

Squandering Public Resources

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Introduction

One measure of the wealth of the United States, and an important determinant of Americans' quality of life, is the stock of natural resources found on our public lands – forests, freshwater bodies, wetlands, grasslands, minerals, oil and gas deposits, biodiversity – and the myriad values and services they provide. From the date of European settlement, America's vast natural resources have been heralded as a source of treasure and wealth for the American people.¹ These resources have both economic value and uses that are not easily quantified or translated into dollars and cents.² Our national forests provide timber, but they also provide recreation, habitat for wildlife, water purification and storage, and aesthetic, educational, and spiritual benefits. The very presence of vast wilderness helped to shape America's national character. There is no doubt that the natural resources on our public lands have great and diverse values and have played an important role in our history. The question this report raises is whether those values are being protected or

squandered, whether they are being used to serve the public good or diverted to advance private economic interests at the expense of the public.

On paper, our laws recognize this natural endowment of public natural resources as a source of wealth and commit us to manage and use these resources wisely. In many statutes that govern the management and use of natural resources in public ownership or held in public trust, Congress has expressed a policy of using these resources sustainably – that is, preserving the value of the resource for present and future generations of Americans by careful stewardship, instead of spending the resource down and depleting it without thought for the future.³ In part, this commitment to sustainable use reflects an awareness of our legacy and a desire to leave future generations with a comparable endowment of natural wealth. It also reflects a philosophy of prudence and conservation – a commitment to act as good stewards for the wealth we have been given.

Conservation . . . can be defined as the wise use of our natural environment: it is, in the final analysis, the highest form of national thrift—the prevention of waste and despoilment while preserving, improving and renewing the quality and usefulness of all our resources.

*President John F. Kennedy,
Conservation Message to Congress (1962)*

The Nation behaves well if it treats the national resources as assets which it must turn over to the next generation increased and not impaired in value; and behaves badly if it leaves the land poorer to those who come after it. That is what I mean by the phrase, conservation of natural resources. Use them; but use them so that as far as possible our children will be richer, and not poorer because we have lived.

*President Theodore Roosevelt,
The New Nationalism 52 (1910)*

The philosophy underlying sustainable use is to treat this stock of valuable resources like the natural capital that it is. Just like wisely invested financial capital, our stock of renewable natural resources, if managed wisely, can produce wealth – both tangible and intangible – indefinitely for present and future generations. Also like financial capital, without careful management, it is likely that we will spend down the principle, leaving no capital for the future. If we deplete our public natural resources at an unsustainable pace or degrade their ability to renew themselves, we will leave nothing for the future.

In practice, the record of our stewardship of the natural resources found on our public lands has fallen far short of our commitments, and the government has not fulfilled its role as steward and fiduciary. Over the past thirty years, occasional reports on the national forests, grazing lands, biodiversity, and other resources have attracted public and legislative attention. Almost invariably, these reports have revealed the steady degradation of values associated with our forests, grasslands, parks, and wild lands.⁴ Moreover, the reports often reveal that our policies subsidize particular economic uses and values to the detriment of many other public uses, values and services provided by the public lands.⁵

These reports sometimes spur narrowly-focused legislative or administrative reforms. However, by and large, the patterns of unsustainable use of these public resources remain unchanged notwithstanding the steady accounts of depletion and the sacrifice of non-economic values to economic ones. Moreover, changes in policy spearheaded under the current Administration have moved in the wrong direction, dramatically accelerating the pace of depletion and degradation of the resources on our public lands. Instead of preserving public natural resources, current law and policy tolerates or actively promotes liquidation of these resources, often for private gain and at great but sometimes incalculable cost to the public.

Connecting the Dots

This Report seeks to connect the dots – to show how the natural resources on many different types of public lands are being managed unsustainably, often contrary to stated goals, objectives and legal mandates. The picture that emerges is far more disturbing and significant than resource-specific reports reveal. What emerges is a systematic pattern of squandering public resources or failing to take necessary steps to protect them, notwithstanding stated commitments and mandates under existing law to use them sustainably.

One cause of this failure is the inadequacy of the mandates under existing laws that purport to require sustainable use of public resources. The summaries in this report also reveal that across the board, responsible federal agencies are failing to monitor the depletion and degradation of these resources. Inadequate monitoring of the impact of decisions on the resources on public lands is chronic, and there is insufficient funding for agencies to monitor and enforce even existing law. Without a clear sense of the pace of our resource use and degradation, it is impossible to assess the implications for the future.

