.

123 *Id.* at 1475.

124 *Id.* at 1476-77.
regulations and executive orders.\textsuperscript{125}
This case has important implications for future efforts to prevent the sacrifice of public lands to ORV use. A critical lesson is that public comments describing actual or likely conflicts between ORV riders and wildlife or other public land users are essential to documenting the problem of user conflict. As a predicate to area closures, wilderness advocates should be encouraged to voice their beliefs that ORV use conflicts with wilderness suitability and causes safety risks for non-motorized users.\textsuperscript{126} In light of \textit{Northwest Motorcycle Ass'n}, future litigation regarding user conflict need not rely on the existence of actual, documented conflicts; if it can be demonstrated that conflict is likely to occur, federal land-management agencies may be forced to close certain areas to ORV use.

While the holding in \textit{Northwest Motorcycle Ass'n} is promising, the utility of the case in the battle to protect wilderness-eligible land is limited. The plaintiffs in this case were challenging an agency decision to close a certain area rather than attempting to force the closure of an area the agency left open to ORV use. The court finds sufficient justification to hold that the Forest Service’s decision to close the area was not arbitrary or capricious, but the burden of overcoming judicial deference to agency decisions may dampen efforts to force agencies to make closures.\textsuperscript{127} Nevertheless, user conflict has been demonstrated to be an important element in an agency’s land-management decisions, especially in light of the agency’s duty to minimize conflicts caused by ORV use.

There has been little additional litigation specifically addressing the issue of user conflict. \textit{Washington Trails Ass’n v. U.S. Forest Service} proceeded primarily on a National Environmental Policy Act (NEPA) claim, but the issue of user conflict did arise.\textsuperscript{128} The case involved the proposed expansion and repair of two trails used by both ORVs and hikers in the Gifford Pinchot National Forest. In discussing the issue of user conflict, the district court found that the Forest Service had failed to meet its obligation to consider the impact that increased ORV use along the improved trails would have on other forest users.\textsuperscript{129}

\textsuperscript{126}See COTTRELL, supra note 97, at 29 (emphasizing the importance of written public comments whenever conflict is observed).

\textsuperscript{127}Northwest Motorcycle Ass’n, 18 F.3d at 1481.


\textsuperscript{129}Washington Trails Ass’n, 935 F. Supp. at 1124.
As was the case in *Northwest Motorcycle Ass’n*, the court in *Washington Trails Ass’n* noted that public comments overwhelmingly expressed “heated” opposition to ORV use, describing the noise and disruption caused by ORVs. After pointing to the comment letters, the court found that the Forest Service had violated its duty by failing to consider “all factors which may portend increased use and user conflict in the future.” This holding underscores the importance of user comments in assessing the existence of conflict among public land users. The case also serves to promote the notion that failure to address user conflict may play a role in finding a federal agency to be in violation of its legal obligations. As such, the element of *Washington Trails Ass’n* that addresses user conflict supports the legitimacy of litigation on that issue, if user conflict can be documented.

Further showing the importance of considering user conflict when making decisions regarding ORV use, *American Motorcyclist Ass’n v. Watt* invalidated ORV-route selection criteria that did not contain adequate requirements. The case discussed criteria proposed by the BLM regarding route designation within the California Desert Conservation Area. Specifically, the criteria were held to be invalid because they did not direct BLM officials to minimize environmental impacts and user conflicts, as “expressly required by” federal regulations.

The holding in *American Motorcyclist Ass’n* is especially important in light of the judicial deference scheme outlined two years later by the U.S. Supreme Court in *Chevron U.S.A. v. Natural Resources Defense Council, Inc.* Under *Chevron*, an agency and the court must give effect to the unambiguously expressed intent of a law. Judicial deference to an agency’s construction of a statute is reserved only for those situations in which the statute is ambiguous with respect to a particular issue. Therefore, upon the finding that minimizing user conflict and environmental impacts is “expressly required” – in other words, that it is unambiguous – the relevant agency should simply be obligated to give effect to that requirement, in line with *Chevron*. In the context of Utah wilderness, this understanding buttresses claims that federal

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130 *Id.* at 1124.

