

AIN'T NOTHING LIKE THE REAL THING: ENFORCING LAND USE RESTRICTIONS ON LAND AND WATER CONSERVATION FUND PARKS

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Abstract: Congress created the Land and Water Conservation Fund (LWCF) in 1965 to provide resources for states and federal agencies to acquire and develop land for public outdoor recreation. Over the past forty years, the LWCF has quietly become one of the most successful conservation programs in United States history. The federal government and states have used the LWCF to preserve unique landscapes for their natural beauty, scientific value, and wildlife habitat, as well as to encourage traditional recreational pursuits. The LWCF Act prohibits the conversion of LWCF-funded state and local parks to uses other than public outdoor recreation unless approved by the National Park Service under strict conditions. Nevertheless, state and local LWCF grantees have illegally converted numerous LWCF parks. As pressure grows on state and local governments to develop parkland for non-recreational uses, illegal LWCF park conversions threaten unique landscapes and the integrity of the LWCF program. This Comment argues that federal common law and statutory rights in LWCF-funded lands enable the United States to seek an array of coercive remedies to prevent, remedy, and deter illegal conversions of LWCF parks.

The continued preservation of American parkland depends upon the effective enforcement of land use restrictions on Land and Water Conservation Fund (LWCF) parks. The LWCF is one of the most successful land conservation programs in U.S. history.¹ Over the past forty years, the LWCF has provided more than \$14.4 billion to acquire and develop parkland for public outdoor recreation.² The LWCF has been particularly successful in stimulating state conservation programs.³ Approximately 10,500 LWCF grants have enabled states to acquire more than 2.6 million acres of parkland.⁴

Despite the program's many achievements, the challenge of enforcing development restrictions on LWCF-funded parks jeopardizes the future success of the LWCF.⁵ The LWCF Act provides that a grantee may not

1. See Owen Demuth, *Sweetening the Pot: The Conservation and Reinvestment Act Reignites the Property Rights Debate/Land Conservation Debate for the Twenty-First Century*, 50 *BUFF. L. REV.* 755, 761–62 (2002).

2. State LWCF, http://www.nps.gov/nrcr/programs/lwcf/fed_state.html (last visited July 5, 2007).

3. See State LWCF, <http://www.nps.gov/nrcr/programs/lwcf/history.html> (last visited July 5, 2007).

4. *Id.*

5. See *infra* Part III.

convert an LWCF-funded park to a use other than public outdoor recreation without the approval of the Secretary of the Interior.⁶ Nevertheless, illegal conversions have been a consistent issue throughout the life of the LWCF.⁷ These conversions threaten unique landscapes and undermine the effectiveness of the program.⁸

The LWCF Act enables the National Park Service (NPS) to provide matching grants to states to acquire and develop unique recreational resources.⁹ LWCF grant agreements impose substantive land use obligations on LWCF grantees.¹⁰ Both the LWCF Act and LWCF grant agreements prohibit conversion of LWCF lands to non-recreational use without the consent of NPS.¹¹ NPS may only approve a conversion under strict conditions including the substitution of reasonably equivalent parkland.¹² While NPS asserts broad authority to ensure grantee compliance with federal LWCF requirements,¹³ the agency has neither defined nor tested the full extent of its enforcement powers.¹⁴

This Comment argues that NPS can and should prevent, restore, and deter illegal conversions by bringing suit to enjoin pending illegal conversions and to force states to restore illegally-converted parks.¹⁵ These coercive remedies are necessary to protect the broad preservationist purpose of the LWCF Act from unauthorized and inadequately substituted conversions of LWCF lands.¹⁶ The common law supports coercive remedies to protect federal contract and property rights in LWCF-funded parks.¹⁷ Moreover, federal courts must order

6. 16 U.S.C. § 4601-8(f)(3) (2000).

7. See *infra* notes 92–94 and accompanying text.

8. See *infra* Part III.B–C.

9. See *infra* Part I.B.

10. See *infra* Part I.C.

11. See 16 U.S.C. § 4601-8(f)(3); NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3 Attachment B, Part II(A)–(B) (1991).

12. See 16 U.S.C. § 4601-8(f)(3) (2000); 36 C.F.R. § 59.3 (2006).

13. See *infra* Part III.D. See also NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B, Part II(C); *id.* § 675.1(12). Revisions to the Grants Manual are pending. Interview with Gloria Shinn and Heather Ramsay, LWCF Project Managers, Nat'l Park Serv., in Seattle, Wash. (Jan. 31, 2007).

14. See *id.* § 660.3, Attachment B, Part II.C; *id.* § 675.1(12); interview with Gloria Shinn and Heather Ramsay, LWCF Project Managers, Nat'l Park Serv., in Seattle, Wash. (Jan. 31, 2007).

15. See *infra* Part V.

16. See *infra* Part V.A.

17. See *infra* Part V.B.

coercive remedies where violations of the LWCF Act threaten the preservationist purpose of the law.¹⁸ Therefore, where illegal conversions threaten unique recreational resources, NPS should request injunctive relief for imminent conversions and seek restoration of illegally converted parks.¹⁹

Part I of this Comment provides an overview of the general framework of the LWCF. Part II discusses the broad preservationist purposes of the LWCF Act. Part III evaluates the LWCF Act's conversion provision and the history of illegal conversion of LWCF-funded parks. Part IV discusses common law coercive remedies for breach of a land use agreement and the *Romero-Barcelo* framework²⁰ of equitable relief for violations of environmental statutes. Finally, Part V argues that both the common law and the *Romero-Barcelo* doctrine allow NPS to prevent illegal conversions and force restoration of illegally converted LWCF parks where the conversion harms a unique public recreational resource.

I. GENERAL FRAMEWORK OF THE LWCF

The Land and Water Conservation Fund (LWCF) provides funding for federal and state projects to acquire and develop parks for public outdoor recreation.²¹ The National Park Service (NPS) is responsible for overseeing the state grants program.²² LWCF grants may serve a broad range of purposes, but all projects are governed by individual agreements between the state and NPS that establish the purpose and scope of each specific project.²³ These agreements restrict the use of LWCF-funded parks.²⁴

18. *See id.*

19. *See infra* Part V.C.

20. *See infra* notes 162–167 and accompanying text.

21. *See* 16 U.S.C. §§ 4601-7, 4601-8 (2000).

22. *See* 16 U.S.C. 4601-8(a); 36 C.F.R. § 59.1 (2006).

23. *See* Nat'l Park Serv., L&WCF GRANTS MANUAL § 660.2(5) (1991).

24. *See infra* Part I.C.

A. *The LWCF Supports Both Federal and State Projects to Enhance Outdoor Recreational Resources*

The LWCF distributes funds for both federal and state projects to conserve and improve parkland.²⁵ Congress intended the federal component of the LWCF to enable federal agencies to acquire private parcels within and around federal public lands and to create recreational areas of national significance.²⁶ The state component of the LWCF provides matching grants to states for the acquisition and development of parklands.²⁷ States may also receive funds for comprehensive outdoor recreational resource planning.²⁸ The LWCF Act allows states to designate local political units to receive LWCF grants.²⁹ All grant recipients manage the lands they acquire or develop as a result of federal funding.³⁰

B. *LWCF State Grants Require Coordination Between Federal, State, and Local Policymakers to Meet Local Recreational Needs*

The LWCF Act grants the Secretary of the Interior discretion to establish appropriate terms and conditions for authorizing grants to states.³¹ In practice, the regional directors of NPS distribute blocks of funding to states,³² and states allocate funds for individual grants to state agencies and local government grantees.³³ Grant applicants initially

25. See 16 U.S.C. §§ 4601-7, 4601-8.

26. See *id.* § 4601-9(1) (2000); S. REP. NO. 88-1364 (1964), as reprinted in 1964 U.S.C.C.A.N. 3633, 3640. The federal side of the fund also assisted in financing federal reservoir projects that resulted in the creation of recreational opportunities. See S. REP. NO. 88-1364 (1964) as reprinted in 1964 U.S.C.C.A.N. 3633, 3641.

27. 16 U.S.C. § 4061-8 (2000). State grants are appropriated on the basis of need, considering population, use of recreational resources by out of state visitors, use of federal resources within states, and existing conservation programs within the states. *Id.* § 4601-8(b)(2).

28. See *id.* § 4601-8(a), (d).

29. See *id.* § 4601-8(f).

30. *Id.*

31. *Id.* § 4601-8(a).

32. NAT'L PARK SERV., L&WCF GRANTS MANUAL § 600.1(2) (1991). The Secretary of Interior still retains authority to apportion funds among the states. The LWCF Act provides guidelines for apportionment. 16 U.S.C. § 4601-8(b) provides the formula for dividing annual LWCF state funds among states.

