

Congress Must Act to Fully Fund the Land and Water Conservation Fund

*Andrew J. Lewis**

INTRODUCTION

This past summer my family celebrated my grandfather's 90th birthday by walking the Civil War battlefield at Chancellorsville, Virginia. The battlefield forms a section of the Fredericksburg and Spotsylvania National Military Park, 7600 acres of rural Virginia stitched together by twenty-three miles of trails.¹ History enthusiasts wander the hallowed grounds in awe, walking over the very terrain where 85,000 American's were wounded and 15,000 died for their convictions.² Visitors interested more generally in outdoor recreation can lose themselves walking along the ten mile shore of Lake Anna, a 3127 acre sub-park boasting one of the most popular lakes in the Commonwealth of Virginia.³ As of October 2015, 1,836,626 people had visited the Fredericksburg and Spotsylvania National Military Park that year to reflect on its past and glory in its natural beauty.⁴ None of it would have been possible without over \$3 million in support from the United States Land and Water Conservation Fund (LWCF).⁵

For the last fifty years, the LWCF has been a rousing policy success, but today it is in danger. While Congress recently granted the fund a temporary renewal, its future and funding remain in jeopardy. This Article will discuss the history of the LWCF, its undeniably positive impacts, and the shortcomings of

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* Class of 2016, University of California, Berkeley School of Law

1. *Fredericksburg & Spotsylvania: Nature*, U.S. NAT'L PARK SERV., <http://www.nps.gov/frsp/learn/nature/index.htm> (last visited Mar. 28, 2016).

2. *Id.*

3. *Lake Anna State Park*, V.A. DEP'T OF CONSERVATION & RECREATION, http://www.dcr.virginia.gov/state-parks/lake-anna#general_information (last visited Mar. 28, 2016).

4. *Monthly Public Use Report: Fredericksburg & Spotsylvania NMP*, U.S. NAT'L PARK SERV., <https://irma.nps.gov/Stats/SSRSReports/Park%20Specific%20Reports/Monthly%20Public%20Use?Park=FRSP> (last visited Apr. 13, 2016) (select "Oct 2015" from the "Rep Date" drop-down menu).

5. *Mapping the Land and Water Conservation Fund*, WILDERNESS SOC'Y, <http://wilderness.org/mapping-land-and-water-conservation-fund-lwcf> (last visited Mar. 28, 2016) (search "Fredericksburg and Spotsylvania National Military Park" in website's search engine).

the current statute. The Article concludes by urging Congress to pass Senator Maria Cantwell's Senate Bill 890, a measure currently before the Senate capable of restoring the LWCF to its former glory.

History and Background

Congress created the LWCF with an act sponsored by Senator Henry M. Jackson (D-WA, 1953–1983) in 1964.⁶ The purpose of the LWCF was to preserve, develop, and assure accessibility to outdoor recreation resources for the American people.⁷ The program has implemented this vision through two functions: (1) purchasing new federal public lands and bodies of water,⁸ and (2) providing grants to state governments for outdoor recreation projects, including planning, acquisition of land and water, and development.⁹ Grants to the states cover a maximum of 50 percent of the cost of any given state project.¹⁰ To accomplish these ends, Congress authorized a \$900 million annual appropriation to fund the LWCF.¹¹ However, as discussed below, Congress has generally been reluctant to appropriate anywhere close to that amount.

Since its inception, the LWCF has been a great policy success. It has left a permanent mark on the American landscape by contributing funds to over 41,000 state and local projects,¹² helping states acquire 2.6 million acres of new public land,¹³ and acquiring 4.5 million acres of federal land for recreation, conservation, and other public purposes.¹⁴ With the LWCF's statutory rule mandating that no state can receive more than 10 percent of LWCF investment¹⁵ it is no surprise that 98 percent of American counties have at least one park that has received LWCF funding.¹⁶

In addition to the more general benefits of environmental preservation, federal land acquired by the LWCF has been a major boon to local economies. A 2012 study by Headwaters Economics found that non-metropolitan counties in western states consisting of more than 30 percent federally protected lands

6. Land and Water Conservation Fund Act, Pub. L. No. 88-578, § 1(a), 78 Stat. 897 (1964); HENRY M. JACKSON FOUND., LAND & WATER CONSERVATION FUND: 50 YEARS IN WASHINGTON STATE 3 (2014), www.hmjackson.org/file_viewer.php?id=927.

7. Land and Water Conservation Fund Act § 1(b).

8. 54 U.S.C. § 200306(a)(2) (2012).

9. § 200305(a).

10. § 200305(c).

11. § 200302(c)(1).

12. *The Land and Water Conservation Fund Fact Sheet*, WILDERNESS SOC'Y, http://lwcfcoalition.org/files/LWCFInfo/LWCF_general_factsheet.pdf (last visited Mar. 28, 2016).