131 *Id.* at 1124.

132 *Id.* at 1124.


134 *American Motorcyclist Ass’n*, 543 F. Supp. at 797. The federal regulations expressly requiring the BLM to minimize conflict and impacts caused by ORVs are at 43 C.F.R. § 8342.1 (1998).


136 *Id.* at 842-43.

137 *Id.* at 842-43.
land-management agencies may be required by the courts to take measures to reduce conflict between off-road drivers and non-motorized users in potential wilderness areas.

In *Southern Utah Wilderness Alliance v. Dabney*, the Utah district court does not deal specifically with “user conflict,” but it does discuss the similar topic of “visitor enjoyment” in the limited context of National Park Service property. The 1916 National Park Service Organic Act requires the Park Service “to conserve the scenery and natural historic objects and the wildlife [in the Parks] and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.” *Dabney* interpreted this language to refer to visitor enjoyment of scenery and nature, *not* to the enjoyment of outdoor recreational activities, such as off-road driving. Should the specific issue of user conflict arise in litigation concerning a national park, *Dabney*’s construction of the National Park Service Organic Act would be relevant. Extending the court’s construction to future cases, conflict between ORV recreationalists and visitors seeking to enjoy the scenery and natural beauty of a national park must be resolved in favor of non-motorized users in order to preserve the park-management priorities mandated by the Organic Act.

Overall, user conflict appears to be a potent issue. With the demonstrated importance of public comment on the issue, forcing land-management agencies to respond to actual or potential user conflict in wilderness-eligible areas can be initiated by public campaigns. As a litigation point, the conflict issue appears to have garnered judicial support through favorable decisions. This may have to do with the notion that conflicts among people are more traditionally within the domain of the courts than are the less tangible, but no less real, conflicts between people and the environment. Whatever its appeal to the courts, the user conflict issue may prove to be especially important in future attempts to protect wilderness areas from degradation caused by ORV use.

**V. PROTECTING CULTURAL RESOURCES**


139 This case involves a challenge to ORV use in environmentally sensitive and archaeologically rich areas of Canyonlands National Park in Utah. *Dabney*, 7 F. Supp.2d at 1207. It also involved a NEPA claim, which is discussed later in this paper. *See infra*, notes 182-86 and accompanying text.


141 *Dabney*, 7 F. Supp.2d at 1212.

142 COTTRELL, *supra* note 97.

143 *See* Northwest Motorcycle Ass’n v. U.S. Dep’t of Agric., 18 F.3d 1468 (9th Cir. 1994); Washington Trails Ass’n v. U.S. Forest Service, 935 F. Supp. 1117 (W.D.Wash. 1996).
The term “cultural resource” encompasses both prehistoric and historic archaeological sites, objects, buildings, and structures. Prehistoric archaeology is a tremendous resource in Utah and is especially well-preserved in undisturbed wilderness contexts. However, cultural resources are fragile and particularly susceptible to permanent damage by ORVs.

Legislation guiding the BLM protects archaeological resources and may be relevant to limiting ORV use on potential wilderness lands. For the BLM, FLPMA sets forth the policy that public lands “be managed in a manner that will protect the quality of . . . archaeological resources.” The BLM is further instructed to “take any action necessary to prevent unnecessary or undue degradation of the lands.” This statement is repeated as it applies to the management of potential wilderness areas.

On land managed by the National Park Service, archaeological resources are protected by the National Park Service Organic Act, which directs park managers to conserve cultural resources so that they are unimpaired for the enjoyment of future generations. The enabling legislation for each park or other unit of the national park system may also contain language specifically protecting archaeological resources.

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146 See supra notes 32-34 and accompanying text.


