Statement of Andy Kerr of The Larch Company for inclusion in the hearing record on H.R.2579IH, the proposed Hardrock Leasing and Reclamation Act of 2019, May 23, 2019

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My name is Andy Kerr and I operate a one-person public lands and wildlife conservation consultancy with offices in Ashland, OR, and Washington, DC. The Larch Company is dedicated to the conservation and restoration of nature and is a nonmembership for-profit organization that represents species that cannot talk and humans not yet born. A deciduous conifer, the western larch has a contrary nature. I request that this statement be included in the official hearing record.

Since I began my professional conservation career during the Ford administration, I have been closely involved with the establishment or expansion of forty-seven wilderness areas, fifty-seven wild and scenic rivers, thirteen congressionally legislated special management areas, fifteen Oregon scenic waterways, and one proclaimed (and later expanded) national monument. I have previously presented invited testimony to congressional committees. My full biography can be found in Appendix A.

In addition to my long history of involvement with congressional conservation legislation pertaining to federal public lands, I have also been involved with numerous generally successful efforts to either (1) establish new administrative conservation (natural, cultural, and historical) areas on federal public lands, or (2) defend such existing areas from degradation or elimination by officials of the federal land management agencies or the administration.

I am generally very supportive of H.R.2579IH in its entirety. My commentary and recommendations here are limited to areas of public lands that—due to their special congressional or administrative recognition—are inappropriate venues for hardrock mining under any circumstances. In particular, I will address these parts of the proposed legislation:

- Section 2(a)(18) Definition: “National Conservation System unit”
- Section 2(a)(28) Definition: “undue degradation”
- Section 111(a) Protection of National Park System Units and National Monuments
- Section 111(b) Protection of Conservation Areas
- Section 111(c) Lands Not Open to Mining
- Section 112 Suitability Determination

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Summary of Evaluation and Recommendations

The intent of the legislation to protect both congressionally and administratively established conservation (natural, cultural, and historical) areas from hardrock mining—either directly within such areas, adjacent to them, or in other places if such mining would cause harm to the conservation area—is highly admirable and vitally necessary. However, as drafted, H.R.2579IH would leave several kinds of congressional conservation areas and many kinds of administrative conservation areas vulnerable to the harmful effects of hardrock mining.

H.R.2579IH should be amended to

• expand its mandatory protections to all congressionally designated conservation areas,

• extend its mandatory protections for several kinds of administrative conservation areas that are not covered under its provisions, and

• limit the potential for the abuse of administrative discretion that could result in many administrative conservation areas continuing to be vulnerable to the threats from hardrock mining.

If the committee has any questions about any of the matters discussed here, I can be reached at 503.701.6298 v/t or andykerr@andykerr.net.

General Overview

Congressional Versus Administrative Conservation Areas

The property clause of the United States Constitution gives Congress total control over federal lands (Article IV, Section 3, Clause 2). Any authority the president or the appropriate secretary has over federal land is because Congress delegated some of its power to the executive branch.

Besides providing for systematic administration (through, for example, the National Park System, the National Wildlife Refuge System, the National Forest System, and the National Landscape Conservation System) by the appropriate secretary (further delegated to the appropriate agency), Congress has elevated the conservation status of federal lands by establishing them as wilderness areas, wild and scenic rivers, national trails, or any variety of other congressionally designated areas.

Pursuant to expressed statutory direction in the Federal Land Policy and Management Act of 1976 (FLPMA), the Bureau of Land Management (BLM) has established a system of administrative conservation areas, known as areas of critical environmental concern (ACECs). The Forest Service, using implicit authority granted to it under the statutes pertaining to the National Forest System, has established an informal system of administrative conservation areas of many specific kinds, all generally grouped as “special areas” or administratively “designated areas.”

Forest Service "special areas" are more significant and enduring that mere "management areas" established in management plans. Special areas generally are intended to be permanent and live on beyond the life of the management plan.

The Disconnect Between Administrative (and Sometimes Congressional) Conservation Designations and Protection from Mining

Due to the way Congress provided for public land withdrawals from mining before and after the enactment of FLPMA, countless administrative conservation designations (BLM ACECs and Forest Service "special areas") are open to hardrock mining under the Mining Law of 1872 as amended.

Under FLPMA, a mineral withdrawal can last a maximum of twenty years. Such withdrawals can be big bureaucratic lifts and can be complicated if the administration is resistant to conservation. Even where the renewal of many administrative withdrawals is routine, having to periodically renew them is an unnecessary administrative burden.

Administrative conservation area designations on BLM holdings are established during the land use planning process specified in Section 202 of FLPMA. The deciding officials are generally state directors or lower-level line officers. Under Section 204 of FLPMA, mineral withdrawals can be approved only by a Senate-confirmed official in the Office of the Secretary of the Interior. The processes for establishing an administrative conservation designation and a mineral withdrawal to protect that designation are independent, unrelated, and disconnected. The practical effect is that the overwhelming number of mineral withdrawals called for by BLM line officers in resource management plans for administrative conservation areas are *never* implemented by political appointees at the highest levels of the Interior Department—during good and bad administrations alike.

For Forest Service special conservation area designations, it's even worse. The lower-level Forest Service line officers must ask their BLM counterparts to initiate all withdrawal requests, as FLPMA gave jurisdiction over mining on National Forest System lands to the BLM. BLM bureaucrats are not generally motivated to honor such Forest Service requests.

If the appropriate land management official determines that the federal land is worthy of conservation for the benefit of this and future generations, mining of such areas is inappropriate and should be banned concurrent with the establishment of the administrative conservation area.

Protection Framework for Federal Lands That Are Special Congressional or Administrative Areas or Have Special Characteristics

H.R.2579IH differentially treats special congressional and administrative conservation areas on federal lands and federal lands with special characteristics (Table 1).

• *Top Tier*. For the congressionally designated conservation areas, hardrock mining would be statutorily prohibited within, adjacent to, or anywhere if such mining would be harmful to the area (Sections 111(a) and 111(b)).

• *Middle Tier*. For some administrative conservation areas, mining would be statutorily prohibited.

• *Lower Tier.* For federal lands with special characteristics, the administering agency could prohibit mining on those lands or on adjacent lands if it found that permit conditions would not protect the value(s) that give the lands their special character.

***Table 1*. How Special Areas and Areas with Special Characteristics Are Treated in Regard to Hardrock Mining Under H.R.2759IH**

Section or Subsection	*Section Title*	*Mining in Area or Land Type Named in Subsection*	*Mining Adjacent to Area or Land Type Named in Subsection*	*Mining Anywhere with Impact on Area or Land Type Named in Subsection*
Sec. 111(a)	PROTECTION OF NATIONAL PARK SYSTEM UNITS AND NATIONAL MONUMENTS	--	Statutorily prohibited if harmful	Statutorily prohibited if harmful
Sec. 111(b)	PROTECTION OF CONSERVATION AREAS	--	Statutorily prohibited if harmful	Statutorily prohibited if harmful
Sec. 111(c)	LANDS NOT OPEN TO MINING	Prohibited	--	--
Sec. 112	SUITABILITY DETERMINATION	Can be prohibited if agency finds that the values cannot be protected by permit conditions	Can be prohibited if agency finds that the values cannot be protected by permit conditions	--

Congressional Commands Versus Agency Discretion

Most legislation pertaining to federal lands strikes a balance between congressional commands in the legislative language ("shall" and "shall not") and directing a land management agency to do something if the agency finds certain conditions exist or otherwise wants to ("if . . . then, shall," "if . . . then, may," or "may").

Legislation cannot anticipate the best course for every set of facts, so Congress must grant discretion to the land management agency. However, the potential for that agency to abuse that discretion is always possible. In addition, such agency decisions can be controlled by the political tenor of an administration (how the administration views conservation issues) or the inherent biases of agency land managers (managers of multiple use agencies by their nature like to manage multiple use conflicts, see themselves as expert at it, and lean against voluntarily limiting their own discretion, even though Congress has made that option available to them).

Section 2(a)(18) Definition: "National Conservation System unit"

Current Language

(18) The term ''National Conservation System unit'' means any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Wilderness Preservation System, National Landscape Conservation System, or National Trails System, or a National Conservation Area, a National Recreation Area, a National Monument, or any unit of the National Wilderness Preservation System or lands within the National Forest System, including any of the following:

(A) National Scenic Research Area.
(B) National Scenic Area.
(C) National Game Refuge and Wildlife Preserve.
(D) National Volcanic Monument.
(E) National Historic Area.
(F) National Protection Area.
(G) Special Management Area.
(H) National Botanical Area.
(I) Recreation Management Area.
(J) Scenic Recreation Area.

In General

The intent of the provision is to include the universe of congressionally designated conservation areas (or those indirectly established pursuant to the granting of congressional authority under the property clause of the US Constitution to the president or secretary of the interior). The challenge is that not all congressionally designated conservation areas fit into any one of the conservation systems specified in the definition, or, in the case of the National Forest System, many conservation areas are not limited to one of the specifically named areas in the current legislation.