Alongside instances of benign neglect are more troubling developments: recent initiatives by the Bush Administration have included aggressive and intentional steps to transfer resources to private economic interests at the expense of the public interest. The appointment of agency officials with

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strong ties to industry have exacerbated longstanding agency biases that favor economic resource uses.⁶ Legislative and administrative reforms that exclude the public from decisions about resources and restrict or eliminate environmental review facilitate decisions that deplete or destroy public wealth while benefiting concentrated economic interests. Chronic underfunding of agencies cripple their capacity and ensures that conservation is shortchanged.

If we are to achieve our stated goals and preserve a meaningful legacy of natural resources for our children and grandchildren, a new overarching approach to assessing and managing America's public resources may be needed. Although piecemeal reform efforts can improve the decisions about natural resources on public lands, a comprehensive examination of how we manage natural resources on public lands is overdue. By comprehensively examining our laws and policies, we may uncover new and more effective solutions to pervasive problems. CPR's scholars are currently developing a project on the Future of Public Lands to help guide public land management for the 21st century. But there is much work that Congress is ideally situated to undertake, to investigate the patterns and practices in order to develop a comprehensive picture of the challenges and problems.

The recommendation for a comprehensive reexamination of public natural resources law and policy is not made lightly. Such a reexamination would be a significant undertaking, but as this report shows, the need is clear. Despite longstanding commitments to preserve our public lands and specific measures in the last thirty years designed to ensure their sustainable use, the pattern of unsustainable use is pervasive and chronic. Therefore, any investigation should cut across the various categories of public lands – national forests, national parks, BLM-managed lands, wilderness areas, national wildlife refuges. Accordingly, the sections in this report cover:

- Proposals to Sell Public Lands
- Degrading Bureau of Land Management Lands through Grazing
- Sacrificing Wildlands for Energy Extraction

- Undercutting Non-timber Values in the National Forests
- Neglecting National Parks
- The Unfulfilled Promise of the National Wildlife Refuge System
- The Failure to Appropriate Funds for Conservation Land Acquisition

This report does not purport to address every threat to our public lands. Instead it highlights major patterns and issues. Only by seeing the common themes can we hope to identify new and more effective solutions. Common themes that emerge in this report, cutting across almost every category of public land include:

- Legal standards that lack sufficient clarity or force to achieve sustainable use of resources and protection of non-economic values
- Inadequate monitoring of resource conditions
- Restrictions that limit public participation in planning and the NEPA process and therefore amplify the influence of economic interests seeking to use resources
- Exemptions that eliminate environmental review of significant decisions
- Inadequate funding for natural resource agencies and
- Subsidies that promote exploitation or degradation without adequate justification.

The Report contains chapters that document the pervasive nature of these problems, highlighting

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recent proposals to dispose of public lands, the ongoing degradation of BLM lands through overgrazing, the increased degradation of wild lands for oil and gas development, forest management reforms that undercut non-timber values, the record of neglect of our national parks notwithstanding recent positive steps, the failure to implement the Refuge Improvement Act of 1997 and adequately fund our wildlife refuge system, and the diversion of funds from conservation land acquisition to other purposes.

Proposals to Sell Public Lands

Background

In perhaps the most blatant and direct of efforts to squander the nation's public resources, recent proposals by the Bush Administration and Congress have advocated the sale of massive acreages of public lands to private interests. In its 2007 budget proposal, the Bush Administration proposed raising more than \$1 billion over five years by selling outright hundreds of thousands of acres of public lands currently managed by the United States Department of Agriculture, Forest Service and Department of the Interior (DOI), Bureau of Land Management (BLM). Despite widespread disapproval, the proposals appear again – in virtually identical form – in the President's 2008 budget. After better heeding public outcry and withdrawing his proposal to sell fifteen National Parks, former Rep. Richard W. Pombo managed to insert language in deficit reduction legislation passed by the House that would have allowed the sale of millions of acres more of public lands. Though that provision was ultimately withdrawn amid an outpour of public protest, the recent trend toward elected officials proposing to sell off federal land for short term economic gains raises grave concerns for the future of our forests, parks, and other shared lands.

Each measure has been billed by its proponents as a means of raising needed revenue and/or providing support to communities, while “disposing” only of negligible tracts of public land. The cited benefits appear overstated, while the costs to the public of privatizing hundreds of thousands (potentially millions under one proposal) of acres of land set

aside for public use receive shamefully little consideration. Of equal or greater concern is the underlying attitude of some of our policymakers laid bare by these proposals: that lands set aside for public use represent little more than surplus assets to be sold, at present monetary value, as necessary to finance other priorities.

