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# Making the Case for Wilderness: The Bureau of Land Management's Wild Lands Policy and Its Role in the Storied History of Wilderness Protection

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# MAKING THE CASE FOR WILDERNESS: THE BUREAU OF LAND MANAGEMENT’S WILD LANDS POLICY AND ITS ROLE IN THE STORIED HISTORY OF WILDERNESS PROTECTION

MAUREEN O’DEA BRILL\*

“Wilderness is a resource which can shrink but not grow . . . the creation of new wilderness in the full sense of the word is impossible.”

*Aldo Leopold, American forester and environmentalist*

“We have a responsibility to carefully develop our resources for America, for energy security, for our economy, and jobs for our citizens. I commend the House for choosing to de-fund the Wild Lands Policy for this current fiscal year.”

*Mike McKee, Uintah County Commissioner, Utah*

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\* J.D. Candidate, 2013, Washington College of Law; Legislative Aide, United States Senate. Thank you to those who helped to make this paper, and my experience at law school, possible. Special thanks to the *Legislation and Policy Brief* staff for their assistance. To those who have protected the Earth so that I could enjoy areas “untrammled by man,” I am eternally grateful. To my family and friends, thank you for your constant support. Finally, to my husband, Mark, thank you for always believing in me.

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### INTRODUCTION

On December 23, 2010, the Secretary of the Department of the Interior, Ken Salazar, issued Secretarial Order No. 3310, commonly referred to as the Wild Lands Policy.<sup>1</sup> The Wild Lands Policy established a two-step process through which the Bureau of Land Management (BLM), an agency within the Department of the Interior, was to inventory and to manage its lands with wilderness characteristics (LWCs). The policy continued the requirement that the BLM maintain a current inventory of LWCs and evaluate these LWCs during the previously established land use planning process.<sup>2</sup> The Wild Lands Policy further required that the BLM protect LWCs from impairment unless the BLM determined the impairment was appropriate and took measures to minimize the impacts to wilderness characteristics.<sup>3</sup> If the BLM determined, through the land use planning process, that protection was appropriate, the BLM was to designate the area “Wild Lands” and to protect it as wilderness until the land use plan was revised or amended.<sup>4</sup> The Wild Lands Policy proved immediately contentious. Uintah County, Utah and the Utah Association of Counties quickly filed a lawsuit alleging that the Wild Lands Policy violated the terms of the 2003 Norton-Leavitt Settlement, described later.<sup>5</sup> As it turned out, however, after a lengthy display of political showmanship, on April 14, 2011, the United States Congress passed a Continuing Resolution to

<sup>1</sup> SEC’Y OF THE INTERIOR, ORDER No. 3310, PROTECTING WILDERNESS CHARACTERISTICS ON LANDS MANAGED BY THE BUREAU OF LAND MANAGEMENT (2010), available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications\\_Directorate/public\\_affairs/news\\_release\\_attachments.Par.26564.File.dat/sec\\_order\\_3310.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf) (referring to language included in the Fiscal Year 2011 Continuing Resolution that prohibits the U.S. Department of Interior from using federal funding to implement its Wild Lands Policy).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Phil Taylor, *Utah Counties File Lawsuit over BLM Wilderness Policy*, N.Y. TIMES, March 24, 2011, available at <http://www.nytimes.com/gwire/2011/03/23/23greenwire-utah-counties-file-lawsuit-over-blm-wilderness-60695.html?pagewanted=all>; see *infra* Part II.C.

finance the federal government that prohibited the BLM from spending any federal funds to implement its Wild Lands Policy.<sup>6</sup>

For wilderness advocates throughout the country, the Secretary's policy announcement signaled a victory in the long and litigious fight for more federal wilderness designations, or at least an increase in land management plans that provide some level of special protection to lands with wilderness characteristics. Congress's defunding mechanism, however, revoked the conservationists' victory. For those advocating for commercial development of BLM lands, the Wild Lands Policy signaled the unraveling of a victory secured in 2003 when the BLM signed a settlement agreement with Utah, relinquishing its claim of authority to conduct wilderness reviews and to establish new Wilderness Study Areas (WSAs) under §§ 201 and 202 of the Federal Land Policy and Management Act, respectively.<sup>7</sup>

Those opposed to the Wild Lands Policy celebrated Congress's defunding mechanism. On June 1, 2011, Secretary Salazar announced that "pursuant to the 2011 [Continuing Resolution], the BLM [would] not designate any lands as 'Wild Lands.'"<sup>8</sup> He further stated that the Interior Department planned to work with congressional members and state and local officials to identify BLM lands potentially appropriate for protection under the Wilderness Act.<sup>9</sup> This endeavor represents the most current status of federal policy for wilderness lands under the jurisdiction of the BLM.

This paper provides a brief history of federal wilderness policies that served as the foundation for Secretarial Order No. 3310.<sup>10</sup> Detailing the litigation between Utah and the BLM, which altered the course of the BLM's wilderness management practices,<sup>11</sup> this paper will summarize the Wild Lands Policy that was issued as a result of the litigation's settlement terms.<sup>12</sup> It will analyze whether the BLM had the authority to inventory lands with wilderness characteristics under the Federal Land Policy and Management Act (FLPMA).<sup>13</sup> It will consider whether wilderness is considered a proper use under the BLM's multiple use

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<sup>6</sup> The Department of Defense and Full-Year Continuing Appropriations Act of 2011, Pub. L. 112-10, § 1769, 125 Stat. 38 (2011) (prohibiting the use of appropriated funds to implement, administer, or enforce Secretarial Order No. 3310 in Fiscal Year 2011); Rocky Barker, *Budget Deal Stops BLM Wild Lands Inventory*, IDAHO STATESMAN, April 12, 2011, <http://www.idahostatesman.com/2011/04/12/1602645/budget-deal-stops-blm-wild-lands.html>.

<sup>7</sup> Compare *infra* Part II.C (describing the Norton-Leavitt Settlement) with Federal Land Policy and Management Act of 1976 §§ 201-202, 43 U.S.C. §§ 1711-1712 (2006) (proving BLM with the authority to conduct wilderness reviews and to establish new Wilderness Study Areas).

<sup>8</sup> Memorandum from the Sec'y of the Interior on Wilderness Policy to the Dir. of the Bureau of Land Mgmt. (June 1, 2011) <http://www.doi.gov/news/pressreleases/upload/Salazar-Wilderness-Memo-Final.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part III.A.

<sup>13</sup> See *infra* Part III.B.

and sustained yield management standard.<sup>14</sup> It will explore whether the BLM overstepped its land management authority under FLPMA when it issued the directive to avoid the impairment of wilderness characteristics unless an alternative management was deemed appropriate.<sup>15</sup> Finally, this paper will evaluate whether “Wild Lands” would have created de facto Wilderness Study Areas.<sup>16</sup> By analyzing the potential legal issues created by Secretarial Order No. 3310, this paper provides an evaluation of how well the current Administration is handling the complex task of managing wilderness lands under the multiple use and sustained yield management standard. It will also illuminate the power of Congress to alter wilderness policy with whatever abruptness and intensity it deems appropriate.

## I. AMERICAN WILDERNESS POLICIES

### A. EARLY WILDERNESS PROTECTED BY ADMINISTRATIVE AUTHORITY

Wilderness provides people with a place to escape city-life; to enjoy solitude; and to relax by hunting, fishing, hiking, and camping. Wilderness provides an essential habitat for wildlife, including threatened and endangered species. Protecting ecosystems and preserving biodiversity, wilderness purifies our air, filters our water, and reduces the effects of climate change through carbon storage. It even serves as study areas for scientists interested in biological adaptation and for legislators struggling to implement the most beneficial environmental policies.<sup>17</sup> Yet, despite these positive attributes, permanent protection of wilderness inherently eliminates development opportunities, which traditionally equate to economic growth opportunities. For this reason, even since the earliest days of federal wilderness protection, tension has existed between land preservation and land development.<sup>18</sup>

Throughout American history, the federal government has followed dramatically different land management policies. Initially, the government attempted to dispose of federal lands by transferring ownership to states or to individuals, believing that this practice would hasten the settlement and development of the American West.<sup>19</sup> In the late 1800s,

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<sup>14</sup> See *infra* Part III.C.

<sup>15</sup> See *infra* Part III.D.

<sup>16</sup> See *infra* Part III.E.

<sup>17</sup> See William G. Myers III & Jennifer D. Hill, *Along the Trammled Road to Wilderness Policy on Federal Lands*, 56 ROCKY MT. MIN. L. INST. 15-1 (2010); see also *The Benefits of Wilderness*, The Wilderness Society, (2010), [http://wilderness.org/files/Benefits%20of%20Wilderness\\_0.pdf](http://wilderness.org/files/Benefits%20of%20Wilderness_0.pdf) (exploring the benefits to society of the wilderness).

<sup>18</sup> See BUREAU OF LAND MGMT., DEPARTMENT OF THE INTERIOR, THE FEDERAL LAND POLICY AND MANAGEMENT ACT FLPMA OF 1976: HOW THE STAGE WAS SET FOR BLM'S "ORGANIC ACT," available at <http://www.blm.gov/flpma/organic.htm> (last visited Apr. 19, 2011) (describing the progression of wilderness policy, which included private ownership as well as preservation).