33. Interview with Gloria Shinn and Heather Ramsay, LWCF Project Managers, Nat'l Park Serv., in Seattle, Wash. (Jan. 31, 2007); see 16 U.S.C. § 4601-8(f)(2) (2000) (providing states with authority to administer LWCF funds).

apply to the State LWCF Liaison Officer for specific funding and the state officer ranks grant applications based on the priorities asserted in the State Comprehensive Outdoor Recreational Plan (SCORP).³⁴ NPS determines the number of projects that can be funded based on the annual LWCF state grants appropriation³⁵ and then negotiates individual project agreements with the state.³⁶ The state must accept responsibility for ensuring that the individual project sponsors³⁷ adhere to the terms of their project agreements.³⁸

C. State LWCF Projects Are Governed by Grant Agreements That Impose Substantive Land Use Restrictions on LWCF-Funded Parks

NPS regulations allow LWCF grants to serve a broad range of purposes,³⁹ but individual projects must adhere to the conditions and

34. See 16 U.S.C. § 4601-8(d), (f)(1). For backgrounds on SCORPs, see NAT'L PARK SERV., L&WCF GRANTS MANUAL § 630.1(1). The LWCF Act requires all states to prepare a SCORP to be considered for LWCF grants. In its SCORP, the state assesses supply and demand for recreational resources in the state and creates a plan for improving overall access to state resources. The SCORP then becomes the basis for evaluating individual grant applications. States may receive LWCF funds to create SCORPs. See *supra* note 28 and accompanying text.

35. The LWCF Act generally devotes sixty percent of LWCF funds for the state grants program. See 16 U.S.C. § 4601-7 (2000). For a history of Congressional LWCF appropriations, see Robert L. Glicksman & George Cameron Coggins, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 COLUM. J. ENVTL. L. 125 (1984); Demuth, *supra* note 1, at 763; CRS REPORT TO CONGRESS, LAND AND WATER CONSERVATION FUND: OVERVIEW, FUNDING HISTORY AND CURRENT ISSUES 1, 4–5 (July 10, 2006).

36. See NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.2(5).

37. Project sponsors can be either state agencies or local governments. See 16 U.S.C. § 4601-8(f)(2).

38. NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.2(5)(D) (1991) (providing that the State Liaison Officer must make arrangements with the local sponsor to complete the LWCF project and comply with all relevant federal laws). See also *id.* § 660.3 Attachment B (Part IIA) (requiring state to agree to hold local project sponsors accountable for meeting requirements). For examples of state incorporation of federal grant conditions, see WASHINGTON INTERAGENCY COMMITTEE FOR OUTDOOR RECREATION (WICOR) MANUAL #15: LWCF PROGRAM: POLICIES AND PROJECT SELECTION, SECTION 2, PROJECT BOUNDARIES—SECTION 6(f)(3) OF THE LWCF ACT (March 10, 2006) (describing applicability of the conversion provision); WICOR MANUAL #7: FUNDED PROJECTS: POLICIES & THE PROJECT AGREEMENT, Sample Agreement at H (requiring grantee compliance with all applicable federal statutes).

39. NAT'L PARK SERV., L&WCF GRANTS MANUAL § 640.2(2). For example, these activities include fishing, nature study, and sightseeing. As for development projects, the Grants Manual states that “[f]inancial assistance may be available . . . to provide most facilities necessary for the use and enjoyment of outdoor recreation areas.” *Id.* § 640(3)(1). The LWCF Act specifies that development projects may consist of basic outdoor recreation facilities to serve the general public provided that the funding of such projects is in the public interest and in accord with the SCORP. *Id.*

obligations set forth in grant agreements with NPS.⁴⁰ The LWCF Act requires grant applicants to demonstrate that the grant is consistent with the state's SCORP⁴¹ and agree to use the grant for the stated purpose only.⁴² All grants are governed by individual project agreements that establish the specific framework for accomplishing the project.⁴³ NPS regards these agreements as contractual in nature.⁴⁴ The agreements require grantees to commit to uphold federal law and to preserve park lands acquired or developed with LWCF funds in perpetuity as a condition of receiving federal funds.⁴⁵ Moreover, grantees must record their LWCF land use obligations in public property records.⁴⁶

In sum, the LWCF state grants program enables state and local governments to acquire and develop parkland to meet a broad range of recreational interests. NPS establishes the terms of individual LWCF projects in grant agreements with individual states. NPS regards these agreements as contracts that impose substantive land use obligations on grantees.

II. PRESERVATION OF UNIQUE LANDSCAPES AND NATURAL RESOURCES ARE AMONG THE PURPOSES OF THE LWCF ACT

Congress passed the LWCF Act in response to rising national demand for access to outdoor recreation.⁴⁷ The history of the Act reveals that Congress intended for the LWCF to preserve unique landscapes as well as to provide opportunities for active physical recreation.⁴⁸ Since its inception in 1965, Congress, NPS, and states have repeatedly used the

§ 640.3(1).

40. *Id.* § 660.2(5).

41. 16 U.S.C. § 4601-8(d) (2000); *see also* NAT'L PARK SERV., L&WCF Grants Manual § 630.1(4) (elaborating on statutory SCORP requirements).

42. 16 U.S.C. § 4601-8(f)(1).

43. NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.2(5).

44. *See* 36 C.F.R. § 59.1 (2006) (referring to the "contractual agreement between NPS and the State").

45. *See* NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B, Part IIB (1991). In the case of a leased parcel, however, LWCF protections only apply throughout the length of the lease. *Id.*

46. NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B, Part II at F.

47. *See* S. REP. NO. 88-1364 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 3633, 3634.

48. *See infra* Part II.B.

LWCF for broad preservationist purposes, and courts have upheld this use.⁴⁹

A. *The LWCF Act's Origin and Legislative History Indicate That Congress Enacted the Law to Secure the Long Term Future of Outdoor Recreational Resources*

The LWCF Act grew out of a 1962 report issued by the Outdoor Recreation Resources Review Commission (ORRRC).⁵⁰ Congress appointed the ORRRC in 1958 to evaluate the nation's outdoor recreational resources and make recommendations for their long term conservation.⁵¹ After finding that the demand for outdoor recreation was rapidly increasing, the ORRRC declared the availability of outdoor recreation to be of national concern.⁵² The ORRRC determined that the federal government must do more than preserve sites of national significance and exercise stewardship over federal lands.⁵³ Specifically, the ORRRC urged the creation of a grant program that would utilize federal funds to increase state recreational resources.⁵⁴ In response to these findings, President John F. Kennedy sent Congress draft legislation for the creation of a land and water conservation fund.⁵⁵ Congress eventually enacted the bill as the Land and Water Conservation Fund Act of 1965.⁵⁶

In addition to ensuring basic recreational access, the legislative history of the LWCF Act reveals that Congress intended for the LWCF to preserve the emotional and aesthetic value of unique landscapes.⁵⁷ The LWCF Act states its purpose as follows:

[T]o assist in preserving, developing, and assuring accessibility to all citizens of the United States of America of present and

49. See *infra* Part II.C.

50. S. REP. NO. 88-1364 (1964), as reprinted in 1964 U.S.C.C.A.N. 3633, 3637-38 ("H.R. 3846 stems in large part from certain findings of the commission.").

51. *Id.* at 3637.

52. *Id.* at 3638.

53. *Id.*

54. *Id.*

55. *Id.* at 3633.

56. See Pub. L. No. 88-578, 78 Stat. 900 (1964).

57. See letter from John F. Kennedy to Lyndon B. Johnson, President of the Senate and John W. McCormack, Speaker of the House of Representatives in S. REP. NO. 88-1364 (1964), as reprinted in 1964 U.S.C.C.A.N. 3633, 3651-52.

future generations . . . such quantity and quality of outdoor recreation resources as may be available and are necessary and desirable for individual active participation in such recreation and to strengthen the health and vitality of the citizens of the United States⁵⁸

Although this language suggests that Congress primarily intended the LWCF Act to increase opportunities for active physical recreation,⁵⁹ the legislative history of the LWCF Act indicates a broader preservationist purpose.⁶⁰ The LWCF Act's Senate Report notes the need to improve the "physical and spiritual health and vitality of the American people."⁶¹ Similarly, in a letter to the President of the Senate and the Speaker of the House, President Kennedy highlighted protection of "irreplaceable lands of natural beauty and unique recreational value" and the "enhancement of spiritual, cultural, and physical values from the preservation of these resources" in reference to his proposed legislation.⁶²

Finally, the historical context of the LWCF Act's creation also supports assigning it a broad preservationist purpose.⁶³ Congress created the LWCF at a time when American policy and law were beginning to recognize the non-economic values of natural resources.⁶⁴ For example, one year before the creation of the LWCF, Congress enacted the Wilderness Act, which created a system to inventory and preserve unique landscapes in their natural condition.⁶⁵ The statement of policy in the Wilderness Act mirrors the statement of purpose in the LWCF Act.⁶⁶

58. 16 U.S.C. § 4601-4 (2000).