148 Id. § 302(b), 43 U.S.C. § 1732(b) (1982).

149 Id. § 603(c), 43 U.S.C. § 1782(c) (1982).


With such protections in place, it is surprising how often federal land-management agencies allow ORVs to disturb archaeological resources in Utah wilderness.152 For example, on BLM land within the San Juan resource area in southeastern Utah, land managers are aware of widespread damage to archaeological sites being caused by ORVs, but off-road driving in these areas is usually allowed to continue.153

Attempts to litigate this specific issue have not been made by wilderness advocacy groups. However, there appears to be a legal basis for litigation that would require the BLM to close affected areas to ORV use. Such litigation could proceed under language in FLPMA, requiring the BLM to prevent the unnecessary or undue degradation of land under its control.154 In addition, litigation could draw upon regulations requiring the BLM to minimize damage to resources on public lands155 and to close areas where ORVs are adversely affecting cultural resources.156 Similar requirements are imposed on the Forest Service.157 This tactic is untested on BLM and Forest Service lands, but since archaeological sites are so plentiful within wilderness-eligible areas, forming part of the character of the land, it may be worthwhile to make legal efforts to protect them.

152 See SUWA Newsletter, Fall/Winter 1998, supra note 5, at 6 (sites dating to as far back as 450 A.D., many of which have not been studied, are routinely disturbed by ORVs). Many of these sites contain information about a formative stage in the prehistory of the area, with the potential to answer research questions archaeologists consider significant. L.M. Pierson, U.S. Bureau of Land Management, Cultural Resource Summary of the East Central Portion of Moab District 52 (1981).

153 Interview with Phil Gazon and Dale Davidson, supra note 33. Off-road driving continues in archaeologically sensitive areas because it is too difficult for land managers to police entire remote areas and because ORV riders disobey signs and other markers, among other reasons. Id. The Utah BLM has expressed its fear that closing many of these areas to ORVs based on the threat to archaeological sites would be “politically impossible,” a testament to the level of agency capture by ORV enthusiasts. Id.


156 43 C.F.R. § 8341.2 (1998). The doctrine of “considerable adverse impacts” has been discussed above. See supra notes 96-114 and accompanying text. In line with that discussion, it could be argued that adverse impacts to numerous prehistoric archaeological sites must be “considerable” since important information potential is being irrecoverably lost.

In *Southern Utah Wilderness Alliance v. Dabney*, a case involving Canyonlands National Park in southeastern Utah, wilderness advocates successfully sued Park Service directors, in part to prevent further destruction of archaeological sites by ORVs.\textsuperscript{158} The court in *Dabney* banned the use of ORVs in a portion of Salt Creek Canyon where archaeological resources and important riparian vegetation were being destroyed. To support their claim that ORV use in the canyon should be banned, the plaintiffs cited language in the National Park Service Organic Act and the enabling legislation for Canyonlands National Park.\textsuperscript{159} The court understood this “clear” language to prevent the Park Service from allowing ORV use within the park where it permanently impairs unique park resources.\textsuperscript{160} This unequivocal directive indicates the potential strength that the Organic Act and various enabling legislation have in preventing damage to wilderness resources within national parks.

**VI. ADDITIONAL LEGAL TOOLS FOR ENDING THE SACRIFICE**

In addition to laws and regulations specifically concerning ORVs and cultural resources, other environmental laws have significant potential to play a role in protecting wilderness from the ravages of ORV use. Most notably, the National Environmental Policy Act of 1969 (NEPA)\textsuperscript{161} and the Endangered Species Act (ESA)\textsuperscript{162} can have legitimate application in efforts to prevent ORV damage to wild lands.

**A. National Environmental Policy Act**

\textsuperscript{158} *Southern Utah Wilderness Alliance v. Dabney*, 7 F. Supp.2d 1205 (D. Utah 1998). Other aspects of this case have been discussed previously, in the context of user conflict. *See supra* notes 139-41 and accompanying text.

\textsuperscript{159} *See supra* notes 150-51 and accompanying text.

\textsuperscript{160} *Dabney*, 7 F. Supp.2d at 1211.

\textsuperscript{161} 42 U.S.C. §§ 4321 to 4370 (1994).