For reasons of both policy and politics, Congress has sometimes provided for a name of a congressionally designated conservation area that is unique. As it is quite possible that Congress will continue to do so in the future, it is important that this legislative provision capture the congressionally designated conservation area universe as it exists today and also will exist in the future.

Specifically

Below are specific discussions relative to congressionally designated conservation areas (1) in the National Forest System, (2) on BLM holdings, and (3) in national heritage areas.

Congressionally Designated Conservation Areas in the National Forest System

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(The following discussion relies heavily on a report issued annually by the USDA Forest Service entitled "Land Areas of the National Forest System," the latest version being dated November 2018, cited hereafter as "LAR" [Land Areas Report].)

The National Forest System currently totals 192,948,059 acres and consists of 154 national forests, 58 purchase units, 20 national grasslands, 7 land utilization projects, 17 research and experimental areas, and 28 other areas. These holdings are administratively organized into 9 Forest Service regions, 112 forest or forest-level units, and 506 ranger districts or district-level units (LAR, unnumbered fourth page of document).

The Forest Service also administers several other types of nationally designated areas (LAR, unnumbered fourth page of document):
1 National Historic Area in 1 state
1 National Scenic Research Area in 1 state
1 Scenic Recreation Area in 1 state
1 Scenic Wildlife Area in 1 state
2 National Botanical Areas in 1 state
2 National Volcanic Monument Areas in 2 states
2 Recreation Management Areas in 2 states
6 National Protection Areas in 3 states
8 National Scenic Areas in 6 states
12 National Monument Areas in 6 states
12 Special Management Areas in 5 states
21 National Game Refuge or Wildlife Preserves in 12 states
22 National Recreation Areas in 20 states

These areas were either established by specific Acts of Congress or by Acts of Congress that delegated authority to the president to proclaim certain kinds of areas (most national monuments and all national game refuges). While the current language of H.R.2579IH encompasses most of the congressionally designated or congressionally authorized areas noted in LAR, it does not include "Scenic Wildlife Area" or "National Scenic Recreation Area."

"National Protection Area"

In addition, "National Protection Area" is not a term found anywhere in the United States Code. Rather it is a term used by the Forest Service to group a variety of one-off congressionally designated special areas (LAR, Table 22, page 238):

• Ancient Bristlecone Pine Forest, CA (16 USC 539o)
• Bowen Gulch, CO (called Bowen Gulch Protection Area in code, 16 USC 539j)
• James Peak, CO (called James Peak Protection Area in code, 16 USC 539l)
• Crystal Springs Watershed, OR (called Crystal Springs Watershed Special Resources Management Unit in code, 16 USC 539n)
• Cultus Creek, OR (P.L.111-11; 123 STAT. 1017)
• Upper Big Bottom, OR (P.L.111-11; 123 STAT. 1017)

In every instance of a Forest Service–proclaimed National Protection Area, Congress withdrew the area from the application of mineral location and leasing. Congress also specified certain conservation purposes for the area and/or limited certain harmful activities. (For the Cultus Creek and Upper Big Bottom areas, which Congress did not name any particular kind of area, the lack of an "XX area" after the two names was apparently sufficient to prevent codification of the statutory provision into the United States Code.)

The trend toward Congress establishing special conservation areas in parts of the National Forest System continues. The John D. Dingell Conservation, Management and Recreation Act (S.47, 116th) enacted into law this year (P.L.116-9) established the

• Ashley Karst National *Recreation and Geologic* Area, Utah, and
• San Rafael Swell *Recreation* Area, Utah (also includes BLM holdings).

The Forest Service, in its next revision of LAR, may well group these new congressionally designated areas in its National Protection Area list. Alternatively, the agency could establish a new table in LAR for each, which is what it used to do in times long past. If the latter occurs, these one-off (or first-off) congressionally established areas would not be covered by the provisions of H.R.2579IH. (Congressional use of the term "recreation area" is discussed below.)

"Pending Wildlife Conservation Areas" and "National Historic Landscape"

Pending legislation in the House of Representatives (H.R.823,116th) would establish three new congressional conservation areas with two unique names:

• Porcupine Gulch Wildlife Conservation Area,
• Williams Fork Wildlife Conservation Area, and
• Camp Hale National Historic Landscape.

It is likely that Congress will continue to invent new conservation area designations for federal lands, and hardrock mining reform legislation should be drafted to anticipate such events. The recommended language modifications will ensure that such congressional conservation areas come under the provisions of H.R.2579.

Congressionally Designated Conservation Areas on BLM Holdings But Not Within the National Landscape Conservation System

"Recreation Areas" on BLM Lands

Most areas of BLM lands specially designated by Congress are within the National Landscape Conservation System (NLCS). However, at least one congressionally designated type of area, "recreation area," is not in the NLCS.

The San Rafael Swell *Recreation* Area (SRSRA, P.L.116-9) in Utah includes both BLM and National Forest System holdings. It is not a "national recreation area" (NRA), in which case it would be included in H.R.2579IH. The SRSRA is managed for particular conservation values

and recreation, and is withdrawn from the application of the federal mining laws, just as are most of the more than twenty NRAs on National Forest System lands and nearly twenty NRAs on National Park System lands. However, the SRSRA is not the SRS***N***RA—nor likely will be two other BLM "recreation areas" pending in legislation.

The proposed Molalla River and Rogue Canyon [National] Recreation Areas are currently pending in Senate legislation (S.1262,116th). Earlier incarnations of the bill (S.132,114th) would have established each as a "national recreation area." However, the current language of the bill reflects the feeling of Senate Energy and Natural Resources Committee majority staff that there should not be "national recreation areas" on Bureau of Land Management holdings (they are now included only in the National Forest System and the National Park System). In committee markup, the two areas were downgraded in name (but not in legislative substance) to mere "recreation areas." (In fact, the preamble of the bill still says "national recreation areas.") If S.1262 becomes law, the two BLM "recreation areas" would not be units of the NLCS under the current language of H.R.2579IH. If the two areas had "national" preceding "recreation areas," they would be.

Merely inserting "recreation area" into the definition after "national recreation area" would not do, as the term "recreation area" is also used for administratively, rather than congressionally, designated management areas.

"Special Management Areas" on BLM Lands

Until 2019, the congressional use of "special management area" was limited to the National Forest System under Forest Service administration. However, Congress recently established the Vinagre Wash Special Management Area in California (P.L.116-9). The act establishing the National Landscape Conservation System does not include "special management area" among the listed kinds of congressional conservation areas included in the NLCS.

National Heritage Areas

More than fifty national heritage areas (NHAs) have been designated by Congress. While administered locally, NHAs are somewhat funded by the National Park Service. Yet, NHAs are *not* units of the National Park System. However, some NHAs do include federal land within their boundaries as defined in H.R.2579IH. According to the National Park Service:

> National Heritage Areas (NHAs) are designated by Congress as places where natural, cultural, and historic resources combine to form a cohesive, nationally important landscape. Through their resources, NHAs tell nationally important stories that celebrate our nation's diverse heritage. NHAs are lived-in landscapes. Consequently, NHA entities collaborate with communities to determine how to make heritage relevant to local interests and needs.

Rep. Paul Tonko (D-20th-NY) has introduced legislation that has 103 cosponsors, including 17 Republicans, to establish a National Heritage Area *System* (H.R.1049, 116th).

Recommended Language Revision

To make totally clear that the specifically named conservation areas are for the National Forest System, a comma (",") should be inserted before "or lands within the National Forest System." I also note a redundant reference to the "National Wilderness Preservation System" in the following recommended modifications to the provision.

[Suggested language changes are shown in *italics* for deletions and in **bold for additions**.]

(18) The term ''National Conservation System unit'' means any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Wilderness Preservation System, National Landscape Conservation System, or National Trails System, or a National Conservation Area, a National Recreation Area, a National Monument, **a National Heritage Area,** *or any unit of the National Wilderness Preservation System*

(A) or *lands* **areas** within the National Forest System, including any of the following:

(**i***A*) National Scenic Research Area.
(**ii***B*) National Scenic Area.
(**iii***C*) National Game Refuge and Wildlife Preserve.
(**iv***D*) National Volcanic Monument.
(**v***E*) National Historic Area.
(**vi***F*) **any "**National Protection Area**" listed in the annual report by the Forest Service entitled "Land Areas of the National Forest System**."
(**vii***G*) Special Management Area.
(**viii***H*) National Botanical Area.
(**ix***I*) Recreation Management Area.
(**x***J*) Scenic Recreation Area.
(xi) Scenic Wildlife Area.
(xii) Scenic Recreation Area.
(xiii) Recreation and Geologic Area.
(xiv) Recreation Area.

(B) or areas established by Congress and administered by the Secretary of the Interior through the Director of the Bureau of Land Management as

(i) Recreation Area.
(ii) Special Management Area.

Alternative Language Suggestion: Given the plethora of existing and potential congressional designations for conservation areas, here is an alternative way to ensure that all such areas come under the provisions of H.R.2579:

[Suggested language changes are shown in *italics* for deletions and in **bold for additions**.]