59. See *Friends of the Shawangunks, Inc. v. Clark*, 754 F.2d 446, 450 (2d Cir. 1985).

60. See *id.*

61. S. REP. NO. 88-1364 (1964), reprinted in 1964 U.S.C.C.A.N. 3633, 3636.

62. Letter from John F. Kennedy to Lyndon B. Johnson, President of the Senate and John W. McCormack, Speaker of the House of Representatives (Feb. 14, 1963), in S. REP. NO. 88-1364, as reprinted in 1964 U.S.C.C.A.N. 3633, 3651-52.

63. See, e.g., DOUG SCOTT, *THE ENDURING WILDERNESS* 51 (2004) (describing the Wilderness Act as the flagship of President Kennedy's "New Frontier" conservation agenda).

64. See generally Thomas G. Smith, *John Kennedy, Stewart Udall, and New Frontier Conservation*, 64 PAC. HIST. REV., 329 (1995).

65. 16 U.S.C. § 1131 (2000). The Wilderness Act defines wilderness as "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor and does not remain." *Id.* § 1131(c). The word "untrammelled" is defined as "not confined or limited" or "not hindered" WEBSTER'S NEW INTERNATIONAL DICTIONARY 2513 (3d ed. 2002).

66. Compare 16 U.S.C. § 1131(a) ("In order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States . . . it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of

The LWCF Act was thus part of a larger congressional effort in the 1960s to preserve America's natural heritage.

B. Congress, NPS, and States Have Repeatedly Used the LWCF to Preserve Unique Landscapes

The LWCF's integration with subsequent American environmental laws has strengthened the LWCF's preservationist purpose. For example, the 1968 Wild and Scenic Rivers Act (WSRA) established a system for preserving free-flowing rivers throughout the United States.⁶⁷ The WSRA authorizes the Secretary of the Interior and the Secretary of Agriculture to use LWCF monies to purchase land and interests in land to further the Act's purposes.⁶⁸ Congress found that the federal government could not manage the task of preserving rivers alone, and it encouraged states to take responsibility by using LWCF grants to acquire applicable lands.⁶⁹ The WSRA thus utilized both the federal and state components of the LWCF to stimulate government efforts to preserve unique waterways.⁷⁰

Furthermore, the federal government has used LWCF funds to purchase and preserve a number of the crown jewels of America's national park system.⁷¹ For example, LWCF funds were instrumental in creating Redwood National and State Parks in northern California.⁷²

wilderness.") with the LWCF Act's statement of purpose *supra* text accompanying note 58.

67. 16 U.S.C. § 1273 (2000). The Wild and Scenic Rivers Act stemmed from the same 1962 ORRRC report that built momentum for the LWCF Act. The Commission recommended that "[c]ertain rivers should be preserved in their free-flowing condition and natural setting" and that "[r]ecreation should be recognized as a beneficial use of water." H.R. REP. 90-1623 at 2 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3801, 3802.

68. 16 U.S.C. § 1277(a)(1) (2000).

69. H.R. REP. 90-1623, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 3801, 3803.

70. *See id.*; 16 U.S.C. § 1277(a)(1). Federal law has also authorized the use of LWCF funds to protect endangered species habitat and to purchase public land for the development of the National Trails System. *See id.* § 1534 (Endangered Species Act (ESA)); *id.* § 4601-9 (LWCF federal money for habitat protection pursuant to ESA); *id.* § 1246(g) (national trails).

71. Examples include North Cascades National Park and Recreation Area, WA; Point Reyes National Seashore, CA; Voyageurs National Park, MN. LWCF Grants (1965–2005) http://www.nps.gov/nrcr/programs/lwcf/fed_state.html (last visited July 15, 2007).

72. *See* 16 U.S.C. § 79c(b)(2) (2000). *See also* S. REP 90-641, at 12–13 *as reprinted in* 1968 U.S.C.C.A.N. 3906, 3917 (discussing the use of LWCF funds for state park purchases); letter from Stewart Udall, Secretary of the Interior to Hubert H. Humphrey, President of the Senate, *id.* at 3933 (discussing the use of LWCF funds for national park land purchases).

Congress created Redwood National Park⁷³ almost entirely from private land acquired with LWCF funds or through exchanges of federal land.⁷⁴ Redwood National Park is surrounded by a number of state parks, several of which were expanded with LWCF grants when the national park was created.⁷⁵ The Redwood Parks demonstrate the successful use of the LWCF's federalist system to accomplish a broad preservationist purpose.

C. *A Federal Circuit Court Upheld Use of the LWCF for Preservationist Purposes*

In a leading LWCF case, the Second Circuit gave the concept of "public outdoor recreation" a broad, preservationist interpretation.⁷⁶ In *Friends of the Shawangunks, Inc. v. Clark*⁷⁷ a citizens' group challenged the proposed construction of a golf course on LWCF-funded property.⁷⁸ One issue in the case was whether the underlying LWCF grant agreement was valid because it sought to preserve the ecology and scenery of the area without providing the public with access to the specific federally-funded tract.⁷⁹ On appeal, the Second Circuit held that the grant was a valid use of the LWCF because the LWCF Act's authorization of grants for public outdoor recreational uses "encompasses uses not involving the public's actual physical presence on the property."⁸⁰ Because the right to preserve the landscape by preventing further development was the property right acquired by the grantee, Palisades Interstate Parks Commission, the proposed golf course construction violated the terms of the grant.⁸¹

73. Redwood National Park was established to "preserve significant examples of the primeval coastal redwood . . . forests and the streams and seashores with which they are associated for purposes of public inspiration, enjoyment, and scientific study." 16 U.S.C. § 79a.

74. See *id.* § 79c(b)(2). See also S. REP 90-641, at 9-10 (1968) as reprinted in 1968 U.S.C.C.A.N 3906, 3909-10.

75. S. REP 90-641, at 12-13 (1968), reprinted in 1968 U.S.C.C.A.N 3906, 3917. The non-profit conservation group Save the Redwoods League provided most of the matching funds to the State of California for these purchases. *Id.* See *id.* at 3907-08 for a history of the California state redwoods parks.

76. *Friends of the Shawangunks, Inc. v. Clark*, 754 F.2d 446, 450 (2d Cir. 1985).

77. *Id.*

78. *Id.* at 447.

79. *Id.* at 449.

80. *Id.*

81. *Id.* at 450-51.

In sum, Congress intended for LWCF to preserve unique landscapes as well as to ensure general access to outdoor recreation. The LWCF's integration with subsequent environmental laws strengthened its preservationist purpose. Congress, NPS, and states have used the LWCF to preserve many natural treasures throughout the nation and a federal circuit court has upheld the use of the LWCF for preservationist purposes.

III. ILLEGAL CONVERSIONS THREATEN UNIQUE LWCF LANDSCAPES

The LWCF Act not only provides funding for the protection of recreational resources, but it also safeguards those resources in perpetuity.⁸² A grantee “converts” LWCF land when it puts any portion of the parcel to a use other than public outdoor recreation.⁸³ To limit conversion of LWCF land, the LWCF Act contains a provision that requires grantees to receive federal approval for a conversion and to provide adequate substitution for the loss of recreational lands.⁸⁴ Despite the conversion provision's requirements, NPS has historically struggled to prevent unauthorized conversions and to assure adequate substitution of converted parks.⁸⁵ NPS explicitly reserves the right to seek coercive

82. 36 C.F.R. § 59.3 (2006).

83. See 16 U.S.C. § 4601-8(f)(3) (2000); 36 C.F.R. § 59.3. The LWCF Act does not define the term “conversion,” and its meaning is a source of litigation. See *Friends of the Shawangunks, Inc. v. Clark*, 754 F.2d 446, 450 (2nd Cir. 1985) (discussed *supra* notes 76–81 and accompanying text); *Sierra Club v. Davies*, 955 F.2d 1188, 1193–95 (8th Cir 1992) (holding that commercial test drilling for diamonds in an Arkansas state park did not constitute a conversion because it would not necessarily lead to commercial exploitation); *Friends of Ironbridge Park v. Babbitt*, 187 F.3d 629 at *3 (4th Cir. 1999) (unpublished opinion) (upholding NPS's interpretation of its regulations concerning the construction of facilities in LWCF-funded parks); for NPS guidelines on land use changes constituting conversion see NAT'L PARK SERV., L&WCF GRANTS MANUAL § 675.9.3(A).

84. 16 U.S.C. § 4601-8(f)(3). NPS has approved a large number of conversions of LWCF parks across the country. While no one has compiled comprehensive, authoritative conversion data, NPS indicated in the year 2000 that it had approved approximately 1,000 conversions since the creation of the Fund. See Robert H. Levin, *When Forever Proves Fleeting: the Condemnation and Conversion of Conservation Land*, 9 N.Y.U. ENVTL. L.J. 592, 607 (2001) (citing Telephone Interview with Wayne Strum, Director, Recreation Programs Division, National Parks Service (July 5, 2000)). In the Pacific Northwest, NPS has approved approximately 127 conversions since 1995, NPS Northwest Regional Conversion Database Nov. 2006 (on file with author), and the Pacific Regional Office is currently tracking over 100 potential conversions, interview with Gloria Shinn and Heather Ramsay, LWCF Project Managers, Nat'l Park Serv., in Seattle, Wash. (Jan. 31, 2007).