13. MARGARET WALLS, RES. FOR FUTURE, FEDERAL FUNDING FOR CONSERVATION & RECREATION: THE LAND & WATER CONSERVATION FUND 5 (2009), http://www.rff.org/files/sharepoint/WorkImages/Download/RFF-BCK-ORRG_LWCF.pdf.

14. *Id.*

15. § 200305(b)(3).

16. WALLS, *supra* note 13, at 5.

saw a 345 percent increase in job growth from 1970 to 2010.¹⁷ By contrast, similarly situated counties where less than 10 percent of the land is federally protected saw 108 percent job growth over the same period, and counties with 0 percent public lands grew by a comparatively anemic 83 percent.¹⁸ Headwaters Economics credits the job growth to the increasing importance of quality of life factors for employers when deciding where to headquarter a company.¹⁹

The findings of the Headwaters study are further supported by government estimates of the economic impact of public lands. A U.S. Department of the Interior budget request reported that tourism and recreation on U.S. public lands contributed an astounding \$51 billion to the U.S. economy in 2012 alone, directly supporting 880,000 American jobs.²⁰ Factoring in the sporting industry adds an additional \$90 billion in economic activity, supporting 1.5 million jobs and generating over \$26.7 billion in state, federal, and local taxes.²¹ Additionally, a 2010 study conducted by the Trust for Public Lands found that sixteen American national parks, forests, wildlife refuges, monuments, and wildernesses alone attract 10.6 million visitors annually, who in turn spend \$511 million in the surrounding local communities.²² In total, the study found that the \$537 million of LWCF funds invested to acquire public lands in the sixteen aforementioned federal lands areas led to over \$2 billion in economic activity, a return of four private dollars for every public dollar invested.²³ Finally, the LWCF Coalition notes that the jobs created through recreation activities made possible by the LWCF are tourism-based, and therefore cannot be outsourced.²⁴

The LWCF's major success as a driver of conservation and economic growth has been made all the more impressive by the reluctance of Congress to fund it at the full \$900 million authorization.²⁵ Between 1965 and 1981 the average amount appropriated to the LWCF for state grants was \$626 million.²⁶

17. HEADWATERS ECON., WEST IS BEST: HOW PUBLIC LANDS IN THE WEST CREATE A COMPETITIVE ECONOMIC ADVANTAGE 19 (2012), http://headwaterseconomics.org/wphw/wp-content/uploads/West_Is_Best_Full_Report.pdf.

18. *Id.*

19. *Id.* at 16.

20. U.S. DEP'T OF THE INTERIOR, THE LAND AND WATER CONSERVATION FUND: 2016 BUDGET REQUEST 1 (2015) (citing FED. INTERAGENCY COUNCIL ON OUTDOOR RECREATION, OUTDOOR RECREATION: JOBS AND INCOME 2 (2014), <http://www.funoutdoors.com/files/FICOR%20Report%20on%20Jobs%20and%20Income.pdf>).

21. CONG. SPORTSMEN'S FOUND., 2013 SPORTSMEN'S ECONOMIC IMPACT REPORT – WASHINGTON (2013), http://sportsmenslink.org/uploads/page/EIR_Washington_final_low.pdf.

22. THE TRUST FOR PUB. LANDS, RETURN ON THE INVESTMENT FROM THE LAND & WATER CONSERVATION FUND 4 (2010), http://www.lwcfcoalition.org/files/LWCF%20ROI%20Report_11%2029%2010.pdf.

23. *Id.* at 11.

24. THE LWCF COAL., ECONOMIC BENEFITS OF THE LAND AND WATER CONSERVATION FUND, http://lwcfcoalition.org/files/Factsheets/LWCF_Economics.pdf (last visited Mar. 28, 2016).

25. 54 U.S.C. § 200302(c)(1).

26. WALLS, *supra* note 13, at 4 (in 2007 dollars).

Since 1981, the average appropriation has dropped to roughly \$60 million.²⁷ If Congress had fully funded the LWCF since its inception, the American people would have an additional \$16 billion worth of investments in their public lands.²⁸

The current status of the LWCF is tenuous. After the LWCF expired on October 1, 2015²⁹ Congress temporarily re-extended it in an omnibus act in December of that year.³⁰ The temporary measure extends the life of the LWCF by three years³¹ and appropriates \$450 million to the fund.³² While this temporary extension and stop-gap funding is preferable to allowing the LWCF to expire, Congress should act to make the LWCF permanent and take steps to ensure the program is fully funded for future generations.