The National Environmental Policy Act was passed in 1969 in recognition of "the profound impact of man’s activity on the interrelations of all components of the natural environment." 163 The Act and its regulations 164 impose procedural obligations on federal agencies seeking to undertake projects that may affect the quality of the environment. 165 As a prerequisite to all major federal actions significantly affecting the quality of the human environment, a federal agency must prepare an environmental impact statement (EIS) 166 or an environmental assessment (EA), which is sometimes necessary to determine whether or not an EIS is required. 167 These obligations have been interpreted to be entirely procedural, most notably in Robertson v. Methow Valley Citizens’ Council, where the Supreme Court declared that NEPA merely prohibits uninformed -- rather than unwise -- agency action. 168 When reviewing agency decisions regarding the need to prepare an EIS or an EA, a court will determine whether the decision was arbitrary or capricious, a notably deferential standard. 169 Nonetheless, as the court declared in Calvert Cliffs Coordinating Committee v. Atomic Energy Commission, the procedural requirements themselves are enforceable and must be taken seriously. 170

The procedural requirements for preparing an EIS or an EA have been invoked in litigation concerning ORV use on public lands. With special relevance to potential wilderness

164Pursuant to NEPA, the Council on Environmental Quality promulgated federal regulations concerning the protection of the environment, included in the federal code at 40 C.F.R. §§ 1500 to 1517 (1998).
166Id. See also, 40 C.F.R. § 1502 (1998).
168Robertson v. Methow Valley Citizens’ Council, 489 U.S. 332 (1989) (upholding a Forest Service decision to allow expansion of a ski resort despite detrimental environmental consequences, since NEPA’s procedural requirement to produce an EIS had been followed).
169See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377-78 (reviewing courts must apply the arbitrary and capricious standard, affording the agency substantial deference); Committee to Preserve Boomer Lake Park v. Department of Transp., 4 F.3d 1543, 1555 (10th Cir. 1993). This standard of review still requires the court to ensure that an agency has taken a “hard look” at the environmental consequences of its proposed action. Marsh, 490 U.S. at 373-74.
areas, the court in *Washington Trails Ass’n v. U.S. Forest Service*¹⁷¹ found in an inventoried roadless area violation. When the Forest Service sought to reconstruct and relocate two trails used by ORVs, it attempted to categorically exclude the project from the NEPA process.¹⁷² The court found that the actions of the Forest Service violated NEPA in several ways. First, the court held that a categorical exclusion is never appropriate within an inventoried roadless area.¹⁷³ This finding is especially important when applied to cases within potential wilderness since these areas are, by definition, roadless. In the context of southern Utah, *Washington Trail Ass’n* provides persuasive precedent for negating any possible attempts by federal land agencies to exclude projects related to ORV use in potential wilderness from the NEPA process.

¹⁷¹*Washington Trails Ass’n v. U.S. Forest Service*, 935 F. Supp. 1117 (W.D.Wash. 1996). Other aspects of this case are discussed *supra* at notes 128-32 and accompanying text.

¹⁷²*Id.* at 1120. By declaring a categorical exclusion from NEPA requirements, the Forest Service sought to avoid the need to prepare either an EA or an EIS. *Id.*

¹⁷³*Id.* at 1121. This finding was based on a Forest Service regulation stating that the presence of an inventoried roadless area served as “an extraordinary circumstance” precluding the declaration of a categorical exclusion. 57 Fed. Reg. 43208, *cited in Washington Trails Ass’n*, 935 F. Supp. at 1120-21.
In addition to discussing the inappropriateness of declaring a categorical exclusion in a roadless area, *Washington Trails Ass’n* went on to examine other NEPA violations, all of which center around the environmental impact of ORV use.\(^{174}\) In an important portion of its ruling, the court declared that the environmental impact of the proposed trail project could not be adequately assessed unless the Forest Service considers the potential for increased ORV use in the area after the trails are opened.\(^{175}\) This holding is particularly relevant when applied to a wilderness context because both the designation and construction of ORV trails, and the opening of certain areas to unrestricted ORV use have tremendous and obvious potential to increase use of the area, with attendant impacts on wilderness suitability. It can be argued that the cumulative impact of increased ORV use triggers the NEPA process, requiring federal agencies to prepare an EIS that considers these impacts before making decisions allowing for ORV use in a wilderness-eligible area. This argument could be employed if an agency attempts to avoid the NEPA process by characterizing the environmental impact of trail designations as insignificant. In an example of appropriate application, the cumulative effects of increased use were discussed in a draft management plan for the Grand Staircase-Escalante National Monument along the Arizona-Utah border, where the BLM is considering several alternative plans.\(^{176}\)