85. See *infra* Part III.B–C. NPS's historically poor record keeping of LWCF grants is a related problem. For an example of the impact of deficient record keeping on the enforcement of LWCF

remedies from grantees that violate the conversion provision, but this assertion has not been adjudicated.⁸⁶

A. *The LWCF Act's Conversion Provision*

The LWCF Act's conversion provision is the cornerstone of federal efforts to ensure that grantees retain LWCF-funded properties for public outdoor recreational use.⁸⁷ The conversion provision provides that once a property⁸⁸ has received funding from the LWCF, it may not be converted to non-outdoor recreational uses without the approval of the Secretary of the Interior.⁸⁹ If a grantee proposes to convert only a portion of an LWCF-funded park, NPS requires an evaluation of the conversion's impact on the park as a whole.⁹⁰ In order to receive LWCF funding, the state must agree to require all local project sponsors to adhere to conversion requirements.⁹¹

B. *Conversions Regularly Occur Without the Requisite Federal Approval*

Despite strict conversion requirements, a number of significant conversions have occurred without the approval of the NPS Regional Administrator. There are numerous examples of grantees converting LWCF lands without first securing, or even seeking, federal approval.⁹²

conversion requirements, see letter from Heather Ramsay, LWCF Project Manager, Nat'l Park Serv., to Darrell Jennings, Outdoor Grants Manager, WICOR (Apr. 21, 2006) (on file with author) (noting that it is unclear whether NPS ever investigated or sanctioned intensive development in a major LWCF park in the City of Spokane, Washington. The park, known as Riverpark, now has an IMAX theater, amusement rides, restaurants, and gift shops).

86. NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B, Part II.C (1991); *id.* § 675.1(12).

87. 36 C.F.R. § 59.3.

88. If any part of a park has received LWCF funds, NPS extends conversion protection to the whole parcel. *See* NAT'L PARK SERV., L&WCF GRANTS MANUAL § 675.9(3).

89. 16 U.S.C. § 4601-8(f)(3) (2000). Conversion evaluation has also been delegated to the Regional Administrator of the NPS. *See* 36 C.F.R. § 59.3(b) (2006).

90. 36 C.F.R. § 59.3(b)(5). If NPS approves the conversion, then the remainder of the park must remain "recreationally viable." *Id.*

91. *See* NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B at (A)–(B).

92. "It isn't unusual to deal with a conversion after it has taken place." Letter from Ruth Anderson, LWCF Project Officer, Nat'l Park Serv., to Mr. Winters et. al. (June 22, 1994) (on file with author). *See also* Levin, *supra* note 84, at 626 (citing telephone interview with Paul Doscher, Society for the Protection of New Hampshire Forests (June 21, 2000)).

Unapproved conversions have been a persistent issue in the Northwest since at least the 1970s,⁹³ and the regional NPS office is currently responding to approximately two dozen unauthorized conversions.⁹⁴

For example, the City of Boise, Idaho has engaged in a number of prominent unapproved conversions.⁹⁵ Between 1966 and 1979, Boise received six LWCF matching grants totaling more than \$952,000 in federal funding for acquisition and development of parkland to form a greenbelt along the Boise River.⁹⁶ Without notifying NPS, the City constructed a four-lane highway through the greenbelt in 1978.⁹⁷ In the 1980s, the City allowed residential developments to encroach on the greenbelt in three locations⁹⁸ and sold at least one parcel to a developer.⁹⁹ Finally, after conversion negotiations with NPS stalled in the early 1990s, the City installed a water treatment plant on the greenbelt without approval to meet a Clean Water Act compliance deadline.¹⁰⁰ These unapproved conversions resulted in the loss of unique urban recreational resources along the Boise River.¹⁰¹

93. See *infra* discussion of Boise, ID greenbelt.

94. Interview with Gloria Shinn and Heather Ramsay, LWCF Project Managers, Nat'l Park Serv., in Seattle, Wash. (January 31, 2007); letter from Heather Ramsay, LWCF Project Manager, Nat'l Park Serv., to Marguerite Austin, Manager, Washington Interagency Committee for Outdoor Recreation (Sept. 27, 2004) (on file with author) (listing twenty-three potential unauthorized conversions in Washington).

95. A 1987 letter from the Idaho State Parks Commission to then Boise mayor Dirk Kempthorne detailed a number of conversions on the Boise greenbelt. This letter states "over the years, the city [Boise] has effected numerous conversions of property acquired by this [LWCF-funded greenbelt] project." Letter from Rinda Ray Just, Deputy Attorney General, Idaho Dep't of Parks and Recreation, to Dirk Kempthorne, Mayor, City of Boise (Mar. 2, 1987) (on file with author). The letter also contains a legal analysis advising the City that its conversion practices were breaking federal and state law. *Id.* A 1991 interagency memo stated that "Boise has a very poor conversion record." Letter from Jake Howard, Supervisor, Outdoor Recreation Program, Idaho Dep't of Parks and Recreation, to Don Ketter, Outdoor Recreation Planner, Nat'l Park Serv. (Jul. 9, 1991) (on file with author).

96. Email from Gloria Shinn, Regional LWCF Program Manager, Nat'l Park Serv., to jay_spector@ios.doi.gov (Jan 26, 2000) (on file with author).

97. Letter from Rinda Ray Just, Deputy Attorney General, Idaho Dep't of Parks and Recreation, to Dirk Kempthorne, Mayor, City of Boise (Mar. 2, 1987) (on file with author).

98. Boise Greenbelt Grant No. 16-00097, Amendment to Project Agreement No. 97.10, Attachments A & B (Mar. 20, 1989).

99. Letter from Rinda Ray Just, Deputy Attorney General, Idaho Dep't of Parks and Recreation, to Dirk Kempthorne, Mayor, City of Boise (Mar. 2, 1987) (on file with author).

100. Letter from Ruth Anderson, LWCF Project Officer, Nat'l Park Serv., to Mr. Winters et. al. (June 22, 1994) (on file with author).

101. See, e.g., *infra* notes 119–124 and accompanying text.

Another notable unauthorized conversion is now occurring on Portage Island in Puget Sound off the coast of Bellingham, Washington.¹⁰² Whatcom County received an LWCF grant in 1966 to acquire parcels for the creation of a county park that would allow camping, picnicking, and water-based recreation.¹⁰³ After a lengthy dispute with the Lummi Tribe over an easement to provide public access to the island,¹⁰⁴ the parties agreed that the County would deed the island back to the Tribe.¹⁰⁵ The Tribe agreed to assume the responsibilities of the LWCF grant, including providing public recreational access to the island.¹⁰⁶ Shortly thereafter, the Tribe banned all non-Indians from the island.¹⁰⁷ More than twenty five years later, the Tribe continues to deny public access and NPS has not brought an enforcement action against the Tribe.¹⁰⁸ Because the Tribe never sought approval to close the island to the public, the closure represents an illegal conversion under the LWCF Act and a breach of Whatcom County's LWCF project agreement.¹⁰⁹

102. See letter from Michael Linde, Leader, Partnership Programs, Dep't of the Interior, to William Back, Solicitor General's Office, Dep't of the Interior (Mar. 9, 2005) (on file with author).

103. Memorandum from Glenn F. Tiedt, Recommendations and Findings, Portage Island Acquisition Project (Nov. 28, 1966) (on file with author); Department of Interior News Release (Jan. 12, 1967).

104. See *Whatcom County Park Bd. v. Bureau of Indian Affairs*, 6 Interior Bd. of Indian Appeals, 196, 198 (1977). The entire island is within the Lummi Reservation. *Id.* at 200. Before the county purchase, the island had been divided into private allotments owned by both Indians and non-Indians. *Id.* at 201.

105. Agreement between Whatcom County and the Interagency Comm. for Outdoor Recreation (Dec. 16, 1980) (on file with author) at 2.

106. *Id.* ("[t]he state of Washington and the citizens of the State of Washington shall have the right to use the Island forever for outdoor recreation purposes.").

107. See letter from Marlene Dawson, Council Member, Whatcom County Council, to Senator Slade Gordon (Apr. 5, 1994) (on file with author); Whatcom County Park and Recreation Board Resolution 25 (Aug. 14, 1990).

108. See letter from Michael Linde, Leader, Partnership Programs, Dep't of the Interior, to William Back, Solicitor General's Office, Dep't of the Interior (Mar. 9, 2005) (on file with author); e-mail from Heather Ramsay, LWCF Project Manager, Nat'l Park Serv., to Marilyn Gillen, Nat'l Park Serv. (Jul. 27, 2006) (on file with author). In 1995, WICOR noted that it did not have funding for enforcement activities. Letter from Laura Eckert, Director, Interagency Comm. for Outdoor Recreation, to Susie Chang, Office of Senator Slade Gorton (Oct. 28, 1995) (on file with author). NPS is currently seeking advice from the Solicitor General's Office about how to proceed. Michael Linde, Leader, Partnership Programs, Dep't of the Interior, to William Back, Solicitor General's Office, Dep't of the Interior (Mar. 9, 2005) (on file with author).