(18) The term ''National Conservation System unit'' means any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, National Wilderness Preservation System, National Landscape Conservation System, or National Trails

System, or a National Conservation Area, a National Recreation Area, a National Monument, **a National Heritage Area, or any discrete area that in an Act of Congress or a presidential proclamation pursuant to an Act of Congress**

(A) is named and identified by map and/or description and contains federal land
(B) for which the purposes and/or management of the area is to
(i) protect and/or promote recreation, and/or the conservation of natural, cultural, and/or historical values; and/or
(ii) limit some uses of the area to advance the values listed in (i).

or any unit of the National Wilderness Preservation System or lands within the National Forest System, including any of the following:
(A) National Scenic Research Area.
(B) National Scenic Area.
(C) National Game Refuge and Wildlife Preserve.
(D) National Volcanic Monument.
(E) National Historic Area.
(F) National Protection Area.
(G) Special Management Area.
(H) National Botanical Area.
(I) Recreation Management Area.
(J) Scenic Recreation Area.

Section 2(a)(28) Definition: "undue degradation"

Current Language

(28) The term ''undue degradation'' means irreparable harm to significant scientific, cultural, or environmental resources on public lands.

In General

Previously, Congress has used the term "undue degradation" only three times in the United States Code. The first is in a provision relating to administrative facilities for Zion and Yosemite national parks:

> Such facilities may only be constructed by the Secretary upon a finding that the location of such facilities would … avoid **undue degradation** of natural or cultural resources within the park. [emphasis added] (16 USC 364e)

The other two occur in the Federal Land Policy and Management Act of 1976 (FLPMA), as amended:

> In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent **unnecessary or undue degradation** of the lands. [emphasis added] (16 USC 1732)
>
> . . .

> That, in managing the public lands [in wilderness study areas] the Secretary shall by regulation or otherwise take any action required to prevent **unnecessary or undue degradation** of the lands and their resources or to afford environmental protection. [emphasis added] (16 USC 1782)

In none of these instances is "undue degradation" or "unnecessary or undue degradation" defined in statute. A definition is quite necessary in H.R.2579.

Specifically

Besides in the definition itself, "undue degradation" is found in five instances in H.R.2579IH:

> The Secretary concerned shall consider lands suitable for mineral activities if the Secretary concerned finds that such activities would not result in **undue degradation** to a special characteristic described in paragraph (2) that cannot be prevented by the imposition of conditions in the permit required for such activities under title III. [emphasis added] (Sec.112(b)(1))
>
> . . .
>
> . . . the Secretary shall ensure that mineral activities on any Federal land that is subject to a mining claim, millsite claim, tunnel site claim, or any authorization issued under title I of this Act are carefully controlled to prevent **undue degradation** of public lands and resources. [emphasis added] (Sec. 301)
>
> . . .
>
> (B) The applicant has demonstrated that the proposed reclamation in the operation and reclamation plan can be and is likely to be accomplished by the applicant and will not cause **undue degradation**. [emphasis added] (Sec. 304(c)(B))
>
> . . .
>
> The Secretary concerned shall work with State and local governments with authority over the allocation and use of surface and ground water in the area around the mine site as necessary to ensure that any surface or ground water withdrawals made as a result of mining activities approved under this section do not cause **undue degradation**. [emphasis added] (Sec. 307(c))
>
> . . .
>
> (1) by inserting ''and to ensure that mineral extraction and processing not cause **undue degradation** of the natural and cultural resources of the public lands'' after ''activities'' [emphasis added] (Sec. 501(a)(1))

The lack of a statutory definition in these previous instances has allowed the secretary to render the term meaningless in effect, since under the present mining laws, mining generally ranks supreme. Making a big mess on the land is considered due degradation because it is necessary to meet the generally supreme purpose of hardrock mining. Only if a mining operator gratuitously went out of its way to do environmental damage in excess of that necessary to extract the minerals might that be undue degradation. Yet any such gratuitousness would run against profit maximization.

Recommended Language Revision

It is recommended that the definition of "undue degradation" (1) be expanded to include more, and more specific, public values than just "scientific, cultural, or environmental resources," and (2) in the case of Section 112, link specifically to the values for which the "special characteristic" was identified. For (1), certain appropriate "multiple uses" defined in the FLPMA are recommended to be added ("including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values" [43 USC 1702(c)]).

[Suggested language changes are shown in *italics* for deletions and in **bold for additions**.]

(28) The term ''undue degradation'' means irreparable harm to significant **recreational,** scientific, cultural, **historical, watershed, wildlife and fish, natural scenic,** or **other** environmental resources on public lands**, and additionally, in pertaining to special characteristics listed in Sec. 112(b)(2), to the resources and values for which the special characteristic was recognized**.

Section 111(a) Protection of National Park System Units and National Monuments
and
Section 111(b) Protection of Conservation Areas

In that they are quite related, these subsections are evaluated together.

Current Language

SEC. 111. PROTECTION OF SPECIAL PLACES.

(a) PROTECTION OF NATIONAL PARK SYSTEM UNITS AND NATIONAL MONUMENTS.—No permit shall be issued under this Act that authorizes mineral activities that would impair the land or resources of a unit of the National Park System or a national monument. For purposes of this subsection, the term ''impair'' includes any diminution of the affected land including wildlife, scenic assets, water resources, air quality, and acoustic qualities, or other changes that would impair a citizen's experience at the National Park System unit or a national monument.

(b) PROTECTION OF CONSERVATION AREAS.—In order to protect the resources and values of National Conservation System units, the Secretary, as appropriate, shall utilize authority under this Act and other applicable law to the

> fullest extent necessary to prevent mineral activities that could have an adverse impact on the resources or values for which such units were established.

In General

The intent of the two provisions seems to be to specify a higher level of protection for areas of the National Park System or any national monument than for other National Conservation System units. However, the current language may not achieve that effect.

Additionally, while National Park System units and national monuments are important, they are not any more important (in the context of natural, historical, cultural, recreational, and other public values) than other National Conservation System units—they are just better branded.

Specifically

While Sections 111(a) and 111(b) generally seek similar ends, "that would impair" (Sec.111(a)) is far different from and a lower standard of protection for a national park or national monument than "could have an adverse impact" (Sec. 111(b)) for other National Conservation System units.

Under subsection (a), the standard to protect a National Park System unit or national monument is an unambiguous command that "no permit shall be issued . . . **that would impair** the land or resources" of a national park or monument [emphasis added]. Under subsection (b), the Secretary, for other National Conservation System units, is directed to fully utilize all existing authority to "prevent mineral activities **that could have an adverse impact** on the resources or values" [emphasis added].

The standard for National Park System units or national monuments is *actual* impairment ("that **would** impair") of land or resources, where impairment is defined as "any diminution," while the standard for other National Conservation System units is *potential* impairment ("that **could** have an adverse impact") of resources or values. In making a finding that a project "**would** impair," the evidentiary burden is higher for the Secretary than for a finding that a project "**could** have an adverse impact." More certainty is necessary to justify a finding of "would" than "could."

As this section is drafted, and apparently contrary to intent, a National Park System unit or national monument elsewhere would have a lower standard of protection than other National Conservation System units. The more conservative standard is "could have an adverse impact" rather than "would impair."

In addition, "wildlife, scenic assets, water resources, air quality, aesthetic qualities, or other changes" in subsection (a) for National Park System units and other national monuments is potentially less encompassing that "the resources or values for which such units were established" in subsection (b).

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Recommended Language Revision

It is recommended that subsections (a) and (b) be merged so as to apply the same standard to any and all National Conservation System units (which definitionally includes all National Park System units and national monuments).

[Suggested language changes are shown in *italics* for deletions and in **bold for additions**.]

SEC. 111. PROTECTION OF SPECIAL PLACES.
(a) PROTECTION OF NATIONAL *PARK SYSTEM UNITS AND NATIONAL MONUMENTS* **CONSERVATION SYSTEM UNITS**.— No permit shall be issued under this Act that authorizes mineral activities that *would impair* **could have an adverse impact on** the land**,** *or* resources**, or values for which a** *of a* **National Conservation System** unit **was established.** *of the National Park System or a national monument*. For purposes of this subsection, the term ''*impair* **adverse impact**'' includes any diminution of the affected land **and resources** including**, but not limited to,** wildlife, scenic assets, water resources, air quality, and acoustic qualities, or other changes that **could have an adverse impact on a** *would impair* a citizen's experience **in the National Conservation System unit** *at the National Park System unit or a national monument*.
(b) PROTECTION OF CONSERVATION AREAS.—In order to protect the resources and values of National Conservation System units, the Secretary, as appropriate, shall utilize authority under this Act and other applicable law to the fullest extent necessary to prevent mineral activities that could have an adverse impact on the resources or values for which such units were established.