<sup>19</sup> *Id.*

when the government started to recognize the value of land retention and scientific conservation, the U.S. Forest Service led the way in protecting and preserving federal public lands as wilderness through administrative action.<sup>20</sup> By the 1950s, the Forest Service had nearly 15 million acres under its administrative protection. At this time, loggers and recreationalists informally challenged the legality of the Forest Service's administrative authority to designate wilderness areas.<sup>21</sup> In 1964, pressured into taking legislative action, Congress passed the Wilderness Act and provided the first broad federal protection of wilderness.<sup>22</sup>

## B. THE BROAD STROKES OF THE WILDERNESS ACT OF 1964

Using its authority under the Property Clause of the Constitution,<sup>23</sup> Congress passed the Wilderness Act of 1964 in an attempt to “secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”<sup>24</sup> The Wilderness Act established the National Wilderness Preservation System (NWPS), a collection of federal lands preserved as wilderness through land use restrictions and prohibitions “for the use of the American people in such a manner as will leave [the lands] unimpaired for future use and enjoyment.”<sup>25</sup> The Wilderness Act provides Congress with the exclusive authority to designate wilderness areas and defines “wilderness” as undeveloped federal land that:

(1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.<sup>26</sup>

<sup>20</sup> *Id.*

<sup>21</sup> ROSS W. GORTE, CONG. RESEARCH SERV., RL31447, WILDERNESS: OVERVIEW AND STATISTICS 1 (2011) (detailing why Congress legislated a system for wilderness designations).

<sup>22</sup> *Id.*

<sup>23</sup> See U.S. CONST. art. IV, § 3, cl. 2. (providing Congress the “[p]ower to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”).

<sup>24</sup> See 16 U.S.C. §§ 1131-1136 (2006) (defining “wilderness” in part as: “[a] wilderness, in contrast with those areas where man and his works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain.”).

<sup>25</sup> *Id.* at §§ 1131(a), 1133(c) (prohibiting, for example, “commercial enterprise, permanent or temporary roads, [and] mechanical transports,” within the NWPS, with exceptions for activities necessary for “area administration and personal health and safety emergencies”).

<sup>26</sup> *Id.* § 1132(b)-(c) (requiring the evaluation of lands in the forest system, the national park system, the national wildlife refuges and game ranges).

Upon its passage into law, the Wilderness Act directed the Interior Secretary and the Agriculture Secretary to review the wilderness potential of certain public lands and to recommend wilderness designations to the President and to Congress within the ten years.<sup>27</sup> This review did not include any BLM lands.<sup>28</sup>

### C. THE FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976 AND ITS ROLE IN THE AMERICAN WILDERNESS NARRATIVE

The Federal Land Policy and Management Act (FLPMA) is commonly regarded as the BLM Organic Act, the law which provides the BLM with a consolidated directive on how to manage its public lands.<sup>29</sup> Prior to 1976, longstanding federal land management policy generally favored land disposal.<sup>30</sup> However, through FLPMA, Congress established policy favoring public land retention unless the disposal of specific land would better serve the national interest.<sup>31</sup> FLPMA directs that, under most circumstances, the BLM manage retained lands under a multiple use and sustained yield management standard.<sup>32</sup> This management standard requires that the BLM balance the diverse uses of the public land resource.<sup>33</sup> Currently, the BLM has primary management responsibility for 245 million acres of public land.<sup>34</sup> The BLM manages approximately 13 percent of the total land surface of the United States and more than 40 percent of all federal lands.<sup>35</sup> Congressionally-designated Wilderness and BLM-designated WSAs comprise less than

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<sup>27</sup> *Id.* (requiring the evaluation of lands in the forest system, the national park system, the national wildlife refuges and game ranges).

<sup>28</sup> *Id.*

<sup>29</sup> See Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701-87 (2006); BUREAU OF LAND MGMT., DEPARTMENT OF THE INTERIOR, THE FEDERAL LAND POLICY AND MANAGEMENT ACT FLPMA OF 1976: HOW THE STAGE WAS SET FOR BLM'S "ORGANIC ACT," available at <http://www.blm.gov/flpma/organic.htm> (last visited Apr. 19, 2011); see also Bureau of Land Mgmt., U.S. Department of the Interior, The Federal Land Policy and Management Act As Amended 60 (2001), available at <http://www.blm.gov/flpma/FLPMA.pdf> (regarding congressional passage of FLPMA, Senator Henry Jackson, Chairman of the Senate Committee on Energy and Natural Resources, wrote that "for the first time in the long history of the public lands, one law provides comprehensive authority and guidelines for the administration and protection of [BLM lands].") (quoting Eleanor Schwartz, *A Capsule Examination of the Legislative History of the Federal Land Policy and Management Act of 1976*, 21 ARIZ. L. REV. 285 (1979)).

<sup>30</sup> Taylor, *supra* note 5 (explaining an earlier preference to transfer land ownership to the States or individuals).

<sup>31</sup> BUREAU OF LAND MGMT., DEPARTMENT OF THE INTERIOR, THE FEDERAL LAND POLICY AND MANAGEMENT ACT FLPMA OF 1976: HOW THE STAGE WAS SET FOR BLM'S "ORGANIC ACT," available at <http://www.blm.gov/flpma/organic.htm> (last visited Apr. 19, 2011).

<sup>32</sup> 43 U.S.C. §§ 1701(a)(7), 1702(c).

<sup>33</sup> *Id.*

<sup>34</sup> See GORTE, *supra* note 21.

<sup>35</sup> *About the BLM*, Bureau of Land Mgmt., [http://www.blm.gov/wo/st/en/info/About\\_BLM.html](http://www.blm.gov/wo/st/en/info/About_BLM.html) (last visited Apr. 19, 2011).

9 percent of the 245 million acres.<sup>36</sup> There are no BLM-designated Wild Lands because the BLM did not make any such designations before Congress prohibited the BLM from using federal funds to implement its Wild Lands Policy.

The BLM is required to inventory all of the resources on its lands “on a continuing basis . . . giving priority areas of critical environmental concern” under FLMPA § 201.<sup>37</sup> This requirement, frequently referred to as the “FLMPA § 201 inventory requirement,” is intended to provide the BLM with a working understanding of what land uses are available and what yields are sustainable. FLPMA also states that:

This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands.<sup>38</sup>

Accordingly, the FLPMA § 201 inventory requirement does not automatically trigger any new protection for these lands.<sup>39</sup>

Although Congress did not require the BLM to conduct a wilderness review of its lands under the Wilderness Act of 1964, Congress did impose such a requirement twelve years later under FLPMA.<sup>40</sup> FLPMA § 603 instructed the Interior Secretary to evaluate the wilderness potential of “those roadless areas of five thousand acres of more and roadless islands of the public lands, identified during the inventory required by § 201(a) . . . as having wilderness characteristics” within fifteen years.<sup>41</sup> By the conclusion of its wilderness review, the BLM had to present NWPS designation recommendations to the President.<sup>42</sup> The President

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<sup>36</sup> See *BLM Fact Sheet*, Bureau of Land Mgmt., [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications\\_Directorate/public\\_affairs/news\\_release\\_attachments.Par.3162.File.dat/Americas\\_Wild\\_Lands\\_BLM\\_fact%20sheet.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.3162.File.dat/Americas_Wild_Lands_BLM_fact%20sheet.pdf) (last visited Apr. 21, 2011) (stating that there are 221 Wilderness areas, totaling over 8.7 million acres, and 545 WSAs, totaling nearly 13 million acres) [hereinafter *BLM Fact Sheet*].

<sup>37</sup> 43 U.S.C. § 1711.

<sup>38</sup> *Id.*

<sup>39</sup> See discussion *infra* Part III, B and accompanying notes.

<sup>40</sup> The Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-87 (2011); see *The Federal Land Policy and Management Act (FLPMA) of 1976: How the Stage Was Set for BLM's "Organic Act,"* BUREAU OF LAND MGMT., available at <http://www.blm.gov/flpma/organic.htm> (last visited Apr. 19, 2011) (explaining that in 1976 Congress passed the FLPMA which required the BLM to conduct a wilderness review of its lands).

<sup>41</sup> 43 U.S.C. § 1782 (a); but see 16 U.S.C. § 1132(b)-(c) (Wilderness Act does not include review of BLM lands).

<sup>42</sup> 43 U.S.C. § 1782(a).



then had two years to report recommendations to Congress.<sup>43</sup> To assist the BLM staff tasked with analyzing the suitability of potential wilderness designations under FLPMA § 603, the BLM issued guidance establishing wilderness planning criteria, including the evaluation of an area's wilderness values and its long-term manageability.<sup>44</sup> Under this guidance, each area that the BLM recommended had to possess the same three mandatory wilderness characteristics established in the Wilderness Act: size, naturalness, and outstanding opportunities for solitude or primitive recreation.<sup>45</sup> Through its guidance, the BLM instructed staff to label inventoried lands possessing wilderness characteristics as WSAs.<sup>46</sup> Regardless of whether the BLM recommended inventoried WSAs for wilderness designation, FLPMA § 603 requires the BLM to manage all inventoried WSAs "until Congress determines otherwise . . . in a manner so as not to impair the suitability of such areas for preservation of wilderness . . . ." <sup>47</sup>

For areas which are not inventoried WSAs, FLPMA § 202 instructs the BLM to develop and revise land use plans applying "the principles of multiple use and sustained yield."<sup>48</sup> Given the BLM's mandate to manage lands under the multiple use and sustained yield standard, the inventory requirement "enables [the BLM] to ascertain the character of the lands within its jurisdiction, and the best use to which particular portions of land can be put given such things as wilderness characteristics, mineral values, and the nation's needs for recreation, energy, etc."<sup>49</sup> Further, the BLM must allow for public involvement in the land use planning process.<sup>50</sup>

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<sup>43</sup> See 43 U.S.C. § 1782(b); see also GORTE, *supra* note 21 (due to a timeframe which spanned two Presidential Administrations, both President George H.W. Bush and President William Clinton recommended NWPS designations to Congress).