109. See 16 U.S.C. § 460l-8(f)(3) (2000); NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B, Part IIB (1991).

C. *Inadequate Substitution of Converted Land Further Frustrates the Purpose of the LWCF Act*

For NPS to approve a conversion of LWCF land, the grantee must agree to substitute land of equivalent fair market value and “reasonably equivalent usefulness and location.”¹¹⁰ Once NPS approves the conversion, NPS generally requires the grantee to immediately acquire substitute property.¹¹¹ If it is not possible to identify substitute land prior to the conversion, the grantee must agree to satisfy the substitution requirement within a specified period, usually one year.¹¹² The substitute property generally must serve the same community and geographic area,¹¹³ and must provide similar types of recreational resources.¹¹⁴ Furthermore, the substitute should generally be administered by the same political jurisdiction as the converted property.¹¹⁵ NPS also imposes these substitution mandates as mitigation for unauthorized conversions.¹¹⁶ NPS therefore generally subjects unapproved conversions to the same legal requirements as approved conversions.¹¹⁷

The unique natural features and subjective recreational values of many parks make adequate substitution difficult.¹¹⁸ For example, as a

110. *Id.*

111. 36 C.F.R. § 59.3(c) (2006).

112. *Id.*

113. *Id.* § 59.3(b)(3).

114. *Id.* There is one significant exception to this rule. The LWCF Act was amended in 1986 to deem wetlands “reasonably equivalent in usefulness” to any converted land as long as the wetland has been identified by the state SCORP. See Emergency Wetland Resources Act of 1986, Pub. L. No. 99-645, § 303(3), 100 Stat 3582, 3587–88 (codified at 16 U.S.C. § 4601(8)(f)(3)).

115. 36 C.F.R. § 59.3(3). If the local project sponsor cannot provide substitute property, then the state must do so. See NAT’L PARK SERV., L&WCF GRANTS MANUAL § 675.9(3)(B)(3) (1991). If the substitute meets this jurisdictional requirement, NPS may approve it even if it is geographically distant from the converted parcel. Interview with Gloria Shinn and Heather Ramsay, LWCF Project Managers, Nat’l Park Serv., in Seattle, Wash. (Jan. 31, 2007).

116. See 36 C.F.R. § 59.3(c).

117. See *id.* See also, *e.g.*, description of Boise Greenbelt conversion substitute *infra* notes 119–124 and accompanying text; letter from Michael Linde, Leader, Partnership Programs, U.S. Dep’t of Interior, to William Back, Solicitor General’s Office (Mar. 9, 2005) (on file with author) and e-mail from Heather Ramsay, LWCF Project Manager, Nat’l Park Serv., to Marilyn Gillen, Nat’l Park Serv. (July 27, 2006) (on file with author) (federal officials discussing whether the Lummi Tribe’s transfer of parkland to Whatcom County as part of the Portage Island settlement could serve as a substitute for the Tribe’s conversion of Portage Island).

118. See, *e.g.*, letter from Don Ketter, Outdoor Recreation Planner, Nat’l Park Serv., to Jake Howard, Supervisor, Outdoor Recreation Program, Idaho Dep’t of Parks and Recreation (July 22, 1991) (on file with author) (questioning the adequacy of replacement land at Warm Springs Park in

substitute for Warm Springs Park,¹¹⁹ the City of Boise proposed acquiring a nearly 100-acre parcel in the foothills surrounding the city known as Hull's Gulch.¹²⁰ The City described Hull's Gulch as an "urban habitat area with a system of perimeter trails."¹²¹ The trails linked to other open space and allowed for "wildlife watching, nature study, vista viewing and photography."¹²² NPS questioned the adequacy of Hull's Gulch as a substitute because, unlike Warm Springs, Hull's Gulch was not located on the river¹²³ and thus offered different recreational opportunities. Nevertheless, after Boise converted without approval, NPS chose to accept Hull's Gulch as a substitute.¹²⁴

The Jewell Wildlife Meadow in northwestern Oregon provides another example of a questionable conversion substitute. The Oregon Department of Fish and Wildlife (ODFW) acquired the original Jewell site with a LWCF grant in 1969 to secure wildlife habitat and provide the public with the opportunity to view wildlife, primarily elk.¹²⁵ Noting that elk studies indicate that the animals prefer strands of mature trees, the LWCF project proposal stated ODFW would manage the sixty-plus acres of mature forest on the site to enhance wildlife and recreational values.¹²⁶ Nevertheless, NPS approved a conversion that transferred the

Boise, Idaho).

119. Warm Springs is the portion of greenbelt that Boise converted for the water treatment plant. *See supra* note 100 and accompanying text.

120. Letter from Ruth Anderson, LWCF Project Officer, Nat'l Park Serv., to Mr. Winters et. al. (June 22, 1994) (on file with author). The Ore-Ida Corporation donated the site. Letter from Jake Howard, Supervisor, Outdoor Recreation Program, Idaho Dep't of Parks and Recreation, to Robert Karotko, Chief, Recreation Programs Recreation Resources and Professional Services, Nat'l Park Serv. (Nov. 2, 1992) (on file with author) at 2.

121. Letter from Ruth Anderson, LWCF Project Officer, Nat'l Park Serv., to Mr. Winters et. al. (June 22, 1994) (on file with author).

122. *Id.*

123. *See* letter from Don Ketter, Outdoor Recreation Planner, Nat'l Park Serv., to Jake Howard, Supervisor, Outdoor Recreation Program, Idaho Dep't of Parks and Recreation (July 22, 1991) (on file with author) (raising questions of the recreational utility of Hull's Gulch including its proximity to the river). NPS also questioned the relative property values of Hull's Gulch and Warm Springs. Letter from Ruth Anderson, LWCF Project Officer, Nat'l Park Serv., to Mr. Winters et. al. (June 22, 1994) (on file with author).

124. Letter from Ruth Anderson, LWCF Project Officer, Nat'l Park Serv., to Mr. Winters et. al. (June 22, 1994) (on file with author).

125. *See* memorandum from Edward B. Johnson, Project Office, to Oregon File 36-00209 (Apr. 2, 1969) (on file with author); letter from Alan Cook, Planning and Grants Manager, Or. Dep't of Transp., Parks & Rec. Div., to Richard Winters, Nat'l Parks Serv. (June 17, 1986) (on file with author).

126. Project proposal, Jewell Valley Wildlife Meadow – Acquisition of Engbretson Tract, Doc

forested lands to the Oregon Department of Forestry (ODF) for logging.¹²⁷ ODFW acquired ODF's adjacent wildlife refuge as a substitute for the converted forest.¹²⁸ While both NPS and state officials noted that the land exchange would enhance hunting opportunities,¹²⁹ neither considered the overall impact on recreational and scenic values.¹³⁰ Accordingly, the Jewell substitution was arguably inadequate because it did not replace the mature forest landscape with an equivalent recreational resource.

D. NPS Has Not Sought Coercive Remedies to Enforce the Conversion Provision, Despite Reserving the Right to Do So.

NPS asserts broad authority to seek coercive remedies against LWCF grantees.¹³¹ The L&WCF GRANTS MANUAL states that if a grantee breaches a grant agreement, it is inadequate for the grantee to merely refund the amount of the grant.¹³² Instead, NPS requires specific performance.¹³³ Additionally, NPS explicitly reserves the right to take “such other action deemed appropriate under the circumstances until compliance or remedial action has been accomplished by the State to the satisfaction of the [NPS] Director.”¹³⁴ Despite these broad statements, NPS has not tested the extent of its authority to seek coercive remedies for illegal conversions.¹³⁵

O.P.253, A-600-1 at 3 (on file with author).

127. See Amendment to Project Agreement No. 41-00527.3 between William J. Briggie, Acting Reg'l Dir., Nat'l Park Serv., and John E. Lilly, Assistant Adm'r, State of Oregon (July 15, 1986) (on file with author).

128. See *id.*

129. See memorandum from Ruth M. Anderson, Project Officer, to Brand et. al. (July 11, 1986) (on file with author); letter from Alan Cook, Planning and Grants Manager, Or. Dep't of Transp., Parks & Rec. Div., to Richard Winters, Nat'l Parks Serv. (June 17, 1986) (on file with author). These statements contradict the stated purpose of the original grant proposal. See *supra* note 126 and accompanying text.

130. See memorandum from Ruth M. Anderson, Project Officer, to Brand et. al. (July 11, 1986) (on file with author); letter from Alan Cook, Planning and Grants Manager, Or. Dep't of Transp., Parks & Rec. Div., to Richard Winters, Nat'l Parks Serv. (June 17, 1986) (on file with author).