Section 111(c) Lands Not Open to Mining

Current Language

(c) LANDS NOT OPEN TO MINING.—Notwithstanding any other provision of law and subject to valid existing rights, no hardrock mining activity shall be allowed in any of the following:

(1) Sacred sites.
(2) Wilderness study areas.
(3) Areas of critical environmental concern.
(4) Units of the National Conservation System.
(5) Areas designated for inclusion in the National Wild and Scenic Rivers System pursuant to the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.), areas designated for potential addition to such system pursuant to section 5(a) of that Act (16 U.S.C. 1276(a)), and areas determined to be eligible for inclusion in such system pursuant to section 5(d) of such Act (16 U.S.C. 1276(d)).
(6) Any area identified in the set of inventoried roadless areas maps contained in the Forest Service Roadless Area Conservation Final Environmental Impact Statement, Volume 2, dated November 2000.

In General

~1.5 million acres of administratively designated research natural areas, outstanding natural areas, and national natural landmarks on BLM lands are not "areas of critical environmental concern" (ACECs) and therefore would remain open to mining.

The Forest Service equivalent of ACECs in the National Forest System are equally worthy of protection from mining.

In most particular, research natural areas (RNAs) are so scientifically important that they should be listed as not open to mining and not be subject to the potential abuse of administrative discretion that can take place when they are deemed open to evaluation for their suitability for mineral activities based on being designated as a "special characteristic" under Section 112(b)(2).

Finally, and not least, BLM-designated "lands with wilderness characteristics" should be protected from mining. Their inclusion would give wilderness-quality lands in BLM holdings the same protections against mining as inventoried roadless areas on National Forest System lands.

Specifically

Table 2. **Outstanding Natural Areas, Research Natural Areas, and National Natural Landmarks Included and Not in BLM Areas of Critical Environmental Concern**

*Bureau of Land Management Conservation Designation**	*Number of Conservation Areas So Designated*	*Total Acreage of Designated Areas*	*Number of Designated Areas That Are NOT ACECs*	*Total Acreage of Designated Areas That Are NOT ACECs*
Outstanding Natural Area	27	148,054	7	56,000
Research Natural Area	208	1,514,218	28	1,034,218
National Natural Landmark	40	366,758	26	319,633

* Areas and acreages are not totaled in that some areas have more than one conservation designation.

Source: BLM, Areas of Critical Environmental Concern (webpage).

Bureau of Land Management Administratively Designated Conservation Areas

On BLM lands, FLPMA provides a statutory underpinning for a system of administratively designated conservation areas, deemed "areas of critical environmental concern" (ACECs),

> where special management attention is required (when such areas are developed or used or where no development is required) to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards. (43 U.S.C. 1702(a))

Due to BLM practice in the field, the ACEC designation does not cover many research natural areas (RNAs), outstanding natural areas (ONAs), and national natural landmarks (NNLs) found

on BLM lands (Table 2). RNAs, ONAs, NNLs, and nonspecific ACECs are the backbone of the administratively designated conservation system on BLM lands.

Forest Service Administratively Designated Conservation Areas

On Forest Service lands, no comparably explicit FLPMA ACEC congressional framework exists. Yet, using existing statutory authority, since 1939 the agency has established countless "special areas" (or administratively designated areas) that similarly serve as the agency's system of administratively established conservation areas.

In 1939, Secretary of Agriculture Henry A. Wallace issued the "U" regulations, pertaining to the designation of wilderness areas (U-1), wild areas (U-2), primitive areas (U-2A), special areas (U-3), and experiment and natural areas (U-4) within the National Forest System.

In the Wilderness Act of 1964, Congress afforded permanent congressional protection to U-1, U-2, and U-2A areas. Under that act the areas were, among other things, withdrawn from hardrock mining (to take effect two decades after the act passed into law).

Congress has never addressed the special areas designated pursuant to Regulation U-3 or the experiment and natural areas pursuant to Regulation U-4. Most areas are open to location, leasing, and sale under the federal mining laws, though such mining would undoubtedly be detrimental to the special values for which the special, experiment(al), and natural areas were designated. Over the decades, many such areas have been established, but the overwhelming majority are open to hardrock mining.

Appendix B, "The Authority for and Implementation of Forest Service Administratively Designated Special Areas Within the National Forest System," surveys the evolution and implementation of the Forest Service's system of administratively designated special conservation areas. It also reviews the authority, framework, and guidance as found in provisions in the Code of Federal Regulations, Forest Service Manual, and Forest Service Handbook, which provide coherence to this administrative conservation system. The passage of many decades, the emergence of the importance of protecting high conservation value areas, and the evolution of bureaucratic guidance have resulted in an effective system of administratively designated conservation areas within the National Forest System. As detailed in Appendix B, the result is a veritable plethora of administrative names given to Forest Service special areas (Table 3).

Like ACECs on BLM lands, these Forest Service–designated special areas include the crown jewels of the National Forest System outside of wilderness areas, wild and scenic rivers, and other special areas established by Congress.

Research Natural Areas

According to Section 112(b)(2), the designation of land as a research natural area (RNA) is a special characteristic that qualifies it to be evaluated for its suitability for mineral activities. Such areas should be listed as lands not open to mining in Section 111(c). RNAs are too important to be left open to hardrock mining through abuse of agency discretion.

Table 3. ***The Variety of Names Applied to Forest Service Special Areas Under Various Administrative Authorities***	
Forest Service Special Area	*Most Specific Authority or Use**
Recreation Area	36 CFR 294.1(a)
Public Recreation Area	36 CFR 294.1(b)
Special Area	FSM 2370
Special Recreation Area	FSM 2370
Limited Areas	FSM 2370
Scenic Area	FSM 2372.05
Geological Area	FSM 2372.05
Botanical Area	FSM 2372.05
Zoological Area	FSM 2372.05
Paleontological Area	FSM 2372.05
Historical Area	FSM 2372.05
Recreation Area	FSM 2372.05
National Natural Landmark	FSM 2373
Designated Area	36 CFR 219.19
Experimental Forest	36 CFR 219.19
Research Natural Area	36 CFR 219.19
Scenic Byway	36 CFR 219.19
Significant Cave	36 CFR 219.19
Critical habitat under ESA**	FSM 1909.12
Experimental Range	FSM 1909.12
Inventoried Roadless Area***	FSM 1909.12
National Recreation Trail****	FSM 1909.12
Scenic Byway-Forest Service	FSM 1909.12
Scenic Byway-National	FSM 1909.12
Wild Horse and Burro Territories	FSM 1909.12
Unusual Interest Area	Various L&RMPs
Geologic Area	Various L&RMPs
Unique Interest Area	Various L&RMPs
Special Interest Area	A catchall term not actually found in any of the specific authorities but sometimes applied to specific established named areas of land and also used as the bureaucratic shorthand to describe the body of special area designations attached to Forest Service lands.
* All Forest Service authority is originally derived from Acts of Congress that delegated Congress's authority over the public lands found in the Constitution's Property Clause. From these statutes, the Secretary of Agriculture has issued regulations, from which the Forest Service has issued manual direction, from which the Forest Service has further issued handbook direction. CFR: Code of Federal Regulations; FSM: Forest Service Manual; FSH: Forest Service Handbook	
** A "special characteristic" named in H.R.2579IH Sec. 112(b)(2).	
*** Citing 36 CFR 294.	
**** NRTs are part of the National Trails System and therefore units of the National Conservation System under H.R.2579IH.	

Lands with Wilderness Characteristics

H.R.2579IH treats congressionally designated wilderness areas and formally designated wildness study areas the same on BLM and Forest Service lands. However, as currently drafted, the bill affords protection from hardrock mining to inventoried roadless areas (IRAs) on Forest Service

lands but not to their functional equivalent on BLM lands, "lands with wilderness characteristics" (LWCs) (Table 4).

LWCs are inventoried, evaluated, and somewhat protected in BLM resource management plans (RMPs). Although Section 603 of FLPMA (43 U.S.C. 1782) has required the BLM to establish and maintain wilderness study areas (WSAs) since the enactment of FLPMA in 1976, many acres of BLM wilderness-quality lands are not WSAs. The BLM has a continuing obligation under FLPMA's Section 201 (43 U.S.C. 1711) to maintain an inventory of wilderness-quality lands, even outside of the WSAs first established ca. 1980. The BLM has identified these lands as LWCs and gives them special consideration in RMPs prepared pursuant to FLPMA Section 202 (43 U.S.C. 1712).

Table 4. *H.R.2579IH Treatment of Wilderness Resources on BLM and Forest Service Lands*

Wilderness Resource	*BLM*	*Forest Service*
Congressionally designated wilderness areas	No mining	No mining
Wilderness study areas	No mining	No mining
Roadless areas (USFS inventoried roadless areas [IRAs] and BLM lands with wilderness characteristics [LWCs], functionally equivalent to each other)	Open to mining	No mining

Recommended Language Revision

Research natural areas, outstanding natural areas, and national natural landmarks should be afforded protection from hardrock mining. ONAs are found only on BLM lands, while RNAs and NNLs are also found on Forest Service lands (and within the National Park System and National Wildlife Refuge System as well).