<sup>44</sup> See Wilderness Study Policy, 47 Fed. Reg. 5098, 5103 (1982) (discussing guidelines of the BLM for conducting wilderness studies on the public lands as mandated by the FLPMA).

<sup>45</sup> *Id.*; See 16 U.S.C. §§ 1131-1136 (2006), see generally H. Michael Anderson & Aliko Moncrief, *Am.'s Unprotected Wilderness*, 76 Denv. U. L. Rev. 413, 427 (1999).

<sup>46</sup> See U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., WILDERNESS INVENTORY AND STUDY PROCEDURES, H-6310-1, 2-3 (2001).

<sup>47</sup> 43 U.S.C. § 1782(c); See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 59 (2004) (applying 43 U.S.C. § 1782(c)).

<sup>48</sup> 43 U.S.C. §§ 1701(a)(7), 1712(c)(1), 1732(a).

<sup>49</sup> *Utah v. Andrus*, 486 F. Supp. 995, 1003 (D.C. Utah, 1979).

<sup>50</sup> See 43 U.S.C. § 1712(a) (stating the requirement of public involvement in developing and maintaining land use plans).

## II. THE LITIGIOUS ROAD TO THE WILD LANDS POLICY

### A. THE BLM'S CONTROVERSIAL DESIGNATION OF WSAs THROUGH FLPMA § 202 LAND USE PLANNING

In October 1991, the BLM's authority to inventory lands under FLPMA § 603's fifteen year wilderness review concluded.<sup>51</sup> At that time, the BLM continued to have clear legal authority under FLPMA § 201 to inventory lands with wilderness characteristics.<sup>52</sup> The BLM interpreted FLPMA § 202 as authorizing the agency to designate additional WSAs through the land use planning process, rather than the FLPMA § 603 process, and to manage these WSAs under the non-impairment standard.<sup>53</sup> Following the beginning of a wilderness inventory in Utah, the Utah School and Institutional Trust Lands Administration, the Utah Association of Counties, and the State of Utah, immediately alleged that the BLM's interpretation of FLPMA § 202 was incorrect and that the BLM was acting outside of its legal authority. The statutory interpretation created significant controversy and led to a lawsuit filed by the State of Utah against the BLM.<sup>54</sup> This lawsuit is described in greater detail later in this paper.<sup>55</sup>

Yet despite these allegations, many Interior Department officials affirmed the BLM's interpretation of FLPMA § 202 throughout the 1990s and 2000s.<sup>56</sup> In fact, four Presidential Administrations applied this interpretation and together designated and managed more than 100 WSAs under FLPMA § 202.<sup>57</sup> During the Reagan Administration, the Department of the Interior's Office of the Solicitor issued a memorandum to the BLM Director specifically on this issue which expressly affirmed that:

[T]he land use planning provisions of section 202 of FLPMA underline the Secretary's broad authority to manage public lands for any number of uses, including

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<sup>51</sup> *Id.* at § 1782(a).

<sup>52</sup> *Id.* at § 1711(a).

<sup>53</sup> Secretary of the Interior, Instruction Memorandum No. 2003-275, "Consideration of Wilderness Characteristics in Land Use Plans (Excluding Alaska)," (October 23, 2003), available at [http://www.swccd.us/images/FF1\\_IM\\_2003-275ch1.pdf](http://www.swccd.us/images/FF1_IM_2003-275ch1.pdf).

<sup>54</sup> *Utah v. Babbitt*, 137 F.3d 1193, 1199 (10th Cir. 1998).

<sup>55</sup> See discussion *Infra* Part II, B.

<sup>56</sup> See generally *The Impact of the Administration's Wild Lands Order on Jobs and Economic Growth Before the H. Comm. on Natural Res.*, 112<sup>th</sup> Cong. 88-98 (2011) (statement of Mark Squillace, Director, Natural Resources Law Center, University of Colorado Law School) [hereinafter *Impact of Wild Lands Order*] (naming Presidential Administrations under Presidents Carter, Reagan, George H.W. Bush, and Clinton); see also Letter from Robert W. Adler et al., professors of natural resource law, to Ken Salazar, U.S. Sec'y of the Dep't of the Interior (Sept. 30, 2009), available at [http://wilderness.org/files/Law\\_Professors\\_Letter\\_September\\_2009.pdf](http://wilderness.org/files/Law_Professors_Letter_September_2009.pdf) (illustrating that many members of the legal community agreed with the Department's interpretation of FLPMA).

<sup>57</sup> See *id.*

wilderness. Additionally, reviewing public lands for wilderness preservation and protecting those values, as a mode of multiple use management, is consistent with Congress' declared policy in passing FLPMA.<sup>58</sup>

Further, in 1995, the BLM issued a manual that reasserted the validity of WSAs established under a FLPMA § 202 land use plan and managed under the non-impairment standard.<sup>59</sup> In 2001, the BLM reaffirmed this interpretation in its Handbook on Wilderness Inventory and Study Procedures, which provided guidance on how to identify new WSAs and manage them under the non-impairment standard.<sup>60</sup>

### **B. APPLICATION OF FLPMA § 603 IN UTAH AND THE NORTON-LEAVITT SETTLEMENT THAT FOLLOWED**

Secretary Salazar felt compelled to affirm that "the protection of the wilderness characteristics of public lands is a high priority for the BLM" in Secretarial Order No. 3310 largely due to the events that occurred during and following the FLPMA § 603 wilderness review in Utah.<sup>61</sup> The BLM has jurisdiction over about 23 million acres in Utah, a land-mass equal to almost half of the entire state.<sup>62</sup> During this wilderness review, the BLM inventoried the lands and identified 2.5 million acres as WSAs in 1980.<sup>63</sup> After the review, challenges were made through the BLM's administrative appeals process.<sup>64</sup> Following this, more than a decade later, in 1991, the Interior Secretary recommended to President George H.W. Bush that the federal government should designate 1.9 million acres as wilderness.<sup>65</sup> In 1993, President Bush made this recommendation to Congress.<sup>66</sup>

<sup>58</sup> Memorandum from Keith E. Easter, Dep't of the Interior Associate Solicitor, to the Dir. of the Bureau of Land Mgmt. (Aug. 30, 1985), available at <http://naturalresources.house.gov/UploadedFiles/SquillaceTestimony03.01.11.pdf>.

<sup>59</sup> See U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., INTERIM MGMT. POLICY AND GUIDELINES FOR LANDS UNDER WILDERNESS REVIEW, H-8550.02.A(3) (1985) (stating that "Wilderness Study Areas (WSAs) identified by the wilderness review required by section 603 of [FLPMA] and "WSAs identified through the land use planning process in section 202 of FLPMA" should be managed under the same interim management plan).

<sup>60</sup> U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., WILDERNESS INVENTORY AND STUDY PROCEDURES, H-6310-1, 2-3 (2001).

<sup>61</sup> SEC'Y OF THE INTERIOR, *supra* note 1.

<sup>62</sup> Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 59 (2004).

<sup>63</sup> See Utah v. Babbitt, 137 F.3d 1193, 1199-1200 (10th Cir. 1998).

<sup>64</sup> See *id.* (citing *see, e.g.*, Decision on Protests, 46 Fed. Reg. 15,332 (1981); *see also Utah Wilderness Ass'n*, 86 I.B.L.A. 89 (1985) (appealing BLM's reassessment with respect to approximately 250,000 acres)); *Utah Wilderness Ass'n*, 72 I.B.L.A. 125 (1983) (appealing BLM decision involving approximately 925,000 acres of public lands); Decision on Reassessment of Units Set Aside and Remanded by I.B.L.A., 48 Fed. Reg. 46,858 (1983).

<sup>65</sup> See 1 U. S. Dept. of Interior, BLM, *Utah Statewide Wilderness Study Report 3* (1991).

<sup>66</sup> See Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 59 (2004) (stating that to date, Congress has not designated any of the 1.9 million acres as wilderness.).

In 1996, Congress had not designated any land in Utah as wilderness.<sup>67</sup> At that time, then-Interior Secretary Bruce Babbitt, of the Clinton Administration, ordered the BLM to reinventory the lands it had dismissed in the original review in order to identify all public lands in Utah that possessed wilderness characteristics.<sup>68</sup> Members of the Utah congressional delegation publically opposed this reinventory.<sup>69</sup> A month after the reinventory began, the State of Utah filed suit against the Department of the Interior challenging the legality of the 1996 reinventory.<sup>70</sup> Although the district court enjoined the BLM from conducting the reinventory, the Tenth Circuit vacated the injunction on the basis of standing and Utah did not pursue the case.<sup>71</sup> In 1999, the BLM completed its reinventory and identified 2.5 million new acres of lands with wilderness characteristics.<sup>72</sup> In its 2001 Wilderness Inventory Handbook, the BLM provided guidance on conducting new wilderness inventories and designating new WSAs as part of the BLM's land use planning process.<sup>73</sup> For those in Utah opposed to the designation of new wilderness, the 2001 Handbook symbolized the Clinton Administration's intention to designate new WSAs and eliminate potential opportunities for commercial development.