Current Authorization Language

While the LWCF enjoys an economically progressive funding source, it suffers from the fact that Congress can redirect that funding. Senator Jackson included a statutory authorization of \$900 million for the LWCF, but also paid for it by diverting a portion of federal revenues from offshore oil production.³³ While Congress has authority to appropriate up to \$900 million for the LWCF “out of any money in the Treasury [of the United States of America] not otherwise appropriated”,³⁴ in practice the lion’s share of the funding comes from federal oil revenue collected under the Outer Continental Shelf Lands Act.³⁵ This revenue includes rentals, royalties, and other incidental sums paid to the government by oil companies for any lease on the outer Continental Shelf.³⁶

Using revenue from oil leases to fund the LWCF makes for good environmental policy. First, equity concerns support using a portion of federal oil revenue to indirectly mitigate the adverse effects of oil exploration through

27. *Id.* (in 2007 dollars).

28. *Id.* at 2 (in 2007 dollars).

29. Kerry Klein, “*There Is Just No Program Like the LWCF*”, SLATE (Sept. 30, 2015, 3:39 PM), http://www.slate.com/articles/health_and_science/science/2015/09/land_and_water_conservation_fund_is_out_of_budget_and_will_expire.html.

30. Joel Connelly, *Congress Revives Land and Water Conservation Fund, Which Has Saved Washington Wildlands*, SEATTLE POST-INTELLIGENCER: STRANGE BEDFELLOWS (Dec. 16, 2015, 1:01 PM), <http://blog.seattlepi.com/seattlepolitics/2015/12/16/the-land-and-water-conservation-fund-which-has-saved-washington-wildlands-is-revived-by-congress/>; see Consolidated Appropriations Act of 2016, H.R. 2029, 114th Cong. § 801(a) (2015) (enacted).

31. § 801(a).

32. Tom Kuglin, *LWCF Gets Temporary Reauthorization and Funding*, HELENA INDEP. REC. (Dec. 16, 2015 10:30 PM), http://helenair.com/news/natural-resources/lwcf-gets-temporary-reauthorization-and-funding/article_60247e06-3a90-5b5f-af29-d544d0b65d13.html.

33. 54 U.S.C. § 200302(c)(2).

34. § 200302(c)(1).

35. § 200302(c)(2) (“To the extent that amounts appropriated . . . are not sufficient to make [\$900 million] . . . an amount sufficient to cover the remainder shall be credited to the [LWCF] from revenues due and payable to the United States . . . as miscellaneous receipt under the Outer Continental Shelf Lands Act.”).

36. Outer Continental Shelf Lands Act, 43 U.S.C. § 1338 (2012).

conservation on public lands. Second, funding the LWCF through oil revenues—rather than taxes—supports the LWCF without a tax burden on individuals. This makes the funding source economically progressive. The entire funding scheme is a policy triumph for the American people.

The problem is Congress did not make the outer continental shelf revenue a dedicated funding source when the LWCF was created in 1964. The statute states that Congressional appropriations “may” be made without fiscal year-limitation,³⁷ thereby making any LWCF funding discretionary. As a result, Congress has seen fit in recent years to appropriate less to the LWCF. And while the recent omnibus deal provides more funding than past LWCF allocations, the program will remain in a year-to-year limbo until a dedicated funding source is written into statute.

Providing Permanent Funding

Senator Maria Cantwell (D-WA) has introduced Senate Bill 890 to permanently extend the LWCF³⁸ and guarantee its annual appropriation of \$900 million worth of offshore oil revenue. Senate Bill 890 guarantees full funding for the LWCF by simply changing the aforementioned “may” in “the appropriations *may* be made without fiscal-year limitation”³⁹ to “shall.”⁴⁰ The effect of this one-word change will deny Congress the ability to re-appropriate funds from the LWCF after they have been deposited. Senate Bill 890 goes on to add several accountability factors requiring data collection and an annual report from the executive on the activities of the LWCF.⁴¹

Passage of Senate Bill 890 will not result in a single dollar of general treasury money going to the LWCF. Instead, it will make the \$900 million in continental shelf revenue already authorized for the LWCF mandatory, rather than permissive. The outer Continental Shelf is generating more than enough revenue to sustain the LWCF. In 2015 alone the lease and royalty revenues from the outer Continental Shelf totaled more than \$4.5 billion,⁴² generated by over 8000 active energy leases on 1.7 billion acres of federally owned offshore areas.⁴³ It is a stable funding source, and urgently needed to meet the Department of the Interior’s demand for LWCF eligible programs.

37. 54 U.S.C. § 200303.

38. S. 890, 114th Cong. § 2(a) (2015).

39. 54 U.S.C. § 200303 (emphasis added).

40. S. 890 § 2(b)(1).

41. *Id.*

42. U.S. DEP’T OF THE TREASURY, COMBINED STATEMENT OF RECEIPTS, OUTLAYS, AND BALANCES: PART 2, DETAILS OF RECEIPTS 19 (2015).