Forest Service "special areas" should be afforded the same protections as their BLM counterparts, ACECs. Rather than attempting to name them all and quite possibly miss some areas, a provision referencing the areas by their regulatory authority, manual direction, and handbook guidance is suggested.

Wilderness-quality lands on BLM holdings (LWCs) should be afforded protection against hardrock mining as are their counterparts on Forest Service lands (IRAs).

[Suggested language changes are shown in *italics* for deletions and in **bold for additions**.]

(c) LANDS NOT OPEN TO MINING.—Notwithstanding any other provision of law and subject to valid existing rights, no hardrock mining activity shall be allowed in any of the following:

(1) Sacred sites.
(2) Wilderness study areas.
(3) Lands with wilderness characteristics.
(**4**3) Areas of critical environmental concern.

(5) Outstanding natural areas.
(6) Research natural areas.
(7) National natural landmarks.
(**8***4*) Units of the National Conservation System.
(**9***5*) Areas designated for inclusion in the National Wild and Scenic Rivers System pursuant to the Wild and Scenic Rivers Act (16 U.S.C. 1271 et seq.), areas designated for potential addition to such system pursuant to section 5(a) of that Act (16 U.S.C. 1276(a)), and areas determined to be eligible for inclusion in such system pursuant to section 5(d) of such Act (16 U.S.C. 1276(d)).
(**10***6*) Any area identified in the set of inventoried roadless areas maps contained in the Forest Service Roadless Area Conservation Final Environmental Impact Statement, Volume 2, dated November 2000.
(11) Any area, by whatever name, in the National Forest System established or continued under the authority of 36 CFR 294.1 and/or Forest Service Manual Chapter 2370, and/or being an "administratively designated area" as defined in the Forest Service Handbook 1909.12.

Section 112 Suitability Determination

Current Language

SEC. 112. SUITABILITY DETERMINATION.
(a) IN GENERAL.—The Secretary concerned shall make each determination of whether lands are suitable for mineral activities that is otherwise required by this Act, in accordance with subsection (b).
(b) SUITABILITY.—
(1) IN GENERAL.—The Secretary concerned shall consider lands suitable for mineral activities if the Secretary concerned finds that such activities would not result in undue degradation to a special characteristic described in paragraph (2) that cannot be prevented by the imposition of conditions in the permit required for such activities under title III.
(2) SPECIAL CHARACTERISTICS.—For purposes of paragraph (1) the Secretary concerned shall consider each of the following to be a special characteristic:
(A) The existence of a significant water resource or supply in or associated with such lands, including any aquifer or aquifer recharge area.
(B) The presence on such lands, or any adjacent lands, of a publicly owned place that is listed on, or determined by the Secretary of the Interior to be eligible for listing on, the National Register of Historic Places.
(C) The designation of all or any portion of such lands, or any adjacent lands, as a National Conservation System unit.
(D) The designation of all or any portion of such lands, or any adjacent lands, as critical habitat under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(E) The designation of all or any portion of such lands, or any adjacent lands, as a class I area under section 162 of the Clean Air Act (42 U.S.C. 7472).
(F) The presence of such other resource values as the Secretary concerned may by rule specify, determined based upon field testing, evaluation, or credible information that verifies such values.
(G) The designation of such lands, or adjacent lands, as a Research Natural Area.
(H) The presence on such lands, or any adjacent lands, of a sacred site.
(I) The presence or designation of such lands adjacent to lands not open to mining pursuant to section 111.

(3) A determination under this subsection of suitability for mineral activities shall be made after publication of notice and an opportunity for submission of public comment for a period of not less than 60 days.
(4) Any determination made in accordance with this subsection with respect to lands shall be incorporated into each Federal land use plan applicable to such lands, at the time such plan is adopted, revised, or significantly amended pursuant to any Federal law other than this Act.

(c) CHANGE REQUEST.—The Secretary concerned shall, by rule, provide for an opportunity for any person to request a change in determination for any Federal land found suitable under subsection (a).
(d) EXISTING OPERATIONS.—Nothing in this section shall be construed as affecting lands on which mineral activities were being conducted on the date of enactment of this Act under an approved plan of operations or under notice.

In General

Agency Bias

Section 112 vests large amounts of discretion with agency managers. Agency line officers view themselves as professional managers with the job of either avoiding or mitigating conflicts between multiple uses on federal lands. Section 112 gives such managers basically two paths to protect special characteristics from undue degradation: designate the land as unsuitable for mining up front or impose adequate terms and conditions in the permits. Agency decision makers will lean toward imposing terms and conditions later on projects that may or may not ever proceed versus preemptively finding the land unsuitable. The latter course requires agency managers to decide to limit their own management discretion, something they are professionally and bureaucratically loathe to do.

Surface Disturbance

In almost all cases, any surface disturbance disturbs or destroys the land's special characteristic(s), causing undue degradation. To adequately protect the special characteristic(s) in

the permitting process, the agency would most likely have to condition the permit on no surface occupancy of some or all of the land with special characteristics.

Special Characteristics

Additional special characteristics should be included in the provision: essential fish habitat, free-roaming horse and burro areas, scenic byways, and small roadless areas.

Specifically

Special Characteristics in H.R.2579IH

(A) Significant Water Resource or Supply

The language should be amended to make clear that the "significant water resource or supply" can be for direct human uses downstream and/or for in-stream flows to support fish, wildlife, and other aquatic resources.

(B) Historic Places

For some historic places, even though the historic place is privately owned, hardrock mining on adjacent public lands will be detrimental to the historic place.

(C) National Conservation System Units

Section 112 is intended to allow the appropriate Secretary to prohibit mining in certain areas if permit conditions cannot protect the special characteristic. Mining in National Conservation System units is banned in Section 111(c). This language should be amended to reflect that the suitability determination applies only to adjacent lands.

(D) Endangered Species Act Critical Habitat

Believe it or not, no comment.

(E) Clean Air Class I Area

Section 112 is intended to allow the appropriate Secretary to prohibit mining in certain areas if permit conditions cannot protect the special characteristic. All of the areas statutorily classified as Class I are already National Conservation System units.

(F) Other Resource Values

Field "testing" is problematic. Does the presence of a rare plant species have to be "tested" in the field by agency personnel before it is a special characteristic? Please see below for recommendations of additional special characteristics.

(G) Research Natural Area

By agency policy, on BLM lands, RNAs are supposed to be designated as areas of critical environmental concern. Mining in ACECs would be prohibited under Section 111(c). RNAs on Forest Service lands are presently not protected under Section 111(c) but should be. RNAs are important enough to warrant Section 111(c) protection and should not be left to agency discretion.

(H) Sacred Site

Section 112 is intended to allow the appropriate Secretary to prohibit mining in certain areas if permit conditions cannot protect the special characteristic. Mining on sacred sites would be banned in Section 111(c). This language should be amended to reflect that.

(I) Lands Not Open to Mining

Section 112 is intended to allow the appropriate Secretary to prohibit mining in certain areas if permit conditions cannot protect the special characteristic. This language should be amended to reflect that.

Special Characteristics That Should be Added

Several congressionally recognized values are recommended to also be designated as special characteristics.

Essential Fish Habitat

In the 1996 amendments to the Magnuson-Stevens Fishery Conservation and Management Act, Congress defined "essential fish habitat" as those waters and substrate necessary for fish to spawn, breed, feed, or grow to maturity (16 U.S.C. 1802). NOAA Fisheries has mapped such areas and they include significant amounts of federal land that are habitat for anadromous (being born in freshwater, living in the ocean, and returning to the birthplace to spawn) salmon and steelhead. Like ESA critical habitat for threatened and endangered species, essential fish habitat is for commercially valuable species.

Free-Roaming Horses and Burros

Under the Wild Free-Roaming Horses and Burros Act (16 U.S.C. 1331, et seq.), Congress afforded protection to the animals, especially those residing on federal lands administered by the Forest Service and the BLM. The Forest Service has established 53 wild horse and burro territories in nine states and the BLM 177 herd management areas in ten states.

Scenic Byways

In 1991, Congress established the National Scenic Byways Program, which "recognizes roads having outstanding scenic, historic, cultural, natural, recreational, and archaeological qualities"

(23 U.S.C. 162). It includes national scenic byways, all-American roads, and America's byways. The program also recognizes scenic byways established by states, Indian tribes, and federal land management agencies. The Forest Service has its national forest scenic byways and the BLM its backcountry byways. Congress strengthened the program in subsequent transportation bills in 1998 and 2005.

Small Roadless Areas

In addition to the congressionally recognized values noted above, special characteristic status should be granted to roadless areas smaller than 5,000 acres in size. Most large (>5,000 acres) roadless areas would be protected from hardrock mining in that they are in wilderness or other congressionally protected areas, are BLM wilderness study areas, or are Forest Service inventoried roadless areas. Small roadless areas (1,000–4,999 acres) have important ecological and hydrological values, and are often important wildlife habitat. They are certainly a special characteristic worthy of consideration when hardrock mining is possible. See *Scientific Basis for Roadless Area Conservation* (2003, World Wildlife Fund and Conservation Biology Institute) and *Importance of Roadless Areas in Biodiversity Conservation in Forested Ecosystems: Case Study of the Klamath-Siskiyou Ecoregion of the United States* (2002, *Conservation Biology*).