### C. THE IMPACT OF THE NORTON-LEAVITT SETTLEMENT ON FEDERAL LAND MANAGEMENT

In 2003, following President George W. Bush's arrival into office, Utah revived its 1996 lawsuit by filing an amended complaint alleging that the "BLM's authority under FLPMA [§] 603, and by extension [§] 202, to establish WSAs and to manage such areas under the non-impairment standard, expired in 1993 when the President made his wilderness recommendations to Congress."<sup>74</sup> Two weeks later, then-

<sup>67</sup> *Utah v. Babbitt*, 137 F.3d 1193, 1200 (10th Cir. 1998).

<sup>68</sup> *See id.* at 1193 (discussing that the reinventory included the areas included in a bill pending before Congress that would have granted wilderness protection to approximately 5.7 million acres of public lands.); *see also* H.R. 1500, 104th Cong. (1995); Myers III & Hill, *supra* note 17, 15-1.

<sup>69</sup> *See Utah v. Babbitt*, 137 F.3d 1193 (citing Letter from James V. Hansen, Orrin G. Hatch, & Robert F. Bennett to Bruce Babbitt, Secretary of the Interior (Aug. 1, 1996)).

<sup>70</sup> *Babbitt*, 137 F.3d at 1193.

<sup>71</sup> *See generally* Andrew Hartsig, *Settling for Less*, 2004 Utah L. Rev. 767, 774-76 (2004) (stating that seven of the eight causes of action were dismissed and one cause of action relating to the "claim that the federal defendants imposed a defector wilderness management standard on non-WSA lands" was remanded); Impact of Wild Lands Order, *supra* note 56 (statement of Mark Squillace, Director, Natural Resources Law Center, University of Colorado Law School).

<sup>72</sup> U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., BLM/WO/GI-98/14+8510, UTAH WILDERNESS INVENTORY REPORT, 1999 (1999).

<sup>73</sup> *See* U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., WILDERNESS INVENTORY AND STUDY PROCEDURES, H-6310-1, 2-3 (2001) (describing ways to identify inventory areas and ways to start the inventory process).

<sup>74</sup> *Utah v. Norton*, 2006 WL 2711798, at \*4 (D. Utah Sept. 20, 2006) (unreported); Myers III & Hill, *supra* note 17, 15-1, 15-9.

Interior Secretary Gale Norton and then-Utah Governor Mike Leavitt reached a private, out-of-court settlement, commonly referred to as the “Norton-Leavitt Settlement.”<sup>75</sup> Soon after, Secretary Norton issued two Instruction Memorandums detailing how BLM employees should implement the terms of the Norton-Leavitt Settlement.<sup>76</sup> In Instruction Memorandum No. 2003-274, which concerned the BLM’s implementation of its wilderness study policies, Secretary Norton stated:

1. The authority set forth in [§] 603(a) of FLPMA to complete the three-part wilderness review process (inventory, study and reporting to Congress) expired on October 21, 1993.
2. Following expiration of the [§] 603(a) process, there is no general legal authority for the BLM to designate lands as WSAs for management pursuant to the non-impairment standard prescribed by Congress for [§] 603 WSAs. FLPMA land use plans completed after April 14, 2003 will not designate any new WSAs, nor manage any additional lands under the [§] 603 non-impairment standard.<sup>77</sup>

In Instruction Memorandum No. 2003-275, Secretary Norton also stated that the “settlement did not, however, diminish the BLM’s authority under [§] 201 of the FLPMA to inventory public land resources and other values, including characteristics associated with the concept of wilderness, and to consider such information during land use planning.”<sup>78</sup> This memo concerned the BLM’s consideration of wilderness characteristics during land use planning.<sup>79</sup>

Reviewing the legality of the Norton-Leavitt Settlement, both the district court and the Tenth Circuit in *Utah v. Norton* affirmed that the BLM has a duty to inventory lands with wilderness characteristics and has the authority to manage these lands for their protection.<sup>80</sup> The BLM’s Interior Board of Land Appeals, which, among other tasks,

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<sup>75</sup> See Hartsig, *supra* note 71, at 776-78 (stating “the parties agree[d] that FLPMA section 603 is the only authority by which the BLM may establish WSAs on the public lands”).

<sup>76</sup> Secretary of the Interior, Instruction Memorandum No. 2003-274, “BLM Implementation of the Settlement of Utah v. Norton Regarding Wilderness Study,” (Sept. 29, 2003), available at <http://www.blm.gov/or/efoia//fy2004/ib/ib-or-2004-025.pdf>.

<sup>77</sup> *Id.*

<sup>78</sup> Secretary of the Interior, Instruction Memorandum No. 2003-275, “Consideration of Wilderness Characteristics in Land Use Plans (Excluding Alaska),” (Oct. 23, 2003), available at [http://www.swccd.us/images/FF1\\_IM\\_2003-275ch1.pdf](http://www.swccd.us/images/FF1_IM_2003-275ch1.pdf).

<sup>79</sup> *Id.*

<sup>80</sup> See *Utah v. Norton*, 2006 WL 2711798, at \*23 (2006) (“BLM has discretion to manage lands in a manner that is similar to the non-impairment standard by emphasizing the protection of wilderness characteristics.”); *Utah v. Dep’t of the Interior*, 535 F.3d 1184, 1187 (10th Cir. 2008) (recognizing BLM must take into account the nation’s need for domestic resources when managing lands).

reviews BLM decisions relating to the use of public lands and their resources, also held that following the Norton-Leavitt Settlement, the BLM retained authority to consider wilderness characteristics when amending land use plans.<sup>81</sup> Analyzing the legality of the Norton-Leavitt Settlement, the Interior Department argued in its Brief of the Federal Appellees for *Utah v. Kempthorne* that,

[The BLM] has the authority under [43 U.S.C. § 1712] to manage lands in a manner that is similar to the non-impairment standard that applies to wilderness study areas under [§ 1782], by emphasizing the protection of wilderness-associated characteristics as a priority over other potential uses . . . [U]nder [§ 1712] the agency retains the discretion to change its designation and management of public lands through the land use planning process, whereas [§ 1782(c)] requires BLM to manage lands pursuant to the non-impairment standard “until Congress has determined otherwise.”<sup>82</sup>

The BLM’s assertion in 2007 of its authority to manage lands in a manner similar to the non-impairment standard under FLPMA § 1603 seems to have foreshadowed the issuance of Secretarial Order No. 3310 in December of 2010.

### III. WAS THE WILD LANDS POLICY LEGAL?

#### A. THE MEANS AND THE GOALS OF THE WILD LANDS POLICY

The Norton-Leavitt Settlement was a private, out-of-court settlement. Accordingly, the Obama Administration was not legally bound to its terms.<sup>83</sup> Yet, in May 2009, in response to questioning by then-Senator Robert Bennet of Utah, the Interior Department explicitly stated that it would not designate any new WSAs or apply the FLPMA § 603 non-impairment standard to new areas.<sup>84</sup> In this response, as in *Utah v. Kempthorne*, the Interior Department repeatedly noted that the BLM has the authority to protect areas with wilderness characteristics

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<sup>81</sup> Or. Natural Desert Ass’n v. Bureau of Land Mgmt., 531 F.3d 1114, 1136 (9th Cir. 2008).

<sup>82</sup> Brief of the Federal Appellees at 41, *Utah v. Kempthorne*, 2007 WL 984066 (10th Cir. Feb. 26, 2007).

<sup>83</sup> Impact of Wild Lands Order, *supra* note 56 (statement of Mark Squillace, Director, Natural Resources Law Center, University of Colorado Law School).

<sup>84</sup> See Letter from Christopher J. Mansour, Dir. of the Dep’t of Interior’s Office of Cong. and Legislative Affairs, to Robert F. Bennett, U.S. Sen. (May 20, 2009), available at <http://www.nwma.org/pdf/5-20-09%20DOI%20answers%20to%20Senator%20Bennetts%20questions.pdf> (expressing that “the BLM does not have the authority to apply non-impairment standards to non-WSAs”).

under the FLPMA § 202 land use planning process.<sup>85</sup> Members of the environmental community were outraged by the Administration's willingness to abide voluntarily by the terms of the Norton-Leavitt Settlement and immediately organized to pressure the Administration into reinstating the pre-Settlement management practices.<sup>86</sup> Then, on December 23, 2010, Interior Secretary Ken Salazar issued Secretarial Order No. 3310 in an effort to provide guidance on the BLM's plan to protect and preserve wilderness.<sup>87</sup> At this time, Secretary Salazar stated his belief that, following the Norton-Leavitt Settlement, the BLM lacked "comprehensive long-term national guidance on how to inventory and manage lands with wilderness characteristics."<sup>88</sup>

The Wild Lands Policy established a two-step process for inventorying and managing lands with wilderness characteristics.<sup>89</sup> Specifically, it required the BLM to maintain a current inventory of all LWCs that were not previously designated under FLPMA § 603 and to evaluate these LWCs during FLPMA § 202 land use planning. The BLM was to make information concerning LWCs publicly available and to update management statuses in a database annually.<sup>90</sup> The Wild Lands Policy required the BLM to protect LWCs from impairment unless it determined that the impairment of these lands was appropriate, documented the reasoning, and took measures to minimize any impacts to wilderness characteristics.<sup>91</sup> If the BLM determined through land use planning that protection of the wilderness characteristics was appro-

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<sup>85</sup> *Id.* (noting that examples of the Department's statements include, "In their 2005 Settlement Agreement, both BLM and Utah acknowledged that BLM has the discretion under section 202 to manage lands to protect their wilderness characteristics, consistent with the multiple-use and sustained yield standard in FLPMA," and "FLPMA Section 202 provides BLM with the discretion to manage lands to protect their wilderness characteristics").