\(^{175}\) *Id.* at 1123. In making its ruling, the court pointed to NEPA requirements that federal agencies consider connected and cumulative actions within the scope of an EIS or EA. *Id.* at 1122, citing 40 C.F.R. § 1508.25.

Another important aspect of Washington Trails Ass’n centers around the Forest Service’s failure to conduct site-specific analyses of potential trail projects. The Forest Service had promised in its programmatic 1990 Land and Resource Management Plan (LRMP) to take a closer look at specific areas when projects were planned in the future.\(^{177}\) However, when discussing the current ORV-trail construction plan, the agency simply harkened back to the LRMP as a final decision on the matter.\(^{178}\) In rebuffing this circuitous practice, the court declared that “[i]t is hardly fair to ward off objections to a proposed project by assuring future consideration, and then decline to revisit the issue later on the grounds that it has already been decided.”\(^{179}\) This straightforward language has the potential to apply to numerous situations where the Forest Service or the BLM wishes to rely on programmatic documents as the basis for future, site-specific, land-use decisions.

As part of NEPA’s mandate, federal agencies are required to consider reasonable alternatives to a proposed action in an EIS or an EA.\(^{180}\) Agency violations of this procedural requirement have arisen in litigation concerning ORV use and may be encountered again in the future. For example, as early as National Wildlife Federation v. Morton (1975), the BLM failed to consider the reasonable alternative of leaving lands undesignated for ORV use, pending site-specific evaluations.\(^{181}\)

More recently, in Southern Utah Wilderness Alliance v. Dabney, wilderness advocates included a NEPA claim in a suit against the National Park Service.\(^{182}\) The National Park Service had initiated a back country management plan (BMP) to govern the management scheme in remote areas of Canyonlands National Park, much of which qualified as wilderness.\(^{183}\) In its claim, SUWA challenged the agency for failing to consider the alternative of closing many or all of the back country trails in the planning area to ORV use, and for eventually adopting a plan that was not discussed in the EA. Although “especially troubled” by the adoption of a plan not previously subject to public review and comment, the court held that the plan nonetheless complied with NEPA because other plans considered the continued presence of ORVs in the


\(^{178}\)Id. at 1123.

\(^{179}\)Id. at 1124.


\(^{182}\)Southern Utah Wilderness Alliance v. Dabney, 7 F. Supp.2d 1205, 1212-14 (D.Utah. 1998). Other aspects of this case are discussed supra, notes 138-41, 158-60 and accompanying text.

\(^{183}\)Dabney, 7 F. Supp.2d at 1207.
Regarding the failure to consider closing large portions of the back country to ORV use, the court deferred to the Park Service, saying it had considered alternatives responsive to ORV damage in the most environmentally critical areas.

Dabney serves to indicate the limitations of pursuing a NEPA claim on the grounds that an agency failed to adequately consider alternatives. However, the door is not completely closed. For a portion of its decision, the court relied on the perceived failure of SUWA to “submit at least some evidence” of significant environmental effects that were not considered in the EA. This serves to emphasize the importance of pointing out specific destructive effects of ORV use in particular areas when making the claim that an agency failed to adequately consider these impacts.