131. See NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B, Part IIC. and § 675.1(12) (1991).

132. *Id.* Attachment B is the template for all NPS LWCF grant agreements.

133. *Id.*

134. *Id.* § 675.1(12).

135. Interview with Gloria Shinn and Heather Ramsay, LWCF Project Managers, Nat'l Park Serv., in Seattle, Wash. (Jan. 31, 2007).

In sum, illegal conversions are common despite strict conversion regulations and contractual provisions. Unapproved conversions and inadequate substitution of converted parks pose a serious challenge to the LWCF program. These illegal conversions often result in the loss of unique natural resources and may deprive the public of the recreational opportunities that the LWCF seeks to protect. While NPS has explicitly reserved the right to seek coercive remedies for illegal conversions, this right has not been adjudicated.

IV. COURTS UTILIZE COERCIVE REMEDIES TO PROTECT LAND FROM ECOLOGICAL DAMAGE

Federal grant agreements are binding contracts.¹³⁶ Both the common law¹³⁷ and judicial interpretation of environmental statutes support the use of coercive remedies to protect land use agreements.¹³⁸ The common law traditionally requires coercive remedies for breach of a land use agreement.¹³⁹ Similarly, courts order coercive remedies for violations of environmental statutes when the violation threatens the basic purpose of the act.¹⁴⁰

A. *The United States May Judicially Enforce Conditions on a Federal Grant*

It is well established that federal grant agreements are contracts and that the United States has an inherent right to enforce conditions placed on federal grants.¹⁴¹ For example, in *United States v. Marion County School District*,¹⁴² the U.S. Department of Health, Education and

136. *See infra* Part IV.A.

137. *See infra* Part IV.B.

138. *See infra* Part IV.C.

139. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1979) (stating that courts have traditionally regarded damages as an inadequate remedy for breach of a land use agreement).

140. *See, e.g.*, *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311–14 (1982) (stating rule).

141. *See United States v. Marion County Sch. Dist.*, 625 F.2d 607, 609–10 (5th Cir. 1980) (listing numerous U.S. Supreme Court cases); *see also, e.g.*, *United States v. City and County of San Francisco*, 310 U.S. 16, 30–31 (1940) (finding injunctive relief appropriate where the City violated provisions of a land grant because “the City [was] availing itself of valuable rights and privileges granted by the Government and yet persist[ed] in violating the very conditions on which those benefits were granted”). Federal common law controls the interpretation of federal contracts entered into pursuant to statutory authority. *United States v. Seckinger*, 397 U.S. 203, 209–10 (1970).

142. 625 F.2d 607 (5th Cir. 1980).

Welfare provided financial assistance to a school district on the condition that the district abide by Title VI of the Civil Rights Act of 1964.¹⁴³ After the school district continued to discriminate against black students, the Fifth Circuit held that the grant was a contract and that the United States was entitled to a specific performance remedy.¹⁴⁴

B. Common Law Contract and Property Doctrines Allow for Various Forms of Coercive Relief to Remedy Breach of a Land Use Agreement

A party may hold a conservation easement by contract or estoppel despite a lack of prior ownership interest in the property.¹⁴⁵ A conservation easement is a nonpossessory interest in land imposing obligations on a land owner to protect the natural, scenic, or open space values of real property.¹⁴⁶ Both the Uniform Conservation Easement Act¹⁴⁷ and the Third Restatement of Property have abolished the traditional privity requirement for creation of an easement.¹⁴⁸ A party may therefore acquire a conservation easement by contract where the landowner intends to convey the easement regardless of the party's lack of other interest in the property.¹⁴⁹ In addition, a party may obtain a conservation easement by estoppel where a landowner represents to the party that the land is burdened by an easement and the party relies on that representation.¹⁵⁰

143. *Id.* at 609. Title VI prohibits discrimination on the basis of race, color, or national origin in any program receiving federal financial assistance. 42 U.S.C. § 2000d (2000).

144. *See Marion County Sch. Dist.*, 625 F.2d at 617.

145. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.4, 2.18 (1998); UNIF. CONSERVATION EASEMENT ACT § 4, 12 U.L.A. 179 (1981).

146. *See* UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170 (1981). One commentator has referred to state LWCF grants as "land use restriction easements." *See* Karen A. Jordan, *Perpetual Conservation: Accomplishing the Goal Through Preemptive Federal Easement Programs*, 43 CASE W. RES. L. REV 401, 412 & n.61 (1993).

147. *See* UNIF. CONSERVATION EASEMENT ACT § 4, 12 U.L.A. 179 (1981). Twenty-one states and the District of Columbia have adopted the Uniform Act. *See* 12 U.L.A. 54 (Supp. 2006).

148. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4. State law generally governs federal property rights, but federal courts may decline to apply state law if it is hostile to a federal regulatory program. *See* *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 595–97 (1973) (holding that retroactive application of Louisiana's mineral rights reservation law deprived the United States of bargained-for interests in land acquired pursuant to the Migratory Bird Conservation Act).

149. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.1, 2.18.

150. *See id.* §§ 2.10(2), 2.18(1).

Under the common law, breach of a conservation easement requires coercive relief designed to give full effect to the purpose of the land use agreement.¹⁵¹ The Second Restatement of Contracts states that “[a] specific tract of land has long been regarded as unique and impossible of duplication by the use of any amount of money.”¹⁵² Modern servitudes law¹⁵³ provides for various forms of coercive relief for breaches of contract involving real property.¹⁵⁴ Courts consider the purpose of the servitude and have wide discretion in selecting remedies.¹⁵⁵ With regard to a conservation easement held by a governmental body, the Third Restatement of Property provides that it is enforceable by “coercive remedies and other relief designed to give full effect to the purpose of the servitude.”¹⁵⁶ These remedies include “maintenance and restoration of the protected property to the condition contemplated by the servitude,” as well as punitive damages and other measures designed to “deter servient owners from conduct that threatens the interests protected by the servitude.”¹⁵⁷

Federal courts have remedied infringements on federal property interests by ensuring restoration of impacted landscapes. For example, in *United States v. Ponte*,¹⁵⁸ the court ordered removal of illegal structures from a government-held conservation easement on Black Island near Acadia National Park in Maine.¹⁵⁹ The court also ordered the defendant to restore the impacted shoreline.¹⁶⁰

151. *See infra* notes 152–157 and accompanying text.

152. RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1979).

153. The Third Restatement of Property regards easements as a class of servitudes. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1(2) (1998).

154. *Id.* § 8.3.

155. *Id.* § 8.3(1), cmt. b.

156. *Id.* § 8.5.

157. *Id.* § 8.5 cmt. a.

158. 246 F. Supp. 2d 74 (D. Me. 2003).

159. *See id.* at 81.

160. *See id.*; *see also* *United States v. Garfield County*, 122 F. Supp 2d. 1201, 1261, 1265 (D. Utah 2000) (noting that measuring damages by a decrease in land value would not adequately compensate for the loss of natural scenic value to a national park caused by the County’s illegal expansion of its right of way and ordering the County to pay the cost of revegetating the land).

C. *Courts Order Coercive Remedies When Violation of an Environmental Law Undermines the Act's Purpose*

Courts generally favor coercive remedies for violations of environmental laws.¹⁶¹ In *Weinberger v. Romero-Barcelo*,¹⁶² the U.S. Supreme Court established a framework for evaluating the propriety of coercive remedies for environmental injury.¹⁶³ *Romero-Barcelo* instructs that where an environmental statute is violated, courts must first look to the statute's purpose to determine whether coercive relief is required.¹⁶⁴ Congress must show clear intent to strip courts of their traditional equitable discretion to apply coercive remedies.¹⁶⁵ When Congress has not altered the equitable discretion of the judiciary,¹⁶⁶ courts apply the equitable standard by evaluating whether the specific violation undermined the purpose of the environmental statute.¹⁶⁷ The Supreme Court has since noted that this test will usually favor coercive remedies to protect the environment because environmental injury can seldom be adequately remedied by money damages.¹⁶⁸

Where an impending violation of an environmental statute will undermine the purpose of the act, courts are willing to enjoin development even where the amount of impacted land is small, critical public activities are prevented, and the expense to the violator is great.¹⁶⁹

161. See *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987).

162. 456 U.S. 305 (1982).

163. See *id.* at 311–14.

164. See *id.* at 313.

165. See *id.* (discussing *TVA v. Hill*, 437 U.S. 153, 194–95 (1978) (requiring court to enjoin dam construction based on Endangered Species Act's total ban on destruction of habitat for endangered species)).

166. The traditional basis for coercive relief in federal courts is irreparable injury and the inadequacy of legal remedies. *Romero-Barcelo*, 456 U.S. at 312 (citing *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975) (other internal citations omitted)). In environmental cases, it is also relevant whether the balance of effects on each party of granting or not granting the relief weigh in favor of the movant and whether the injunction is in the public interest. See *Amoco*, 480 U.S. at 542.