Recommended Language Revision

[Suggested language changes are shown in *italics* for deletions and in **bold for additions**.]

SEC. 112. SUITABILITY DETERMINATION.

(a) IN GENERAL.—The Secretary concerned shall make each determination of whether lands are suitable for mineral activities that is otherwise required by this Act, in accordance with subsection (b).

(b) SUITABILITY.—

(1) IN GENERAL.—The Secretary concerned shall consider lands suitable for mineral activities if the Secretary concerned finds that such activities would not result in undue degradation to a special characteristic described in paragraph (2) that cannot be prevented by the imposition of conditions**, including, but not limited to, a requirement of no surface occupancy,** in the permit required for such activities under title III.

(2) SPECIAL CHARACTERISTICS.—For purposes of paragraph (1) the Secretary concerned shall consider each of the following to be a special characteristic:

(A) The existence of a significant water resource or supply **important for human use or stream flows** in or associated with such lands, including any aquifer or aquifer recharge area.

(B) The presence on such lands, or any adjacent lands, of a *publicly owned* place that is listed on, or determined by the Secretary of the Interior to be eligible for listing on, the National Register of Historic Places.

(C) The *designation of* **existence on** all or any portion of such lands, or any adjacent lands, *as* **of** a National Conservation System unit.

(D) The designation of all or any portion of such lands, or any adjacent lands, as critical habitat under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

(E) The designation of all or any portion of such lands, or any adjacent lands, as a class I area under section 162 of the Clean Air Act (42 U.S.C. 7472).

(F) The presence of such other resource values as the Secretary concerned may by rule specify, determined based upon field *testing*, evaluation or credible information that verifies such values.

(G) The designation of such lands, or adjacent lands, as a Research Natural Area.

(**G***H*) The presence on such lands, or any adjacent lands, of a sacred site.

(**H***I*) The *presence or designation* **existence** of *such* **lands not open to mining pursuant to section 111, or any** *lands* adjacent *to* lands *not open to mining pursuant to section 111*.

(I) The designation of all or any portion of such lands, or any adjacent lands, as critical habitat under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 et seq.).

(J) The designation of all or any portion of such lands, or any adjacent lands, as wild horse and burro herd areas, herd management areas, or territories under the Wild Free-Roaming Horses and Burros Act (16 U.S.C. 1331 et seq.).

(K) The designation of all or any portion of such lands, or any adjacent lands, as all-American roads, national scenic byways, national forest scenic byways, Bureau of Land Management backcountry byways, or scenic byways established by a state or Indian tribe under the National Scenic Byways Program (23 U.S.C. 162).

(L) The presence of roadless areas between 1,000 and 4,999 acres in size, or adjacent lands.

(3) A determination under this subsection of suitability for mineral activities shall be made after publication of notice and an opportunity for submission of public comment for a period of not less than 60 days.

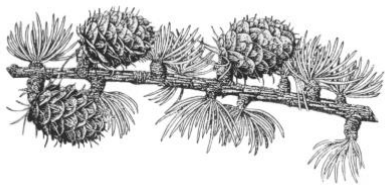
(4) Any determination made in accordance with this subsection with respect to lands shall be incorporated into each Federal land use plan applicable to such lands, at the time such plan is adopted, revised, or significantly amended pursuant to any Federal law other than this Act.

(c) CHANGE REQUEST.—The Secretary concerned shall, by rule, provide for an opportunity for any person to request a change in determination for any Federal land found suitable under subsection (a).

> (d) EXISTING OPERATIONS.—Nothing in this section shall be construed as affecting lands on which mineral activities were being conducted on the date of enactment of this Act under an approved plan of operations or under notice.

I also recommend that Section 304(c)(D) be modified to refer to Section 112:

(D) The area subject to the proposed plan is not listed in section 111 or otherwise ineligible for mineral activities**, including pursuant to section 112**.



Appendix A
Biography of Andy Kerr

Andy Kerr (andykerr@andykerr.net) is the Czar of The Larch Company (www.andykerr.net) and consults on environmental and conservation issues. The Larch Company is a for-profit nonmembership conservation organization that represents the interests of humans yet unborn and species that cannot talk.

He is best known for his two decades with Oregon Wild (then the Oregon Natural Resources Council), the organization best known for having brought you the northern spotted owl. Kerr began his conservation career during the Ford administration.

Through 2019, Kerr has been closely involved with the establishment or expansion of forty-six wilderness areas, fifty-seven wild and scenic rivers, thirteen congressionally legislated special management areas, fifteen Oregon scenic waterways, and one proclaimed (and later expanded) national monument. He has testified before congressional committees on several occasions.

He has lectured at all of Oregon's leading universities and colleges, as well as at Harvard and Yale. Kerr has appeared numerous times on national television news and feature programs and has published numerous articles on environmental matters. He is an Oregon State University dropout.

Kerr authored *Oregon Desert Guide: 70 Hikes* (The Mountaineers Books, 2000) and *Oregon Wild: Endangered Forest Wilderness* (Timber Press, 2004). His articles on solar energy, energy efficiency, and public policy have appeared in *Home Power* magazine. His next book, *Beyond Wood: The Case For Forests and Against Logging*, argues that trees generally grow more slowly than money, that any other use of forests is more important than fiber production, that America can get nearly all of its fiber products from agricultural waste and other crops with less environmental impact, and that most private timberland in this nation should be reconverted to public forestlands.

Kerr participated, by personal invitation of President Clinton, in the Northwest Forest Conference held in Portland in 1993, for which *Willamette Week* gave Kerr a "No Surrender" Award.

Kerr has been mentioned numerous times in the press:

- The *Oregonian* named Kerr one of the 150 most interesting Oregonians in the newspaper's 150-year history.
- *Time* reporter David Seideman, in his book *Showdown at Opal Creek*, described Kerr as "the Ralph Nader of the old-growth-preservation movement."
- Jonathan Nicholas of the *Oregonian* characterized Kerr as one of the "top 10 people to take to (the) Portland bank" for "his gift of truth."
- The *Oregonian*'s *Northwest Magazine* once characterized him as the timber industry's "most hated man in Oregon." In 2010, the *Oregonian* said Kerr was "once the most despised environmentalist in timber country."
- The *Lake County Examiner* called Kerr "Oregon's version of the Anti-Christ."

- In a feature on Kerr, *Time* magazine titled him a "White Collar Terrorist," referring to his effectiveness in working within the system and striking fear in the hearts of those who exploit Oregon's natural environment.
- The *Christian Science Monitor* characterized Kerr as "one of the toughest environmental professionals in the Pacific Northwest."
- *Willamette Week* said Kerr "is entirely unwilling to give an inch when it comes to this state's remaining old-growth timber."
- In his book *Lasso the Wind*, *New York Times* correspondent Tim Egan said that Kerr "has a talent for speaking in such loaded sound bites that it was said by reporters that if Andy Kerr did not exist, someone would have to invent him. . . . [Kerr] forced some of the most powerful timber companies to retreat from a binge of clear-cutting that had left large sections of the Oregon Cascades naked of forest cover."
- *High Country News* ranks Kerr "among the fiercest and most successful environmentalists."
- The *Salt Lake Tribune* described Kerr as "part provocateur and part policy wonk" and said that he "has long been a burr in the side of the cattle industry."
- Rocky Barker of the *Idaho Statesman* said, "There were a lot of environmentalists working to stop logging on old growth national forests in the 1980s and 1990s. But few were more outspoken and effective than Andy Kerr."
- Veteran Pacific Northwest journalist Floyd McKay, writing in *Crosscut.com*, said Kerr was "once considered [a] wild [man], aggressively challenging federal agencies and corporate land managers" who is now "an elder [statesman] in the region's environmental leaders."

Past and current clients include Advocates for the West, Campaign for America's Wilderness, Conservation Northwest, Geos Institute, Idaho Conservation League, Klamath-Siskiyou Wildlands Center, National Public Lands Grazing Campaign, Oregon Natural Desert Association, Oregon Wild, Soda Mountain Wilderness Council, The Wilderness Society, Western Watersheds Project, and the Wilburforce Foundation.

Current projects include advocating for additional wilderness areas and wild and scenic rivers in Oregon, legislating the protection and restoration of Pacific Northwest forests, facilitating voluntary grazing permit buyout of federal public lands, conserving and restoring the Sagebrush Sea, opposing oil and gas exploitation offshore Oregon and elsewhere, and securing permanent conservation status for Oregon's Elliott State Forest.

Kerr is presently on the board of directors of the North American Industrial Hemp Council. He is a former board member of Friends of Opal Creek, the Oregon League of Conservation Voters, The Coast Alliance, and Alternatives to Growth Oregon.

Kerr has held public office, having been an Oregon notary public from 1983 to 1999.