This is not the sort of stewardship of the public lands contemplated by the statutes governing their management. Instead, in the National Forest Management Act (NFMA),⁷ Congress declared that

the National Forest System consists of units of federally owned forest, range, and related lands throughout the United States and its territories, united into a nationally significant system *dedicated to the long-term benefit for present and future generations . . .*⁸

Similarly, in the Federal Land Policy and Management Act (FLPMA),⁹ BLM's “organic act,” which establishes the agency's multiple-use mandate to serve present and future generations, Congress defined “multiple use” to mean:

the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present *and future needs* of the American people; 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; *the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources*, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values . . .¹⁰

Revealing the impropriety of valuing public lands merely by their present monetary value, the section continues, mandating that multiple use management means:

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.*¹¹

Selling these lands – taking them from the public domain and putting them into private hands, for whatever use the buyer desires – represents the ultimate “permanent impairment” of both the productivity of the land and its environmental quality, as far as the American public is concerned. Our elected officials hold these lands in trust. The public must remain vigilant in opposing these and similar efforts, for the passage of any such large-scale sell off of public lands will be seen by certain policymakers as a precedent, one which paves the way for comparable “disposals” of public land in the future.

Proposals to Sell National Forest Lands

President Bush’s 2007 budget proposal called for selling off \$800 million worth of national forest lands, in what “several experts said would amount to the largest land sale of its kind since President Theodore Roosevelt established the U.S. Forest Service in 1905 and created the modern national forest system.”¹² As shown in Figure 1, more than 300,000 acres in 35 states were earmarked by the Forest Service as eligible for sale under the 2007 proposal.¹³ The proposed “fire sale” of public lands, first proposed in 2006, was “utterly unprecedented,” and, according to Dr. Char Miller, professor of environmental history and expert on the Forest Service, “signals that the lands and the agency that manages them are in deep trouble.”¹⁴

The Administration’s rationale for the sale of national forest lands was to fund payments over five years to counties for rural schools and roads. Payments were formerly funded by a federal subsidy established in the Secure Rural Schools and Community Self-Determination Act of 2000 (SRS), which expired in 2006.¹⁶ The idea of extending payments to help fund rural schools and roads enjoys bipartisan support in the Senate, but supporters on both sides of the aisle

expressed clear reservations at the idea of selling public lands to do so.¹⁷ The proposal’s detractors

Figure 1: Lands Identified for Sale by the Forest Service¹⁵

State	Acres of public forest lands potentially eligible for sale		
	FY 2007	FY 2008	Difference, FY 2008 - FY 2007
Alabama	3,220	2,822	-398
Alaska	99	6	-93
Arizona	1,030	1,022	-8
Arkansas	3,612	3,585	-27
California	79,825	65,863	-13,962
Colorado	21,572	21,699	127
Florida	973	973	0
Georgia	4,522	4,523	1
Idaho	25,464	26,021	557
Illinois	191	206	15
Indiana	869	878	9
Kentucky	4,518	3,843	-675
Louisiana	3,895	3,895	0
Michigan	5,880	5,488	-392
Minnesota	2,622	2,622	0
Mississippi	7,503	7,479	-24
Missouri	21,566	21,558	-8
Montana	13,948	11,159	-2,789
Nebraska	866	883	17
Nevada	2,146	1,986	-160
New Mexico	7,447	7,373	-74
North Carolina	9,828	5,685	-4,143
Ohio	420	419	-1
Oklahoma	3,572	3,541	-31
Oregon	10,581	7,591	-2,990
South Carolina	4,665	4,656	-9
South Dakota	13,961	13,310	-651
Tennessee	2,996	2,996	0
Texas	4,813	4,565	-248
Utah	5,998	5,813	-185
Virginia	5,717	5,392	-325
Washington	7,516	5,549	-1,967
West Virginia	4,836	4,827	-9
Wisconsin	80	80	0
Wyoming	17,619	15,498	-2,121
Total	304,370	273,806	-30,564

Source: USDA Forest Service

included a wide variety of interests from outside of Congress – the “plan was also panned by the four men who ran the U.S. Forest Service from 1979 to 2001, as well as dozens of environmental groups, backcountry outfitters, anglers and hunters and thousands of people from across the nation who sent letters arguing that the long-term loss of public lands would offset any short-term gains.”¹⁸