167. *Id.*; for a discussion of the statutory purpose standard in the context of NEPA, see Leslye A. Herrmann, *Injunctions for NEPA Violations: Balancing the Equities*, 59 U. CHI. L. REV. 1263 (1992).

168. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). *Romero-Barcelo* itself was a suit under the Clean Water Act (CWA) involving U.S. Navy weapons training in Puerto Rico. 456 U.S. 305, 307 (1982). The Court held that district courts are not required to grant injunctive relief for all CWA violations, but rather courts have discretion to order coercive relief where the CWA violation threatens the integrity of the nation's waters. *Id.* at 314.

169. See *infra* notes 170–172 and accompanying text.

In *Crutchfield v. U.S. Army Corps of Engineers*,¹⁷⁰ the court enjoined the construction of a wastewater treatment plant until the County complied with the requirements of the National Environmental Policy Act (NEPA) and the Clean Water Act (CWA).¹⁷¹ The court ordered the injunction even though construction of the plant affected fewer than four acres of wetlands and the County claimed that the delay would cost nearly \$2.5 million and threaten its ability to meet the sewage treatment requirements of its general plan.¹⁷²

Courts are also willing to order restoration of ecologically important areas where lands have been damaged by illegal activity that undermines the purpose of an environmental statute.¹⁷³ In *United States v. Weisman*,¹⁷⁴ the court required the total removal of a road and the restoration of a wetland after the landowner knowingly violated the CWA and the Rivers and Harbors Act.¹⁷⁵ Courts have also required ecological restoration for less egregious violations of the CWA,¹⁷⁶ even where federal officials assisted the landowner's illegal construction.

In sum, both common law and environmental law doctrines authorize coercive remedies to protect real property from ecological damage. Just as courts examine the purpose of a land use agreement to evaluate a breach of that agreement under the common law, courts also scrutinize the purpose of an environmental statute to determine the appropriate sanction for illegal environmental harm. Courts are willing to both enjoin destructive development before it occurs and order restoration of

170. 192 F. Supp. 2d 444 (E.D. Va. 2001).

171. *See id.* at 467.

172. *See id.* at 449–50, 461. *See also* Nat'l Audubon Soc'y v. Dep't of the Navy, 422 F.3d 174, 180–81, 207 (4th Cir. 2005) (upholding core elements of an injunction preventing the Navy from constructing an aircraft landing and training field near a national wildlife refuge where the Navy's Environmental Impact Statement gave inadequate consideration to the impact of the proposed site on migratory birds).

173. *See infra* notes 174–176 and accompanying text.

174. 489 F. Supp 1331, 1349–50 (M.D. Fla. 1980).

175. *See id.* at 1349. In reaching its conclusion, the court analyzed the purpose of the CWA, the environmental importance of wetlands, and the equity and practicality of the restorative remedy. *See id.* Even though only 14.5 acres of wetlands had been affected, the court noted that thirty-five percent of the nation's wetlands had been removed by activities similar to those of this landowner. *Id.*

176. *See, e.g.,* United States v. Sunset Cove, Inc., 514 F.2d 1089, 1090 (9th Cir. 1975) (per curiam) (upholding district court decision requiring removal of fill material developer had placed at river mouth to stabilize the shoreline). In *Sunset Cove*, the developer believed that the river was not navigable, and thus not subject to CWA requirements. *Id.*

impacted landscapes where necessary to uphold private agreements and public laws.

V. NPS SHOULD SEEK INJUNCTIONS AGAINST UNAUTHORIZED CONVERSIONS AND FORCE RESTORATION WHERE APPROPRIATE

Coercive remedies are necessary to safeguard the broad preservationist purpose of the LWCF Act and the unique landscapes that have been protected through LWCF grants.¹⁷⁷ LWCF grant agreements provide a legally cognizable mechanism to ensure that unique parks are protected in perpetuity.¹⁷⁸ Both the common law and the *Romero-Barcelo* framework support the application of coercive remedies to uphold the purpose of an LWCF grant agreement.¹⁷⁹ NPS may therefore seek injunctions against unauthorized conversions and restoration of illegally converted parks where substitution of other land is inadequate.

A. *Coercive Remedies for Illegal Conversions are Necessary to Preserve Unique Landscapes and Protect the Integrity of the LWCF*

Coercive remedies for illegal LWCF conversions ensure the protection of irreplaceable recreational resources.¹⁸⁰ Congress intended that the LWCF be used to preserve unique landscapes and resources.¹⁸¹ The legislative history of the LWCF Act reveals that Congress was concerned with the spiritual, as well as the physical health of the American people.¹⁸² President Kennedy supported the LWCF program as a means to preserve unique lands of natural beauty.¹⁸³ Where illegal conversion threatens or affects unique LWCF lands, coercive remedies

177. See *infra* Part V.A.

178. See *infra* Part V.B.

179. See *infra* Part V.C.

180. Cf. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3, 8.5 (1998).

181. See *supra* Part II; see, e.g., *Friends of the Shawangunks, Inc. v. Clark*, 754 F.2d 446, 450 (2d Cir. 1985) (discussing legislative history of the LWCF Act).

182. S. REP. NO. 88-1364 at 3 (1964), as reprinted in 1964 U.S.C.C.A.N. 3633, 3636.

183. Letter from John F. Kennedy to Lyndon B. Johnson, President of the Senate, and John W. McCormack, Speaker of the House of Representatives (Feb. 14, 1963) in S. REP. NO. 88-1364, as reprinted in 1964 U.S.C.C.A.N. 3633, 3651–52.

allow these lands to be safeguarded and restored.¹⁸⁴ If illegal conversion of irreplaceable lands cannot be prevented or the lands restored, then these resources will be lost forever. Even substitution of other parkland does not fully compensate a community for the loss of a unique landscape.¹⁸⁵ This loss of recreational resources undermines the purpose of the LWCF Act.¹⁸⁶

The serious ongoing problem of illegal LWCF land conversions justifies coercive remedies.¹⁸⁷ Both the City of Boise's historic treatment of its LWCF-funded greenbelt and the long running controversy on Portage Island demonstrate the loss of special resources resulting from unauthorized conversions of LWCF lands.¹⁸⁸ Similarly, the logging of Jewell Wildlife Meadow reveals that inadequate substitutions also deprive the public of special natural places.¹⁸⁹ Illegal conversions are not isolated incidents, but occur across the Pacific Northwest and throughout the nation.¹⁹⁰ These activities deny recreational opportunities to affected communities¹⁹¹ and result in the irreplaceable loss of unique landscapes.¹⁹²

NPS must address illegal conversions to protect the integrity of the LWCF. Unauthorized conversions and inadequate land substitutions allow grantees to unfairly reap the benefits of local development without paying the true costs of degrading public natural resources.¹⁹³ As development pressures increase on open spaces, the incentive for

184. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5.

185. Cf. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). See also RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 cmt. a. (describing the necessity of restoration as a remedy for breach of a conservation servitude held by a government body)

186. See S. REP. NO. 88-1364, as reprinted in 1964 U.S.C.C.A.N. 3633, 3634.

187. See *supra* Part III.

188. See *supra* Part III.B.

189. See *supra* Part III.C.

190. See Letter from Heather Ramsay, Project Manager, Nat'l Park Serv., to Marguerite Austin, Manager, Interagency Comm. For Outdoor Recreation (Sept. 27, 2004) (on file with author) (listing twenty-three potential unauthorized conversions in Washington); Levin, *supra* note 84 at 626 (noting unauthorized conversion in New Hampshire).

191. See, e.g., discussion of Portage Island *supra* notes 102–109 and accompanying text.

192. See, e.g., discussion of Jewell Wildlife Meadow *supra* notes 125–130 and accompanying text.

193. See, e.g., Letter from Rinda Ray Just, Deputy Attorney General, Idaho Dep't of Parks and Recreation, to Dirk Kempthorne, Mayor, City of Boise (Mar. 2, 1987) (on file with author) (discussing the unapproved sale of a portion of the LWCF-funded Boise greenbelt to a developer).

grantees to engage in illegal conversions grows.¹⁹⁴ Without adequate remedies, illegal conversions will make it increasingly difficult for the federal government to effectively manage the state grants program consistent with the purposes of the LWCF Act. Deterrence of future illegal conversions is thus a valid and important purpose of judicial remedies to conversions that undermine the preservationist purpose of the LWCF.¹⁹⁵ Forcing a grantee to halt a pending conversion or to restore an illegally converted park is a costly remedy to a state or local grantee,¹⁹⁶ and punitive damages raise the possibility of even higher costs.¹⁹⁷ These remedies can thus provide effective deterrents to illegal LWCF conversions.