A fifth-generation Oregonian, Kerr was born and raised in Creswell, a recovered timber town in the upper Willamette Valley. He presently splits his time between Ashland, a recovered timber town in Oregon's Rogue Valley, and Washington, DC, where the most important decisions affecting Oregon's wildlands, wildlife, and wild waters are made.

Appendix B
The Authority for and Implementation of Forest Service Administratively Designated Special Areas Within the National Forest System

In the Beginning

In 1939, Secretary of Agriculture Henry A. Wallace issued the "U-Regulations," pertaining to the designation of wilderness areas (U-1), wild areas (U-2), primitive areas (U-2A), special areas (U-3), and experiment and natural areas (U-4) within the National Forest System. The regulations were authored by legendary public lands conservationist Bob Marshall, who at the time worked for the Forest Service (and was a co-founder of The Wilderness Society).

In the Wilderness Act of 1964, Congress afforded permanent congressional protection to U-1, U-2, and U-2A areas. Under that act the areas were, among other things, withdrawn from hardrock mining (to take effect two decades after the act passed into law).

Congress has never addressed the "special areas" designated pursuant to Regulation U-3 or "experiment and natural" areas pursuant to Regulation U-4. Most are open to location, leasing, and sale under the federal mining laws, though such mining would undoubtedly be detrimental to the special values for which the special, experiment(al), and natural areas were designated.

Over the decades, the Forest Service—through the actions of line officers (the chief, regional foresters, and forest supervisors, as well as the secretary of agriculture)—has established a plethora of "special areas" within the National Forest System. The result is a hodgepodge of names, but the intent for all is the same: elevating the protection and management of certain national forest lands that are "special" into "areas" that are intended to be permanent and not subject to the transience of a mere national forest "management area" (Table B-1). The overwhelming majority are open to hardrock mining.

The original authority for the establishment of special areas within the National Forest System was the U-3 regulation of 1939 that later evolved into a provision in the Code of Federal Regulations titled "Recreation Areas" (36 CFR §294.1), which underpins the designation and management of special areas. The Forest Service has elaborated and interpreted the 294.1 regulation in a provision of the Forest Service Manual titled "Special Recreation Designations" (FSM 2370) and has further interpreted and operationalized the regulation in a Forest Service Handbook chapter entitled "Designated Areas" as part of the agency's "Land Management Planning Handbook" (FSH 1901.12, Chapter 20

The Current Code of Federal Regulations

Two kinds of areas—recreation areas and public recreation areas—are authorized by 36 CFR 294.1:

> Recreation areas.
> Suitable areas of national forest land, other than wilderness or wild areas, which should be managed principally for recreation use may be given special classification as follows:
> (a) Areas which should be managed **principally for recreation use substantially in their natural condition** and on which, in the discretion of the officer making the classification, certain other uses may or may not be permitted may be approved and classified by the Chief of the Forest Service or by such officers as he may designate if the particular area is less than 100,000 acres. Areas of 100,000 acres or more will be approved and classified by the Secretary of Agriculture.
> (b) Areas which should be **managed for public recreation requiring development and substantial improvements** may be given special classification as **public recreation areas**. Areas in single tracts of not more than 160 acres may be approved and classified by the Chief of the Forest Service or by such officers as he may designate. Areas in excess of 160 acres will be classified by the Secretary of Agriculture. Classification hereunder may include **areas used or selected to be used for the development and maintenance as camp grounds, picnic grounds, organization camps, resorts, public service sites (such as for restaurants, filling stations, stores, horse and boat liveries, garages, and similar types of public service accommodations), bathing beaches, winter sports areas, lodges, and similar facilities and appurtenant structures needed by the public to enjoy the recreation resources of the national forests.** The boundaries of all areas so classified shall be clearly marked on the ground and notices of such classification shall be posted at conspicuous places thereon. **Areas classified under this section shall thereby be set apart and reserved for public recreation use and such classification shall constitute a formal closing of the area to any use or occupancy inconsistent with the classification**. [emphasis added]

Paragraph (a) addresses areas to be "managed principally for recreation use substantially in their natural condition." All these areas generally have a formal name that starts with a place name to identify the area and ends with "Area." Also known as special areas or designated areas and ranging in size from a few to more than 100,000 acres in size, these kinds of "recreation areas" are the focus of the remainder of this appendix (see discussions below about Forest Service Manual and Forest Service Handbook provisions).

Paragraph (b) addresses areas "managed for public recreation requiring development and substantial improvements" that "may be given special classification as a public recreation area." Public recreation areas are generally less than 160 acres in size if for no other reason than that larger public recreation areas must be approved by the secretary of agriculture. Public recreation areas are highly developed with recreational facilities and infrastructure.

The last sentence at the end of subsection (b), which starts with "Areas classified under this section," though unartfully placed applies to the entire "section," which also includes subsection

Table B-1. ***The Variety of Names Applied to Forest Service Special Areas Under Various Administrative Authorities***	
Forest Service Special Area	*Most Specific Authority or Use**
Recreation Area	36 CFR 294.1(a)
Public Recreation Area	36 CFR 294.1(b)
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Special Recreation Area	FSM 2370
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Geological Area	FSM 2372.05
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Zoological Area	FSM 2372.05
Paleontological Area	FSM 2372.05
Historical Area	FSM 2372.05
Recreation Area	FSM 2372.05
National Natural Landmark	FSM 2373
Designated Area	36 CFR 219.19
Experimental Forest	36 CFR 219.19
Research Natural Area	36 CFR 219.19
Scenic Byway	36 CFR 219.19
Significant Cave	36 CFR 219.19
Critical habitat under ESA**	FSM 1909.12
Experimental Range	FSM 1909.12
Inventoried Roadless Area***	FSM 1909.12
National Recreation Trail****	FSM 1909.12
Scenic Byway-Forest Service	FSM 1909.12
Scenic Byway-National	FSM 1909.12
Wild Horse and Burro Territories	FSM 1909.12
Unusual Interest Area	Various L&RMPs
Geologic Area	Various L&RMPs
Unique Interest Area	Various L&RMPs
Special Interest Area	A catchall term not actually found in any of the specific authorities but sometimes applied to specific established named areas of land and also used as the bureaucratic shorthand to describe the body of special area designations attached to Forest Service lands.
* All Forest Service authority is originally derived from Acts of Congress that delegated Congress's authority over the public lands found in the Constitution's Property Clause. From these statutes, the Secretary of Agriculture has issued regulations, from which the Forest Service has issued manual direction, from which the Forest Service has further issued handbook direction. CFR: Code of Federal Regulations; FSM: Forest Service Manual; FSH: Forest Service Handbook	
** A "special characteristic" named in H.R.2579IH Sec. 112(b)(2).	
*** Citing 36 CFR 294.	
**** NRTs are part of the National Trails System and therefore units of the National Conservation System under H.R.2579IH.	

(a). In any case, being "set apart and reserved" and the "formal closing of the area to any uses or occupancy inconsistent with the classification" in regulation doesn't trump the statutory provisions generally known as the Mining Law of 1872. Hardrock mining is incompatible in either kind of recreation area.

Kinds of special areas noted in the Code of Federal Regulations:
- "Recreation area" is generally "natural" in character, designated under 36 CFR 294.1(a). These lands generally have a place-based name.
- "Public recreation area" is generally "developed" in character, designated under 36 CFR 294.1(b). The lands generally do not have a specific place-based name.

The Current Forest Service Manual

Chapter 2370, "Special Recreation Designations," of the Forest Service Manual (FSM) addresses three kinds of areas:

- Areas Designated by Law (FSM 2371)
- Areas Designed Administratively (FSM 2372)
- National Registry of National [sic] Landmarks (FSM 2373) ("Natural" is correct and later used so in the provision)

Areas designated by law are not further discussed here. The focus is "designed" (the chapter later uses the term "designated" in the same context) areas. National natural landmarks are also discussed. FSM 2370 begins with

> **Certain limited areas** of National Forest System lands not designated as wilderness and **containing outstanding examples of plant and animal communities, geological features, scenic grandeur, or other special attributes merit special management**. **These areas are** designated by law, or **may be designated administratively, as special areas. Areas so designated are managed to emphasize recreational and other specific related values**. Other uses are permitted in the areas to the extent that these uses are in harmony with the purpose for which the area was designated. The law or order designating each area provides specific objectives and guidelines for management of each area. [emphasis added]

Though the authority comes from a CFR provision entitled "Recreation Areas," the term "special areas" is introduced here along with non-recreation values worthy of "special management."

According to FSM 2372.01, the authority to administratively designate national forest special areas "is found in the principal Acts of Congress from 1897 to the present that authorize multiple-use management and in 36 CFR 294.1."

According to FSM 2372.02, the objective of special areas is "to protect and manage for public use and enjoyment, special recreation areas with scenic, geological, botanical, zoological, paleontological, archaeological, or other special characteristics or unique values."

Seven specific kinds of special areas are defined in FSM 2372.05:

1. Scenic Area. A scenic area is a unit of land with outstanding natural beauty that requires special management to preserve this beauty.