B. Endangered Species Act

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184 Id. at 1213-14.
185 Id. at 1213.
186 Id. at 1214. “Speculation about adverse environmental effects is insufficient.” Id. at 1214.
Since ORVs are by their nature destructive, they can have particularly devastating impacts on endangered species of plants and animals.\textsuperscript{187} The Endangered Species Act (ESA) contains provisions that directly prohibit any federal agency actions that would harm endangered species and call for specific consultation procedures.\textsuperscript{188} Since the ESA contains a citizen-suit provision to ensure its enforcement, it can be accessed by environmental organizations and government agencies alike to combat the threat ORVs pose to various endangered species.\textsuperscript{189}

\textsuperscript{187}See supra, notes 22-23 and accompanying text.

\textsuperscript{188}ESA § 7, 16 U.S.C. § 1536 (1973). A federal agency must “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species . . . “ Id. See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 173 (1978) (“One would be hard pressed to find a statutory provision whose terms were any plainer than those in Section 7 of the Endangered Species Act.”).

\textsuperscript{189}ESA § 11(g), 16 U.S.C. § 1540(g) (1973).
In an effort to protect a rare shorebird threatened with extinction, the U.S. Fish and Wildlife Service (FWS) successfully sued to enjoin the use of ORVs on a Massachusetts beach in *United States v. Town of Plymouth*. The court concluded that ORVs posed a threat to the continued existence of the piping plovers after testimony from an expert wildlife ecologist that ORVs killed chicks and had substantial adverse effects on the birds’ nesting and feeding habitat. Although seemingly straightforward, *Plymouth* involved a long history of local noncompliance with state and federal guidelines. When a beach-management officer attempted to enforce ORV restrictions in piping plover habitat, town officials called for his dismissal. After irate ORV riders hung him in effigy for supporting area closures, he was fired. This behavior is reminiscent of the tantrums thrown by ORV enthusiasts fearing area closures in southern Utah, where several protestors hung President Clinton in effigy after he created the Grand Staircase-Escalante National Monument in 1996. The “long-standing intransigence” of town officials in *Plymouth* influenced the court to issue an injunction prohibiting ORV use on the beach, pursuant to the ESA.

In the context of Utah wilderness, the ESA has been utilized in an effort to protect endangered plants in the Coral Pink Sand Dunes of the Moquith Mountain WSA. The claim raised in *Southern Utah Wilderness Alliance v. Smith* centered around the BLM’s failure to consult formally with the FWS before approving a plan to protect Welsh’s milkweed from ORVs, as required by the ESA. However, the court dismissed SUWA’s claim as moot since the BLM did consult with the FWS *post hoc*, gaining its approval after the action had been decided upon. The court could not envision what purpose an order for further consultation would serve in this case, although the deciding circuit judge made a point of limiting his decision to the particular facts at hand.

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191 *Id.* at 83-84.

192 *Id.* at 86.

193 *Id.* at 88.


195 *Plymouth*, 6 F. Supp.2d at 91.

196 *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724 (10th Cir. 1997).


198 *Id.* at 728-29.

199 *Id.* at 729-30. “This is not to say that a violation of section 7(a)(2) could always be cured by subsequent consultation, nor is this general approval for consultation after the fact.
Smith was further limited to its facts by the Ninth Circuit in Natural Resources Defense Council v. Houston.\textsuperscript{200} In appealing the district court’s decision that the Bureau of Reclamation violated the ESA by renewing water contracts prior to completing required endangered species consultations, various irrigation and water districts sought to rely on Smith as persuasive authority that the consultation claim was moot.\textsuperscript{201} However, Houston distinguished Smith and adopted a strict approach to enforcing consultation requirements.\textsuperscript{202} Pointing to a fatal flaw in the plaintiff’s case in Smith, the court in Houston noted that the only relief requested by SUWA was the consultation that was in fact eventually completed.\textsuperscript{203} In contrast, the plaintiffs in Houston sought the remedy of contract rescission, which was granted.\textsuperscript{204} Taking a tougher stance, Houston expressed a commitment to the purposes behind the ESA: 

\begin{quote}
Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA had not occurred. The process, which was not observed here, itself offers valuable protections against the risk of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process, as intended by Congress.
\end{quote}

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\hspace*{1cm}\textsuperscript{200}Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1128-29 (9th Cir. 1998).