B. *NPS Holds Common Law and Statutory Rights in LWCF-Funded Parks*

LWCF grants constitute legally enforceable contracts.¹⁹⁸ An LWCF grant provides the project sponsor with funding for its desired project and enables the United States to protect a natural resource in perpetuity.¹⁹⁹ Just as the federal government conditioned the grant in *Marion County School District* on the school district's compliance with Title VI of the 1964 Civil Rights Act,²⁰⁰ NPS conditions LWCF grants on, inter alia, grantee compliance with the conversion provision of the LWCF Act.²⁰¹ When the state accepts LWCF funds, the state is bound to protect the specific recreational interest supported by the grant,²⁰² even if it passes the grant on to a local government sponsor.²⁰³ Sponsoring local

194. See Levin, *supra* note 84 at 597.

195. Cf. *United States v. Weisman*, 489 F. Supp. 1331, 1349 (M.D. Fla. 1980) (requiring restoration of wetland in part to deter future violations of the CWA).

196. Cf. *Crutchfield v. U.S. Army Corps of Engineers*, 192 F. Supp. 2d 444, 449–50, 461 (E.D. Va. 2001) (enjoining construction of wastewater treatment plant for failure to comply with CWA and NEPA despite exorbitant cost of delay); *Weisman*, 489 F. Supp. at 1349–50 (requiring removal of road and wetlands restoration after CWA violations).

197. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 cmt. a (1998).

198. See *supra* Part IV.A.

199. See S. REP. NO. 88-1364 (1964), as reprinted in 1964 U.S.C.C.A.N. 3633, 3638; NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B (1991).

200. See *Marion County Sch. Dist.*, 625 F.2d at 609.

201. See NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3, Attachment B, Part IIB.

202. See *id.* §§ 660.2(5), 660.3, Attachment B, Part II.

203. See *id.* §§ 660.2(5)(D), 660.3, Attachment B, Part IIA.

governments are likewise bound by their commitment to the state to protect the federal LWCF interest.²⁰⁴

LWCF grants also provide the federal government with property rights in LWCF-funded parks. Because an LWCF grant agreement is intended to obligate the grantee to protect the natural, scenic, and open space values of the LWCF-funded park, it constitutes a conservation easement.²⁰⁵ Even if intent to create an easement cannot be shown by the grant agreement,²⁰⁶ a grantee's recording of its LWCF land use obligations in public records constitutes a representation that a conservation easement burdens the parcel in question²⁰⁷ Because the public relies on the LWCF grants to protect parks in perpetuity, this reliance creates an easement by estoppel.²⁰⁸ The federal government thus has contractual rights against the state,²⁰⁹ and a property right in the ultimate project sponsor's LWCF-funded property.²¹⁰

C. *NPS May Pursue Coercive Remedies to Prevent Unauthorized Conversions and Restore Illegally Converted LWCF Parks*

Both NPS and federal courts recognize that the LWCF Act requires protection of unique LWCF-funded parks in perpetuity. NPS asserts that the benefit to local LWCF project sponsors from preservation of outdoor recreational resources immeasurably exceeds the monetary value of the LWCF grant and thus requires specific performance for any breach of a

204. *See id.* *See also, e.g.*, WICOR MANUAL #15: LWCF PROGRAM: POLICIES AND PROJECT SELECTION, SECTION 2, PROJECT BOUNDARIES—SECTION 6(f)(3) OF THE LWCF ACT (describing applicability of the conversion provision); WICOR MANUAL #7: FUNDED PROJECTS: POLICIES & THE PROJECT AGREEMENT, Sample Project Agreement at H (requiring grantee compliance with all applicable federal statutes).

205. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.1, 2.18; UNIF. CONSERVATION EASEMENT ACT § 1(1), 12 U.L.A. 170 (1981).

206. For example, courts may not recognize an intent in a case where the ultimate grantee is a local government because the relevant contract is between NPS and the state. In this situation, however, there will be a second contract between the state and the grantee in which the grantee commits to the state to abide by the federal LWCF regulations. *See* NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.3 Attachment B, Part IIA (1991). *See, e.g.*, WICOR MANUAL #7: FUNDED PROJECTS: POLICIES & THE PROJECT AGREEMENT, Sample Project Agreement at H. A court here could find that the state holds the easement.

207. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10(2) (1998).

208. *See id.* § 2.18.

209. *See* NAT'L PARK SERV., L&WCF GRANTS MANUAL § 660.2(5).

210. *See id.* § 660.3, Attachment B, Part II F.

grant agreement.²¹¹ Moreover, the *Friends of the Shawangunks* court enjoined construction of a golf course on LWCF-funded property where the purpose of the grant was to preserve the natural landscape of the area.²¹² Thus, LWCF grant agreements require coercive remedies to effectively protect the unique public resources underlying the agreements.

Based on the purpose and language of LWCF grant agreements, the common law allows NPS to sue to enjoin unauthorized conversions and ensure restoration of parks converted without authorization or without adequate substitution. The purpose of a LWCF grant is to permanently protect a real property recreational resource.²¹³ The Restatements of Contracts and Property both support NPS's requirement of specific performance for any breach of a grant agreement.²¹⁴ Both Restatements authorize the use of coercive remedies in order to give full effect to the purpose of a government-held conservation easement.²¹⁵ Furthermore, federal courts have remedied infringements on federal property interests by ensuring restoration of impacted landscapes.²¹⁶ Therefore, the language of the LWCF grant agreements, common law, and judicial precedent all support coercive remedies for illegal LWCF park conversions.

Moreover, judicial interpretation of environmental statutes also supports coercive remedies for illegal conversions that threaten unique natural resources. *Romero-Barcelo* dictates that courts must look to the purpose of an environmental statute to determine an appropriate remedy.²¹⁷ Where a violation of an environmental statute threatens the purpose of the law, equity favors coercive remedies.²¹⁸ Because the LWCF Act supports protecting a broad range of recreational

211. *Id.* § 660.3, Attachment B, Part IIC.

212. 754 F.2d 446, 452 (2d Cir. 1985).

213. *See* 16 U.S.C. §§ 4601-4, 4601-8(a) (2000).

214. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e (1979); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 8.3, 8.5 cmt. a (1998).

215. *See* RESTATEMENT (SECOND) OF CONTRACTS § 360 cmt. e; RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 8.3, 8.5 cmt. a.

216. *See* *United States v. Ponte*, 246 F. Supp. 2d 74, 81 (D. Me. 2003); *United States v. Garfield County*, 122 F. Supp. 2d 1201, 1265 (D. Utah 2000) (ordering damages equal to the cost of restoring national park damaged by illegal road construction).

217. *See* *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312–15 (1982).

218. *See* *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). *See also supra* Part IV.C and cases cited therein.

resources,²¹⁹ courts must look to the content of the specific grant agreement governing an illegally converted park.²²⁰ *Romero-Barcelo* thus converges with the common law governing breach of a land use agreement.²²¹ When an unauthorized or an inadequately substituted conversion deprives the public of unique recreational resources, *Romero-Barcelo* dictates that a court should grant a coercive remedy.²²²

Thus, under both the common law and *Romero-Barcelo*, the extent of coercive remedies available for illegal LWCF conversions depends on both the circumstances of the grantee's breach of the LWCF grant agreement and the nature of the specific recreational resource in question. If NPS deems the resources of a particular park to be unique and irreplaceable,²²³ it should require preservation or restoration of a park to give full effect to the purpose of the LWCF grant.²²⁴ If a grantee fails to comply with an NPS order, the agency may seek to judicially enforce its determination.²²⁵

In sum, coercive remedies can effectively address the persistent problem of illegal LWCF land conversions. Illegal conversions threaten unique landscapes as well as the integrity of the LWCF. NPS has the legal authority to enjoin unauthorized conversions and force restoration of illegally converted parks. These remedies allow NPS to protect irreplaceable parks and deter future illegal conversions.

VI. CONCLUSION

Coercive remedies for illegal LWCF land conversions are consistent with the purpose of the LWCF Act and the nature of federal contract and property rights in LWCF parks. These remedies enable NPS to ensure the preservation of unique LWCF lands in perpetuity and safeguard the

219. See NAT'L PARK SERV., L&WCF GRANTS MANUAL § 640.2(2) (1991).

220. See 16 U.S.C. § 4601-8(f)(3) (2000) (requiring substitution of land of equivalent market value, utility, and location); 36 C.F.R. § 59.3 (2006) (NPS regulations interpreting statutory conversion provision).

221. See *supra* Part IV.B-C.

222. See *id.*

223. See NAT'L PARK SERV., L&WCF GRANTS MANUAL § 675.1(12) (providing NPS with discretion in selecting remedies).

224. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 (1998).

225. See, e.g., *United States v. City and County of San Francisco*, 310 U.S. 16, 30-31 (1940) (enjoining city from violating provisions of federal land grant agreement); *United States v. Ponte*, 246 F. Supp. 2d 74, 81 (D. Me. 2003) (ordering removal of structures from federal conservation easement).

integrity of the LWCF program. Enjoining illegal conversions prevents degradation of parkland before it occurs. Requiring restoration of illegally converted parks allows local communities to regain lost recreational resources. The cost and political impact of both remedies provides an effective deterrent to future illegal conversions. This deterrent will force state and local governments to work collaboratively with NPS on long term planning to conserve outdoor recreational resources and protect unique American landscapes.