2. Geological Area. A geological area is a unit of land with outstanding formations or unique geological features of the earth's development such as caves, fossils, dikes, cliffs, or faults.

3. Botanical Area. A botanical area is a unit of land that contains plant specimens, plant groups, or plant communities that are significant because of their form, color, occurrence, habitat, location, life history, arrangement, ecology, rarity, or other features.

4. Zoological Area. A zoological area is a unit of land that contains animal specimens, animal groups, or animal communities that are significant because of their occurrence, habitat, location, life history, ecology, rarity, or other features.

5. Paleontological Areas. A paleontological area is a unit of land that contains fossils of plants and animals, shellfish, early vertebrates, coal swamp forests, early reptiles, dinosaurs, and other prehistoric plants or animals.

6. Historical Area. A historical area is a unit of land possessing a significant site or a concentration of sites, buildings, structures, or objects united historically or prehistorically by plan or physical development. Memorial areas are included in this definition.

7. Recreational Area. A recreational area is a unit of land that has been administratively designated for particular recreation opportunities or activities such as hiking, rock hounding, recreational mining, photography, or other special activity.

National natural landmarks (NNLs) are on the National Registry of Natural Landmarks, administered by the National Park Service (NPS). FSM 2373 allows that "any special recreation designated area" can be placed on the registry. According to the NPS, "[t]he National Natural Landmarks Program recognizes and encourages the conservation of sites that contain outstanding biological and geological resources." The FSM provides for a detailed and time-consuming nomination process that the Forest Service must complete before nominating a potential NNL to the NPS. Therefore, and also since the NNL designation confers mere recognition and mere "encouragement" of conservation of a Forest Service special area that is already conserved, NNLs in the National Forest System are rare.

Kinds of special areas (which have their authority from 36 CFR §294.1) noted in the Forest Service Manual:

- National natural landmarks
- Special recreation areas

- Scenic, geological, botanical, zoological, paleontological, archaeological, or other special characteristics or unique values
- Scenic area
- Geological area
- Botanical area
- Zoological area
- Paleontological area
- Historical area
- Recreational area

"Special interest area" is not used in this FSM provision but is commonly used in the agency in management plans (see below) and on maps (in fact, the title of the downloadable Microsoft Word document is "FSM2370-2USFS**SpecialInterestAreas**.docx" [emphasis added].

The Current Forest Service Handbook

Sections of the Forest Service Handbook provide guidance for developing national forest land management plans. The FSH speaks of "designated areas," which include the special areas being discussed here. "Designated area" is defined in the CFR and elaborated upon in the FSM.

As originally defined in 36 CFR §219.19:

> *Designated area*. An area or feature identified and managed to maintain its **unique special character or purpose**. Some categories of designated areas may be designated only by statute and **some categories may be established administratively in the land management planning process or by other administrative processes** of the Federal executive branch. Examples of statutorily designated areas are national heritage areas, national recreational areas, national scenic trails, wild and scenic rivers, wilderness areas, and wilderness study areas. **Examples of administratively designated areas are experimental forests, research natural areas, scenic byways, botanical areas, and significant caves**.

As elaborated upon in FSM 1909.12, Chapter 14:

> Designated areas are specific areas or features within the plan area that have been given a **permanent** designation to maintain its **unique special** character or purpose. Some categories of designated areas may be established only by statute (statutorily designated areas or often called Congressionally designated areas) and other administrative processes of the Federal executive branch may establish some categories administratively (administratively designated areas). Certain purposes and restrictions are usually established for designated areas, which greatly influence management needs and opportunities associated with them.
>
> Exhibit 01 of this section lists the types of statutorily designated areas and administratively designated areas that may be present or potentially designated in

> National Forest System plan areas; and the administratively designated areas that the Regional Forester may designate. **This exhibit is not comprehensive, as plan areas may have other types of existing designated areas established by specific legislation or other administrative action that is unique to the plan area**. [emphasis added]

Key is the concept of "permanent" administratively designated areas. Designated areas, even those administratively designated, are intended to have a permanence above and beyond a mere "management area" or "geographic area," which are the terms used for various land allocations established and prescribed in national forest land management plans. A management area is based on a purpose, while a geographic area is based on a place. Management (or geographic) areas are generally intended to last as long as the life of the land management plan (FSH 1909.12, Chapter 24). Here is how one national forest explained the differences between special and management areas:

> **Special Areas**
>
> Certain limited areas of National Forest System lands may have outstanding or unique examples of plant and animal communities, geological features, scenic grandeur, or other special attributes that merit special management. These areas are designated by law or may be designated administratively as special areas. Designated areas are managed to emphasize recreational and other specific related values. . . .
>
> **Management Areas**
>
> Besides special areas, a forest plan identifies separate areas similar to county or city zoning where a distinct set of management guidance is applied. These are called management areas. No set list of management areas exists as for special areas. Rather, management areas are defined and developed in a forest plan. Like special areas, management areas have desired conditions and guidelines specific to those areas. Unlike special areas, those desired conditions and guidelines are not specified by law, statute, or administrative direction. Management area guidance is developed by the particular national forest in response to social, ecological, and economic concerns and conditions.

In some contexts, the Forest Service refers to "designated areas" as "special areas," which are intended to be "permanent" (noted above).

FSH 1909.12, Chapter 14 contains this table ("Exhibit 01") of "Designated Areas":

> **Designated Areas**
> *Statutorily Designated Areas*
> National Heritage Area
> National Monument*
> National Recreation Area

National Scenic Area
National Scenic and Historic Trails
Wild and Scenic River
Wilderness, or Wilderness Study Areas
Highway Systems, Interstate and National
Administratively Designated Areas
Critical Habitat under ESA
Experimental Forest or Range
Inventoried Roadless Areas or Roadless Areas designated under state rules in 36 CFR Part 294
National Natural Landmark
National Historic Landmark
National Monument*
National Recreation Trails
Research Natural Area
Scenic Byway – Forest Service
Scenic Byway – National
Significant Caves
Wild Horse and Burro Territories
Regional Forester Administratively Designated Areas
Botanical Area
Geological Area
Scenic Area
Zoological Area
Paleontological Area
Historical Area
Recreational Area
* National Monuments may be congressionally or administratively designated.

Kinds of special areas noted in the Forest Service Handbook:
• Critical habitat
• Significant caves
• Scenic byways
• Experimental forest or range
• Research natural areas
• Highway systems, interstate and national
• Designated critical habitat
• National historic landmark
• Inventoried roadless areas / roadless areas
• Scenic byway – Forest Service
• Scenic byway – national
• Wild horse and burro territories

National Forest Plans: Even More Variant Naming of Special Areas

Brief research discovered these unusually named Forest Service special areas:

• Merkel Canyon Unusual Interest Area, Colville National Forest

• Seven Lakes Basin Unusual Interest Area, established on the Rogue River National Forest, Oregon, in 1934

• Sand Creek Unusual Interest Area (Geological), established on the Winema National Forest, Oregon, in 1967

• Olallie Ridge Special *Interest* Areas, referred to in a 1970 Forest Service document citing a 1967 recreation plan for the Olallie Ridge Unusual Interest Area as including five "areas": Lamb Butte Scenic Area, Quaking Aspen Swamp Botanical Area, Lower Mountain Geologic Area, Yankee Mountain Scenic Area, Rebel Rock Geologic Area.

• Vinegar Hill–Indian Rock Unusual Interest Area (Scenic), referred to in a 1976 Forest Service document and named on the current Forest Service public recreation map (Southern Blue Mountains, North Half) as the Vinegar Hill–Indian Rock Scenic Area—same boundary, different name

A ca. 1990 Forest Service plan (still in effect) has a table with the title "Special Interest and Unusual Interest Area Plans" that lists three "unusual interest areas," two "scenic" areas, one "geologic" area, and one "geological" area.

At least one national forest, the Siskiyou (now administered as part of the Rogue River–Siskiyou National Forest) has established "unique interest areas" (UIAs) that protect "significant cultural or exceptional geologic sites" where "development or vegetation manipulation for commodity protection" are not allowed. Cultural sites include historic structures or locations of historically significant sites. Such geologic areas "consist of prominent or unusual rock buttes or waterfalls."

The standard and guideline in the 1990 forest plan, still in effect, for minerals in UIAs is as follows:

> Strong mitigation to protect Unique Interest Management Area values is essential. Operators of valid claims shall be required to have an operating plan providing the least amount of impact. Unique interest areas may be recommended for withdrawal from mineral entry in situations where mitigation measures do not adequately protect management area values. The mineral potential of the area shall be assessed before withdrawal is recommended. Rock quarries shall not be permitted.

This language seeks to accommodate the Mining Law of 1872, but hardrock mining is inherently incompatible with the purposes of the unique interest area.

That same Siskiyou National Forest Land Management Plan designates, approves, and/or proposes unusual interest areas, botanical areas, scenic areas, and recreation areas, as well as unique interest areas.

Kinds of special areas noted in a sampling of various national forest plans:
- Special interest areas
- Unusual interest areas
- Geologic areas (distinct from “geological areas”)
- Unique interest areas