\hspace*{1cm}\textsuperscript{201}Id. at 1128.

\hspace*{1cm}\textsuperscript{202}Id. at 1128.

\hspace*{1cm}\textsuperscript{203}Id. at 1128.

\hspace*{1cm}\textsuperscript{204}Id. at 1129
The failure to respect the process mandated by law cannot be corrected with post hoc assessments of a done deal.205

As demonstrated by Plymouth, the substantive requirements of the ESA to protect threatened and endangered plants and animals may be forceful mechanisms in banning ORV use in certain areas. Even though the procedural consultation requirements are less stringently construed in Smith, post hoc consultation is nonetheless frowned upon, and the Smith court did not uphold the complete failure of an agency to consult on endangered species involved in a proposed action.206 If wilderness advocates assert a procedural ESA claim, Houston instructs that the relief sought should be more tangibly remedial than declaratory judgement and injunction requiring consultation that has, by that time, been completed. In the future, with Houston as persuasive authority in Utah’s tenth circuit setting, procedural consultation flaws may provide viable causes of action as long as the plaintiffs seek substantive relief. Such relief could include enjoining decisionmaking until consultation is in fact undertaken, or, if the agency exhibits a pattern of avoidance but has consulted after the fact, ordering the agency to notify an environmental organization before all future decisions are made so that recurring abuse can be eliminated.

VII. CONCLUSION: REQUIRING LITIGATION TO PROTECT WILDERNESS VALUES

205 Id. at 1128-29 (emphasis added).

206 See supra note 199.
The notion of the public trust embraces the idea that the legal rights of future generations to protect nature are enforceable against contemporary users.\textsuperscript{207} Currently, no broad public trust doctrine legally binds federal land-management agencies to protect wilderness values from being destroyed by off-road drivers. In fact, federal agencies like the BLM “routinely breach[] most management principles inherent in any public trust concept.”\textsuperscript{208} Although significant gains have been made in alternative dispute resolution,\textsuperscript{209} the strong conviction with which preservationists and ORV enthusiasts advocate their positions precludes resolution through mediation, especially in a climate of agency capture by utilitarian interests. Without public trust protection or protective legislation, therefore, the unique characteristics of Utah’s wild lands are defensible only with resort to existing laws and regulations, not all of which are specifically designed to preserve open space.

In congressionally designated wilderness areas, at least, ORV use is banned, and the character of the land is afforded rigorous protection.\textsuperscript{210} However, in areas eligible for wilderness designation but not yet protected by legislation, only a largely avoidable framework of laws and regulations stands between preservation and permanent destruction.\textsuperscript{211} Meanwhile, due to years of development and natural resource extraction, the vast majority of America’s public land no longer reflects a wilderness quality and is open to ORV use without conflict. For these reasons, resorting to litigation is essential to protecting wilderness-eligible lands from destruction by ORVs. Until wilderness is officially designated through an overtly political process or until the notion of the public trust is expanded to require federal land-management agencies to preserve what remains of America’s wilderness heritage, advocates must undertake aggressive measures to command enforcement of the Executive Orders and attending federal regulations along with NEPA and the ESA. For, as stated in the Wilderness Act itself, it is an important national goal “to secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”\textsuperscript{212}

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\textsuperscript{208}Coggins, \textit{supra} note 58, at 620.
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\textsuperscript{209}See, \textit{e.g.}, \textit{UDALL CENTER FOR STUDIES IN PUBLIC POLICY, ENVIRONMENTAL CONFLICT RESOLUTION IN THE WEST} (Kirk Emerson et al. eds, 1997).
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\textsuperscript{210}16 U.S.C. § 1133(c) (1973).
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\textsuperscript{211}“The few constraints that do exist have been largely undercut by the broad administrative discretion granted to land managers . . . “ Bleich, \textit{supra} note 15, at 177.
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\textsuperscript{212}16 U.S.C. § 1131(a) (1973).
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