<sup>86</sup> *E.g.*, Letter from Robert W. Adler et al., *supra* note 56 (stating that the administration's position "unnecessarily hinder[s] the Department [of Interior's] ability to manage lands with wilderness characteristics, and could result in the irreversible degradation of some areas that would otherwise be excellent and worth additions to the National Wilderness Preservation System").

<sup>87</sup> SEC'Y OF THE INTERIOR, *supra* note 1 ("The Order provides direction to the BLM regarding its obligation to maintain wilderness resources inventories on regular and continuing basis for public lands under its jurisdiction.").

<sup>88</sup> Press Release, Secretary of the Interior, "BLM Restores Guidance for Managing Lands with Wilderness Characteristics as Part of Multiple-Use Mission," (February 25, 2011), available at [http://www.blm.gov/wo/st/en/info/newsroom/2011/february/NR\\_02\\_25\\_2011.html](http://www.blm.gov/wo/st/en/info/newsroom/2011/february/NR_02_25_2011.html).

<sup>89</sup> See Impact of Wild Lands Order, *supra* note 56 (statement of Robert Abbey, Director, Bureau of Land Mgmt. "The first step is to maintain an inventory of lands with wilderness characteristics as required by section 201 of the Federal Land Policy and Management Act. It simply documents the current state of the land. Step two, deciding how lands with wilderness characteristics should be managed, is an open, public process undertaken through BLM's land use planning. A decision may be made to protect lands with wilderness characteristics as wild lands, or to manage them for other uses.").

<sup>90</sup> See SEC'Y OF THE INTERIOR, *supra* note 1 ("The BLM shall describe such inventoried lands as "Land With Wilderness Characteristics," share this information with the public, and integrate this information into its management decisions.").

<sup>91</sup> *Id.*

appropriate, the BLM could designate the area “Wild Lands” and protect it as wilderness until the land use plan was revised or amended.<sup>92</sup> After issuing Secretarial Order No. 3310, Secretary Salazar issued three new manuals providing guidance on FLPMA compliance and land use planning with regards to LWCs.<sup>93</sup>

On March 1, 2011, following the issuance of the Wild Lands Policy, the House of Representatives’ Natural Resources Committee held a hearing entitled, “The Impact of the Administration’s Wild Lands Order on Jobs and Economic Growth.”<sup>94</sup> At this congressional hearing, the controversial nature of the policy was evident. One witness opposed to the policy stated that the “call to arms to protect wilderness lands is merely an excuse to loop in hundreds of thousands of acres of public land into an overly prescriptive management regime, when in fact, the land in question is no more wilderness than it was . . . at the conclusion of the FLPMA inventory.”<sup>95</sup> A witness supportive of the policy stated it “is simply and unequivocally a good measure. Lands with wilderness characteristics are diminishing resources. Their destruction is irrevocable and it would be irresponsible for the BLM to allow their destruction.”<sup>96</sup> These statements illustrate the widely divergent opinions held both by congressional representatives and by those living in communities throughout the country following the issuance of the Wild Lands Policy. Despite the repeated assurances of BLM Director Robert Abbey that the BLM would work “cooperatively with [their] stakeholders and . . . [would be] sensitive to local needs” when managing the public lands, opponents of the policy accused the

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<sup>92</sup> See *id.* (summarizing that “[i]n accordance with Section 201 of FLPMA, BLM shall maintain a current inventory of land under its jurisdiction and identify within that inventory lands with wilderness characteristics that are outside of the area designated as Wilderness Study Areas and that are pending before Congress or units of the National Wilderness Preservation System. The BLM shall describe such inventories lands as ‘Lands with Wilderness Characteristics,’ share this information with the public, and integrate this information into its land management decisions. All BLM offices shall protect these inventoried wilderness characteristics when undertaking land use planning and when making project-level decisions by avoiding impairment of such wilderness characteristics unless the BLM determines that impairment of wilderness characteristics is appropriate and consistent with applicable requirements of law and other resource management considerations. Where the BLM concludes that authorization of uses that may impair wilderness characteristics is appropriate, the BLM shall document the reasons for its determination and consider measures to minimize impacts on those wilderness characteristics. Where the BLM concludes that protection of wilderness characteristics is appropriate, the BLM shall designate these lands as ‘Wild Lands’ through land use planning.”).

<sup>93</sup> U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., WILDERNESS CHARACTERISTICS INVENTORY, MS-6301 (2011); U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CONSIDERATION OF LANDS WITH WILDERNESS CHARACTERISTICS IN THE LAND USE PLANNING PROCESS, MS-6302 (2011); U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CONSIDERATION OF LWCs FOR PROJECT-LEVEL DECISIONS IN AREAS NOT ANALYZED IN ACCORDANCE WITH BLM MANUAL 6302, MS-6303 (2011), available at [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/blm\\_manual.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/blm_manual.html).

<sup>94</sup> Impact of Wild Lands Order, *supra* note 56.

<sup>95</sup> *Id.* (statement of Joel Bousman, Sublette County Commissioner, Pinedale, Wyoming).

<sup>96</sup> *Id.* at 91 (statement of Mark Squillace, Director, Natural Resources Law Center, University of Colorado Law School).



Interior Department of “perfuming a pig” and of attempting to enforce a controversial policy for which it lacked legal authority.<sup>97</sup> The angles from which opponents attacked the legality of the Wild Lands Policy are explored henceforth.

**B. FLPMA § 201 PROVIDED THE BLM WITH THE LEGAL AUTHORITY  
TO REQUIRE INVENTORING LANDS WITH WILDERNESS CHARACTERISTICS  
UNDER THE WILD LANDS POLICY**

The Wild Lands Policy required the BLM to “maintain a current inventory of land under its jurisdiction and identify . . . lands with wilderness characteristics that are outside of the areas designated as Wilderness Study Areas and that are pending before Congress or units of the National Wilderness Preservation System.”<sup>98</sup> In effect, the policy reaffirmed the BLM’s obligation under FLPMA § 201 to “prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values . . . giving priority to areas of environmental concern.”<sup>99</sup> Courts have uniformly held that the BLM has an ongoing duty under FLPMA § 201 to inventory lands with wilderness characteristics, lands considered public resources.<sup>100</sup> FLPMA makes clear that the inventorying of new lands “shall not, of itself, change or prevent change of the management or use of public lands” and it only requires the BLM to revise its management plans “when appropriate.”<sup>101</sup> This statutory construction features significant flexibility and affords the BLM with considerable discretion. Therefore, inventorying LWCs under FLPMA § 201 does not routinely occur and does not automatically trigger any new protection for these lands.<sup>102</sup> Though the BLM has discretion relating to the timing and manner of inventorying, the inventorying itself remains very significant because the BLM’s land use plans must “rely, to the extent it is available, on the inventory of the public lands, their resources, and other values.”<sup>103</sup> Accordingly, the more emphasis that the BLM places on inventorying LWCs, such as

<sup>97</sup> *Id.* at 41 (statement of Joel Bousman, Sublette County Commissioner, Pinedale, Wyoming).

<sup>98</sup> SEC’Y OF THE INTERIOR, *supra* note 1.

<sup>99</sup> 43 U.S.C. § 1712(a).

<sup>100</sup> *See* 43 U.S.C. § 1701(a)(8) (ordering that “the public lands be managed in a manner [...] that, where appropriate, will preserve and protect certain public lands in their natural condition”); *see, e.g.*, *Utah v. United States Department of the Interior*, 535 F.3d 1184 (10th Cir. 2008); *see also, e.g.*, *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1119, 1132-36 (9th Cir. 2008) (“As 1782 makes clear, it is the 43 U.S.C. § 1711(a) general resource inventory process, which catalogues ‘all public lands and their resource and other values’ that is to identify lands ‘as having wilderness characteristics described in the Wilderness Act.’”).

<sup>101</sup> 43 U.S.C. §§ 1711(a), 1712(a).

<sup>102</sup> *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 531 F.3d 1114 (9th Cir. 2008); Myers III & Hill, *supra* note 17, 15-1.

<sup>103</sup> 163 Interior Bd. of Land Appeals 14, GFS(O&G) 13, 27 (2004); 43 U.S.C. § 1712(c)(4).

the emphasis under the Wild Lands Policy, the greater the role these resources and values will have in land use plans.