43. BUREAU OF OCEAN ENERGY MGMT., OIL AND GAS LEASING ON THE OUTER CONTINENTAL SHELF, http://www.boem.gov/uploadedFiles/BOEM/Oil_and_Gas_Energy_Program/Leasing/5BOEMRE_Leasing101.pdf (last visited Mar. 28, 2016).

The LWCF Backlog

In their 2016 budget request the U.S. Department of the Interior reported having more landowners willing to sell lands to the government than funds available to make purchases.⁴⁴ The unfunded backlog of federal land acquisition has grown exponentially worse in recent years, expanding from \$10 billion in 2001 to over \$30 billion in 2009.⁴⁵ The Department of the Interior further expressed concern over its ability to engage in long term projects with local stakeholders while the future of the program is in doubt.⁴⁶ In 2010 alone the U.S. National Parks Service reported an astounding \$18.5 billion in unmet recreation and conservation project funding requests from state and local governments across the country.⁴⁷

Moreover, greater investment from Congress in the short term will allow the Department of the Interior to save money in the long term by implementing cost reducing forest management strategies. Specifically, the Department of the Interior would be able to unite publicly owned parcels to consolidate administrative costs, prevent private development near parks to avoid the costs of installing right of ways, mitigate the costs of sedimentation in streams, protect homes from wildfires, combat the introduction of invasive species, and avoid the costs of new construction by acquiring plots with existing structures.⁴⁸ By passing Senate Bill 890, thereby making the LWCF permanent and fully funded, Congress can respond to the recreational needs of the constituent states while also empowering the Department of the Interior to save money in the long term.

CONCLUSION

The LWCF remains extremely popular with the American public. A 2011 poll conducted jointly by the Republican polling firm Public Opinion Strategies and the Democratic polling firm Fairbank, Maslin, Maullin, Metz & Associates found 85 percent of Americans supported fully funding the LWCF.⁴⁹ Moreover, an even larger majority of 88 percent supported continuing to fund the LWCF through the dedicated funding source of outer Continental Shelf oil revenue.⁵⁰ Additionally, the poll found the LWCF enjoys strong support across

44. U.S. DEP'T OF THE INTERIOR, *supra* note 20, at 2.

45. Ryan Mulvenon, *Clean Energy Jobs and Oil Company Accountability Act: Land and Water Conservation Fund*, S. DEMOCRATIC POL'Y COMM. 1 (2010) https://www.dpc.senate.gov/files_energybill/land_water_conservation_fund.pdf.

46. U.S. DEP'T OF THE INTERIOR, *supra* note 20, at 2.

47. U.S. NAT'L PARK SERV., LAND AND WATER CONSERVATION FUND: STATE AND LOCAL ASSISTANCE PROGRAM 2010 ANNUAL REPORT 8 (2010).

48. U.S. DEP'T OF THE INTERIOR, *supra* note 20, at 4.

49. Press Release, Land & Water Conservation Fund Coal., New Bipartisan Poll Shows Overwhelming Support Across America for Land and Water Conservation Fund (July 25, 2011) (on file with author); *see also* DAVE METZ & LORI WEIGEL, KEY FINDINGS FROM RECENT NATIONAL VOTER SURVEY 4 (2011) (on file with author).

50. *Id.*

the political spectrum, winning approval from 93 percent of Democrats and 83 percent of Republicans.⁵¹ A more recent poll conducted by the same bipartisan pollsters in seven western states⁵² found that 75 percent of respondents favored renewing the LWCF.⁵³

With broad bipartisan support and a strong legacy of achievement, the LWCF should be permanently reauthorized and fully funded in perpetuity. Congress should be applauded for preventing the program's death by temporarily extending it, but more work needs to be done. A bipartisan proposal to permanently reauthorize, but not fully fund, the LWCF has been tacked onto the Energy Policy Modernization Act of 2015;⁵⁴ but as of this writing the future of that legislation remains in doubt.⁵⁵

Congress should break the logjam and pass Senator Cantwell's Senate Bill 890 to reauthorize and fully fund the LWCF. In so doing, Congress could set the LWCF in stone like many of the monuments it underwrites.

51. *Id.*

52. Specifically, Arizona, Colorado, Montana, Nevada, New Mexico, Utah, and Wyoming.

53. PUB. OP. STRATEGIES & FAIRBANK, MASLIN, MAULLIN, METZ & ASSOCS., 2016 WESTERN STATES SURVEY 13 (2015) (on file with author).

54. S. 2012, 114th Cong. § 5002(a) (2015).

55. Kathleen Miller, *Senate Energy Bill Looks Bipartisan for Now, but Can That Last?*, BLOOMBERG POLITICS (Feb. 1, 2016, 2:00 AM), <http://www.bloomberg.com/politics/articles/2016-02-01/senate-energy-bill-looks-bipartisan-for-now-but-can-that-last->.