In discussing the Wild Lands Policy, people emphasized how the BLM would rigorously protect LWCs to preserve their wilderness characteristics. However, analysis of legal precedent concerning the protection of the WSAs established under FLPMA § 603 illuminates the BLM's tremendous discretion over interim management. For example, in *Utah v. Andrus*, the district court upheld the BLM's Interim Management Policy stating that under FLPMA § 603 the BLM has the authority to manage WSAs in order to prevent the impairment of wilderness characteristics and to regulate lands subject to an existing use in order to prevent unnecessary or undue environmental degradation.<sup>104</sup> The court interpreted the non-impairment standard as permitting the BLM to allow temporary impacts to WSAs and not to strictly require the BLM to prevent permanent impairments.<sup>105</sup> The court further determined that whether an activity causes a temporary impact or a permanent impairment is a matter under the BLM's discretion.<sup>106</sup> Accordingly, the BLM benefits from a significant amount of discretion in managing WSAs under the non-impairment standard. Based on the district court's rationale and holding in *Andrus*,<sup>107</sup> it is arguable that courts would have provided the BLM with even more discretion in managing LWCs under the Wild Lands Policy than it did WSAs, since LWCs are not managed under the same FLPMA § 603 non-impairment standard, but under whatever standard the BLM established in its land use planning process.

In its Interim Management Policy for Lands Under Wilderness Review, the BLM provides instruction to manage WSAs to prevent the lands from being "degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress's prerogative to either designate [the WSA] as wilderness or release it for other uses."<sup>108</sup> Nevertheless, courts have been disinclined to compel the BLM to "not impair" wilderness characteristics. In *Norton v. Southern Utah Wilderness Alliance*, the Supreme Court analyzed whether the BLM, by allowing off-road vehicles use in a WSA, violated its FLPMA § 603 mandate to manage the WSA so as not to impair its wilderness characteristics.<sup>109</sup> An Administrative Procedure Act (APA) claim to compel agency action unlawfully withheld or unreasonably delayed

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<sup>104</sup> *Utah v. Andrus*, 486 F. Supp. 995, 1007 (D. Utah 1979).

<sup>105</sup> *See id.* at 1007-09.

<sup>106</sup> *See id.* at 1007 ("[I]f BLM could not prevent activity that would permanently impair wilderness characteristics, then those characteristics could be destroyed before BLM . . . had the chance to evaluate an area's potential uses").

<sup>107</sup> *Andrus*, 486 F. Supp. 995.

<sup>108</sup> *Id.*; *see also* 43 C.F.R. Ch. II, 44 Fed. Reg. 72014-34.

<sup>109</sup> 542 U.S. 55, 66 (2004).

can proceed only where a plaintiff asserts that the agency failed to take a discrete agency action that it was required to take. Under this reasoning, the Supreme Court held in *Norton* that the non-impairment management standard is not a discrete agency action because FLPMA § 603 “is mandatory as to the object to be achieved, but it leaves the BLM a great deal of discretion in deciding how to achieve it.”<sup>110</sup> Based on *Norton*, it is reasonable to believe that a claimant could not have used the Wild Lands Policy to compel the BLM to protect LWCs through such an APA claim because the BLM manual providing guidance on LWC management was as vague, if not more vague, than that regarding WSA management.<sup>111</sup> The BLM would have managed inventoried LWCs under land use plans, which generally describe “allowable uses, goals for future condition of the land, and specific next steps.”<sup>112</sup> The BLM would have managed the LWCs in compliance with the principle of multiple use and sustained yield, a standard which “allows [BLM] ample discretion for management of lands with wilderness values.”<sup>113</sup> Precedential case law suggests that courts would not have recognized the management standard for LWCs under the Wild Lands Policy as establishing a discrete and required agency action. Accordingly, it is unlikely that courts would have compelled the BLM to protect LWCs under a FLPMA § 202 land use plan.

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<sup>110</sup> *Id.* at 66 (explaining that the limitations on the APA are designed “to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve.”); *see also* *Or. Natural Desert Ass’n v. Shuford*, 2007 WL 1695162, at \*9 (holding FLPMA grants the BLM wide discretion to determine when and how to maintain inventories).

<sup>111</sup> U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., INTERIM MGMT. POLICY AND GUIDELINES FOR LANDS UNDER WILDERNESS REVIEW, H-8550.02.A(3) (1985) (stating that “management to the non-impairment standard does not mean that the lands will be managed as though they had already been designated as wilderness. For example some uses that could not take place in a designated wilderness area may be permitted under the IMP because they are only temporary uses that do not create surface disturbance or involve permanent placement or structures. For example, organized off-road vehicle events . . .”); U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., CONSIDERATION OF LANDS WITH WILDERNESS CHARACTERISTICS IN THE LAND USE PLANNING PROCESS, MS-6302 (2011) (“The BLM will determine whether these areas should be designated Wild Lands and managed to protect their wilderness characteristics or managed for other uses that may be incompatible with protection of wilderness characteristics....Consider and document both the extent to which other resource values and uses of an LWC would be forgone or adversely affected. Consider uses that could be accommodated and mitigated, as well as the benefits that may accrue to other resource values and uses as a result of designating the LWC as Wild Lands.”).

<sup>112</sup> *Supra* note 109, at 60 (citing 43 CFR 1601.5(k)).

<sup>113</sup> *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1135 (9th Cir. 2008); 43 U.S.C. § 1732 (a).

**C. UNDER THE WILD LANDS POLICY, THE BLM HAD THE LEGAL AUTHORITY TO MANAGE LANDS SO AS TO PRESERVE WILDERNESS CHARACTERISTICS UNDER THE MULTIPLE USE AND SUSTAINED YIELD STANDARD.**

The Interior Secretary must manage BLM lands and their various resource values “on the basis of multiple use and sustained yield unless otherwise specified by law . . . so that they are utilized in the combination that will best meet the present and future needs of the American people.”<sup>114</sup> The Supreme Court has described multiple use management as “a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put.”<sup>115</sup>

In defining “multiple use,” FLPMA specifically recognizes “a combination of balanced and diverse resource uses . . . [as] including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values.”<sup>116</sup> Opponents of the Wild Lands Policy highlight the absence of the term “wilderness” in this definition as proof that wilderness is not a valid use.<sup>117</sup> However, courts have repeatedly held that the BLM has the authority under FLPMA § 202 to develop land use plans aimed at preserving lands with wilderness characteristics.<sup>118</sup> Courts find legal justification for the use of wilderness under the multiple use and sustained yield standard in the following section of FLPMA:

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<sup>114</sup> 43 U.S.C. §§ 1701(a)(7); *see also* 43 U.S.C. § 1702(c) (stating the definition of “‘multiple use’ [also] means [...]; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; [...]; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.); *see also* *Utah v. Norton*, 2006 WL 2711798, at \*7 (D. Utah Sept. 20, 2006) (citing 43 U.S.C. § 1701(a)(2) (affirming BLM’s management duty under this statute); 43 U.S.C. § 1702(h) (defining “sustained yield” as “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.”).

<sup>115</sup> *Supra* note 109.

<sup>116</sup> 43 U.S.C. § 1702(c).

<sup>117</sup> Letter from Joel Bousman et al., Wy. County Comm’ns Ass’n President, to Robert Abbey, Dir. of the Bureau of Land Mgmt. (Jan. 28, 2011), *available at* <http://naturalresources.house.gov/UploadedFiles/BousmanTestimony03.01.11.pdf> (citing the definition of “multiple use” and highlighting that the term “wilderness” only appears in FLPMA § 1702, the definition section, and § 603).

<sup>118</sup> *See, e.g., Norton*, 542 U.S. at 58 (“Aside from the identification of WSAs, the main tool that BLM employs to balance wilderness protection against other uses is a land use plan.”); *Sierra Club v. Watt*, 608 F. Supp. 305, 340-41 (E.D. Cal. 1985) (holding that the Interior Secretary had discretion to study the less than 5,000 acre parcel and to determine the management protocol pursuant to FLPMA § 202); *Tri-County Cattleman’s Ass’n*, 60 IBLA 305, 314 (1981) (holding that FLPMA § 202 provides the BLM with the authority to manage non-island areas of roadless public land of less than 5,000 contiguous acres in a manner consistent with wilderness objectives).

[T]he public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use.<sup>119</sup>

Some Wild Lands Policy opponents have incorrectly claimed that FLPMA lists the multiple uses as “domestic livestock grazing, fish and wildlife development and utilization, mineral exploration and production, rights-of-way, outdoor recreation, and timber production.”<sup>120</sup> This section of statute, however, lists the “principal or major uses.”<sup>121</sup> The term “principle or major uses” is significant because, under FLPMA, if one or more of these listed activities is totally eliminated during the development or revision of a land use plan, certain unique conditions apply to the implementation of that plan.<sup>122</sup> Simply stated, the phrase “principle or major uses” has specific legal meaning and purpose which is not to define the acceptable multiple uses.<sup>123</sup> Further, it is arguable that if Congress intended for the activities listed as “principal or major uses” to constitute the valid multiple uses, Congress would have included this list in its definition of “multiple use.”<sup>124</sup>

Some opponents argued that the Wild Lands Policy was illegal because it limited the use of the land in such a way that prohibited activities that were permissible on other BLM lands and restricted access to valuable resources. However, FLPMA explicitly recognizes that “the use of some land for less than all of the resources” is a valid management practice.<sup>125</sup> Under the Reagan Administration, the Department of the Interior’s Office of the Solicitor issued a memorandum to the BLM Director which stated “multiple use management envisions instances when the Secretary will manage public lands for a dominant use, such as wilderness.”<sup>126</sup> The memorandum further asserted that FLPMA

<sup>119</sup> 43 U.S.C. § 1701(a)(8).

<sup>120</sup> 43 U.S.C. § 1702(l); see Impact of Wild Lands Order, *supra* note 56 (statement of Mike McKee, Uintah County Commissioner, Vernal, Utah).

<sup>121</sup> 43 U.S.C. § 1702(l).

<sup>122</sup> *Id.* at 1712(e)(1)-(2) (one such condition is that the land use plan must be reported to the Senate and the House of Representatives for review).

<sup>123</sup> *Id.* at § 1702(c).

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*; see, e.g., *Utah v. Andrus*, 486 F. Supp. 995, 1003 (D.C.Utah, 1979); *Headwaters v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1182 (9th Cir. 1990) (finding that the BLM can favor logging over all other possible uses on a particular tract of public domain land after it evaluates the alternate uses).

<sup>126</sup> Memorandum from Keith E. Easter, Dep’t of the Interior Associate Solicitor, to the Dir. of the Bureau of Land Mgmt. 3 (Aug. 30, 1985), available at <http://naturalresources.house.gov/UploadedFiles/SquillaceTestimony03.01.11.pdf>.

expressly permits the BLM manage lands classified as “multiple use” for less than all of the resources in some instances.<sup>127</sup>

**D. FLPMA § 202 PROVIDED THE BLM WITH THE LEGAL AUTHORITY TO AVOID THE IMPAIRMENT OF WILDERNESS CHARACTERISTICS UNLESS ALTERNATIVE MANAGEMENT WAS DEEMED APPROPRIATE**

The Wild Lands Policy directed the BLM to protect “inventoried wilderness characteristics when undertaking land use planning and when making project-level decisions by avoiding impairment of such wilderness characteristics unless the BLM determined that impairment of wilderness characteristics was appropriate and consistent with applicable requirements of law and other resource management considerations.”<sup>128</sup> Policy opponents asserted that this directive exceeded the BLM’s authority under FLPMA and that it would create de facto wilderness areas.<sup>129</sup> In essence, opponents argued, the policy established a rebuttable presumption that LWCs should be protected from impairment.<sup>130</sup> Though presented with the issue, no court ever resolved whether the BLM’s directive to avoid impairment of wilderness characteristics unless alternative management was deemed appropriate illegally promoted the wilderness use above other uses.<sup>131</sup>

By framing the story of how the BLM’s Wild Lands Policy would have impacted communities on the smallest scale possible, policy opponents attempted to portray new protection for LWCs as “a stop sign at the edge of the protected landscape, . . . ending even the thought of a new natural trail, no less a drilling rig.”<sup>132</sup> In his congressional testimony before the House Committee on Natural Resources, Joel Bousman, the President of the Wyoming County Commissioners Association, asserted that during the 20 year life of a land use plan, one planning area in his state could generate \$13.7 million in labor income per year for drilling, and \$51 million in production labor income per year.<sup>133</sup> Whether these figures are inflated or ignore relevant conflicting factors, the information nevertheless illustrates the undeniably impor-

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<sup>127</sup> *Id.*

<sup>128</sup> SEC’Y OF THE INTERIOR, *supra* note 1.

<sup>129</sup> Impact of Wild Lands Order, *supra* note 56 (statement of Joel Bousman, Sublette County Commissioner, Pinedale, Wyoming); *see also* Impact of Wild Land Order, *supra* note 56, at 52-57 (2011) (statement of Mike McKee, Uintah County Commissioner, Vernal, Utah).

<sup>130</sup> William Myers, *Secretary Salazar Promotes Wilderness Management of BLM Lands*, Holland and Hart, (2011), <http://www.hollandhart.com/newsitem.cfm?ID=1767>.

<sup>131</sup> *See* Phil Taylor, *Utah Counties File Lawsuit over BLM “Wild Lands” Policy*, E&E News (March 24, 2011) available at <http://www.eenews.net/Greenwire/2011/03/23/archive/3?terms=utah+counties+file+lawsuit+over+blm> (last visited March 24, 2011).

<sup>132</sup> Impact of Wild Lands Order, *supra* note 56 (statement of Joel Bousman, Sublette County Commissioner, Pinedale, Wyoming).

<sup>133</sup> *Id.*

tant role competing uses play on BLM land and the real impact these lands have on local economies.

Though neither Commissioner Bousman nor other opponents highlighted it, the Wild Lands Policy provided a process for the voicing of concerns and opinions.<sup>134</sup> Specifically, the policy provided guidance on how BLM employees should evaluate LWCs during FLPMA § 202 land use planning, a process which statutorily requires public involvement and specifically calls for “meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands.”<sup>135</sup>

In *Oregon Natural Desert Association v. Bureau of Land Management*, the Ninth Circuit analyzed whether the BLM complied with the National Environmental Policy Act (NEPA) when it failed to consider the effects of a land use plan on areas with wilderness characteristics not designated as WSAs.<sup>136</sup> The Ninth Circuit stated that the BLM has the authority to manage lands with wilderness characteristics in a myriad of ways, ranging from placing lands in “special management categories” such as areas of critical environmental concern or research natural areas to managing these lands in ways “inconsistent with long-term wilderness preservation.”<sup>137</sup> The Ninth Circuit held that the BLM can allow the impairment of LWCs so long as the impairment is laid out in a land use plan.<sup>138</sup> This holding answers a basic legal question raised by the Wild Lands Policy; the BLM can allow for the impairment of LWCs through its FLPMA § 202 process.<sup>139</sup> The Ninth Circuit also found that under the multiple use and sustained yield standard, the BLM has “ample discretion for management of lands with wilderness values.”<sup>140</sup> Accordingly, this considerable discretion would likely have protected the BLM against any legal challenges alleging that the directive to avoid the impairment of wilderness characteristics unless alternative management was deemed appropriate and created de facto wilderness areas.

In *Andrus*, the district court analyzed whether the BLM has the authority to manage those lands with wilderness characteristics that are subject to an existing use under a different standard than those

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<sup>134</sup> 43 U.S.C. §1712(c)(1); see Impact of Wild Lands Order, *supra* note 56 (statement of Joel Bousman, Sublette County Commissioner, Pinedale, Wyoming).

<sup>135</sup> 43 U.S.C. §1712(c)(1).

<sup>136</sup> Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114 (9th Cir. 2008).

<sup>137</sup> *Id.* at 1135-36.

<sup>138</sup> *Id.*; Myers III & Hill, *supra* note 17, 15-1.

<sup>139</sup> Or. Natural Desert Ass'n v. Bureau of Land Mgmt., 531 F.3d 1114 (9th Cir. 2008).

<sup>140</sup> *Id.* at 1135 (holding that when revising land use plans, the BLM must address wilderness characteristics in its environmental impact statement under the National Environmental Policy Act).

lands that are not.<sup>141</sup> The court held that under FLPMA, “the BLM has the authority to manage public lands so as to prevent impairment of wilderness characteristics, unless those lands are subject to an existing use. In the latter case, the BLM may regulate so as to prevent unnecessary or undue degradation of the environment.”<sup>142</sup> Resolving some of the inherent tensions within the multiple use and sustained yield standard, the district court stated that “[i]t is only by looking at the overall use of the public lands that one can accurately assess whether or not BLM is carrying out the broad purposes of the statute. . . . [the] BLM is not obliged to, and indeed cannot, reflect all the purposes of FLPMA in each management action.”<sup>143</sup> Further, FLPMA’s definition of “multiple use” explicitly recognizes that some lands should be managed “for less than all of the resources.”<sup>144</sup> Therefore, since the BLM is responsible for managing 245 million acres of public land under the multiple use and sustained yield standard, courts are unlikely to interfere with its discretion as to how to accomplish this complicated task.<sup>145</sup>

In the statutory section statute establishing BLM’s authority to manage wilderness under the multiple use and sustained yield standard, FLPMA states that “the public lands be managed in a manner that . . . where appropriate, will preserve and protect certain public lands in their natural condition.”<sup>146</sup> In his congressional testimony before the House Committee on Natural Resources, William Myers, a public land use lawyer, interestingly drew attention to the fact that,

FLPMA, when discussing that particular value, places a caveat that management for wilderness values will be undertaken “where appropriate.” This caveat is not placed before the other resources or values listed in the same section. See 43 U.S.C. § 1701(a)(8). Secretarial Order No. 3310 seems to move the modifier preceding wilderness preservation and protection and place it in front of all other uses.<sup>147</sup>

Because it is common belief that each word in statutory construction has meaning, Myers’ observation raises an interesting issue. Nevertheless, taking into account the great amount of discretion that the BLM has in managing the public lands, it remains likely the BLM’s Wild Lands Policy was within the scope of its authority.

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<sup>141</sup> *Andrus*, 486 F. Supp. 995.

<sup>142</sup> *Id.* at 1005.

<sup>143</sup> *Id.* at 1003.

<sup>144</sup> 43 U.S.C. §§ 1702(c), 1732 (a); *see also* *Utah v. Andrus*, 486 F. Supp. 995, 1003, 1005 (D.C. Utah 1979).

<sup>145</sup> *See generally* GORTE, *supra* note 21.

<sup>146</sup> 43 U.S.C. § 1701(a)(8) (emphasis added).

<sup>147</sup> *Impact of Wild Lands Order*, *supra* note 56 (statement of William Myers, Partner at the firm of Holland and Hart).



**E. THE BLM'S MANAGEMENT OF WILD LANDS UNDER FLMPA § 202  
WAS LEGALLY DISTINGUISHABLE FROM ITS MANAGEMENT OF  
WILDERNESS STUDY AREA UNDER FLMPA § 603**

Arguing that Wild Lands are de facto WSAs, opponents of the Wild Lands Policy asserted that the BLM used the same legal criteria to determine LWCs as it did to determine Wilderness Study Areas, lands with wilderness characteristics identified and designated under the FLPMA § 603 wilderness review or through the FLPMA § 202 process prior to April 14, 2003.<sup>148</sup> It is true that the BLM required WSAs, and now would have required LWCs, to possess the mandatory wilderness characteristics defined in Section 2(c) of the Wilderness Act: size, naturalness, and outstanding opportunities for either solitude or primitive and unconfined recreation.<sup>149</sup> However, the use of these characteristics did not support the allegation that Wild Lands were de facto WSAs. Even management of a Wild Lands designation that is effectively the same as the non-impairment management of a WSA would have done little to support this allegation. The fundamental aspects which distinguish Wild Lands from WSAs are the processes through which each is established and managed.

Under Secretarial Order No. 3310, the BLM could only designate Wild Lands through the land use planning process under FLPMA § 202.<sup>150</sup> There was no statutory end date for this process of establishing Wild Lands. The BLM could revise and amend land use plans on its own accord.<sup>151</sup> This process had to include public involvement.<sup>152</sup> Legislation was not required to alter the management status of a Wild Lands designation.<sup>153</sup> Finally, and arguably most significantly, the BLM had the legal authority to permit activities such as the use of motorized vehicles or mining on Wild Lands.<sup>154</sup>

By contrast, the BLM no longer has the authority to designate WSAs through its FLMPA § 603 wilderness review process or its FLPMA § 202 land use process.<sup>155</sup> When the BLM possessed this authority, it was not required to involve the public in its review or recommenda-

<sup>148</sup> See Impact of Wild Lands Order, *supra* note 56 (statement of Joel Bousman, Sublette County Commissioner, Pinedale, Wyoming).

<sup>149</sup> See 15 U.S.C. § 1131(c); Impact of Wild Lands Order, *supra* note 56 (statement of William Myers, Partner at the firm of Holland and Hart) (providing an in-depth analysis of the guidance provided in BLM manual 6301 regarding these characteristics); BLM Wild Lands Policy – Question and Answers, Bureau of Land Mgmt., available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications\\_Directorate/public\\_affairs/news\\_release\\_attachments.Par.86444.File.dat/BLM\\_Wild\\_Lands\\_QandA1.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.86444.File.dat/BLM_Wild_Lands_QandA1.pdf) (last visited April 17, 2011).

<sup>150</sup> See 43 U.S.C. 1712; *BLM Fact Sheet*, *supra* note 36.

<sup>151</sup> See *id.*

<sup>152</sup> See *BLM Fact Sheet*, *supra* note 36.

<sup>153</sup> See *id.*

<sup>154</sup> See *id.*

<sup>155</sup> See 43 U.S.C. § 1782 (a); see also discussion *supra* Part II and accompanying notes.

tion process.<sup>156</sup> Further, the BLM had to manage WSAs “so as not to impair their suitability for preservation as wilderness.”<sup>157</sup> The process of managing WSAs involved significantly less flexibility than that of Wild Lands.

Comparing the BLM’s preservation of wilderness characteristics through land use planning under FLPMA § 202 to its management of WSAs under FLPMA § 603, the Ninth Circuit in *Oregon Natural Desert Ass’n v. Bureau of Land Management* held that the management standards are distinguishable because the management standard under FLPMA § 202 is alterable and the standard under FLPMA § 603 is permanent.<sup>158</sup>

#### IV. WHAT IS NEXT FOR AMERICAN WILDERNESS

On June 1, 2011, following the Congressional prohibition on using federal funds to implement the Wild Lands Policy, Secretary Salazar issued assurances that the BLM would not designate or manage LWCs under the Wild Lands Policy. At this time, the Secretary also reaffirmed that the BLM’s obligations under FLPMA §§ 201 and 202 relating to wilderness characteristics remains in effect.<sup>159</sup> In this announcement, the Secretary stated that “the Department of the Interior will be soliciting input from members of Congress, state and local officials, tribes, and Federal land managers to identify BLM lands that may be appropriate candidates for Congressional protection under the Wilderness Act.”<sup>160</sup> Secretary Salazar tasked Deputy Secretary David Hayes to lead this effort.<sup>161</sup> On June 10, 2011, Secretary Salazar asked Congressional members to “identify BLM-managed public lands where there is strong support in the local community and among elected officials for permanent protection *and that [they] believe are ready for designation as Wilderness by this Congress.*”<sup>162</sup> In Instruction Memorandum No. 2011-147, issued on July 15, 2011, the Secretary asked BLM State Directors to identify public lands having robust solid local support for Wilderness

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<sup>156</sup> 43 U.S.C. § 1782 (c).

<sup>157</sup> *Id.*

<sup>158</sup> *Or. Natural Desert Ass’n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1135-36 (9th Cir. 2008).

<sup>159</sup> Secretary of the Interior, Memorandum, “Wilderness Policy,” (June 1, 2011), *available at* <http://www.doi.gov/news/pressreleases/upload/Salazar-Wilderness-Memo-Final.pdf>.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Salazar Takes Next Steps In Push for Bipartisan Wilderness Agenda*, Bureau of Land Mgmt., (June 10, 2011), *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/im\\_attachments/2011.Par.85060.File.dat/IM2011-147\\_att2.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2011.Par.85060.File.dat/IM2011-147_att2.pdf); *see also* Secretary of the Interior, Instruction Memorandum No. 2011-147, “Identification of Areas with Broad Public Support for Possible Congressional Designation as Wilderness,” (July 15, 2011), *available at* [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2011/IM\\_2011-147.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2011/IM_2011-147.html).

Act protection by September 1, 2011.<sup>163</sup> Ten days later, on July 25, 2011, Secretary Salazar issued Instruction Memorandum No. 2011-154, providing guidance on conducting wilderness characteristics inventories and considering lands with wilderness characteristics in the land use planning process.<sup>164</sup> This Memorandum also “place[d] Bureau of Land Management (BLM) Manuals 6301, 6302, and 6303 into abeyance until further notice.”<sup>165</sup>

Throughout the 20<sup>th</sup> Century and now into the 21<sup>st</sup> Century, federal protection of lands with wilderness characteristics has fluctuated in its effectiveness. Advocates on both sides of the issue have fought desperately to advance their causes. Each has celebrated victories and suffered losses. Most recently, those advocating for the commercial development of the BLM lands pressured Congress into stripping the Department of the Interior of the funding necessary to implement its Wild Lands Policy. Many people continue to wonder when the next federal wilderness policy revision will happen, how dramatic it will be, and how long the policy will remain in effect. The Supreme Court correctly stated the BLM’s task of managing most of its 245 million acres under the multiple use standard is an “enormously complicated task of striking a balance among the many competing uses to which land can be put[.]”<sup>166</sup> The inconsistency in management methods is an indication that the BLM is striving to accomplish its goal. However, to paraphrase Aldo Leopold, America cannot recreate its wilderness.<sup>167</sup>

<sup>163</sup> See Secretary of the Interior, Instruction Memorandum No. 2011-147, “Identification of Areas with Broad Public Support for Possible Congressional Designation as Wilderness,” (July 15, 2011), available at [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2011/IM\\_2011-147.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2011/IM_2011-147.html).

<sup>164</sup> *Id.*; see also Secretary of the Interior, “Policy on Conducting Wilderness Characteristics Inventory on BLM Lands,” available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/im\\_attachments/2011.Par.27443.File.dat/IM2011-154\\_att1.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2011.Par.27443.File.dat/IM2011-154_att1.pdf); see also “Considering Lands with Wilderness Characteristics in the BLM’s Lands Use Planning Process,” available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/im\\_attachments/2011.Par.28612.File.dat/IM2011-154\\_att2.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/im_attachments/2011.Par.28612.File.dat/IM2011-154_att2.pdf).

<sup>165</sup> Secretary of the Interior, Instruction Memorandum No. 2011-154, “Requirement to Conduct and Maintain Inventory Information for Wilderness Characteristics and to Consider Lands with Wilderness Characteristics in Land Use Plans,” (July 25, 2011), available at [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2011/IM\\_2011-154.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2011/IM_2011-154.html).

<sup>166</sup> Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 58 (2004); see Gorte *supra* note 21.

<sup>167</sup> ALDO LEOPOLD, A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE, Oxford University Press (1949).