Apparently, these concerns and protests failed to make the President aware of the public’s repudiation of the proposal. The Administration’s 2008 budget revives the land sale scheme, with the Forest Service having shaved a mere 10 percent off the overall acreage slated for sale, as shown in Figure 1. Again the lands are to be sold to provide funding for a temporary (now four-year) extension of SRS.¹⁹ In an apparent attempt to answer public concerns over losing these public forests, this year’s proposal provides that half the funds raised by selling national forest lands in any given state would remain in that state to, among other things, “buy forest land with higher environmental values.”²⁰

Despite this change, the proposal is again drawing the ire of lawmakers from both parties.²¹ Senator Max Baucus of Montana has said Congress will “find a way to fund the Secure Schools program without selling even one acre of public land Auctioning off our outdoor heritage is not the way to do this. Our public lands in the West are sacrosanct.”²² An alternate solution – one that identifies a stable, long-term funding source – is preferable for affected school districts, as well. Jim Parsons is the superintendent of schools for Alpine Valley, California, which stands to lose one quarter of its teaching staff due to the loss of SRS funds.²³ As Mr. Parsons noted, even if the forest sale proposal is successful, without a long-term fix, his school district will face the same budgetary crisis several years down the road.²⁴

For its part, the Bush Administration downplays the significance of the proposed sale of forest lands. Undersecretary of Agriculture Mark Rey acknowledged that the 2007 proposed sale was the largest of its kind in decades (and perhaps ever), but challenged opponents of the proposal “to take a hard look at these specific parcels and tell [him] they

belong in national forest ownership.”²⁵ Similarly, the President’s Budget Message characterized the lands on the auction block in 2007 as “excess,” and both budgets claim that the parcels proposed for sale are suitable for conveyance according to existing forest plans, because they are “isolated or inefficient to manage.”²⁶ The ecological impacts of the proposed sale, however, concern conservation groups, who point out that the sales could fragment forest corridors important to wildlife.²⁷

The priorities underlying the proposals to sell national forest lands are equally and perhaps even more disturbing than the potential impacts of the sale of the particular identified parcels. After the public protested the proposal to sell more than 300,000 acres of its public forests, the Administration responded by re-submitting the same, warmed-over, albeit slightly tweaked proposal. This disregard for the public’s say in the management of our lands is an oft-repeated theme that runs throughout the Administration’s national forest policies.

As further discussed in the National Forests section of this report, the Administration’s new national forest planning rule eliminates virtually all meaningful opportunity for the public to participate in crafting management plans for particular forests – plans that identify the parcels of land the Administration can later sell off.²⁸ And, most recently, the Administration has categorically excluded national forest management plans from the National Environmental Policy Act’s (NEPA) environmental impact statement requirements, thereby further reducing public participation opportunities. Speaking last year, Agriculture Undersecretary (and former timber lobbyist)²⁹ Mark Rey left little doubt as to the interests that are currently filling the void. Although private stakeholders such as timber, oil or gas interests had not been directly consulted on which parcels should be sold, Rey explained, “some of the plots might have been selected based on such ‘conversations in recent month and years.’”³⁰

Proposals to Sell BLM Lands

National forest lands are not the only public lands at risk from the President’s proposed budget. Also

under the proposal, BLM would be required to “radically increase its land sales” in order to raise \$350 million by 2016.³¹ Although BLM already has the authority to sell lands identified as “excess to the public’s and the Government’s needs,” “[t]he BLM does not offer much land for sale because of a congressional mandate in 1976 to generally retain [public] lands in public ownership.”³²

In 2000, Congress enacted the Federal Land Transfer Facilitation Act (FLTFA) to encourage the sale of lands that do little to contribute to BLM’s mission.³³ The FLTFA, however, specified that BLM retain the sale proceeds and use them to acquire other lands valued for wildlife habitat.³⁴ In a major shift, the President’s 2007 budget “propose[d] to amend the FLTFA by expanding the set of lands that DOI would be authorized to

sell . . . and by allowing some of the sale proceeds to be spent on a broader array of environmental projects.”³⁵ The next several sentences of the President’s Budget Message, however, make clear that the vast majority of sale proceeds would not be restricted for use on any kind of environmental projects, or any other purpose related to BLM’s mission. Instead, 70 percent of any sale proceeds – and a full 100 percent of revenues over \$60 million per year – would be returned to the general treasury, presumably to be spent for any purpose at all.³⁶

As with the forest sale proposal, the President chose to ignore “strong and widespread opposition from hunters, anglers, locally-elected officials, businesses, governors and both Democratic and Republican Members of Congress”³⁷ to the BLM land sale scheme. The President’s proposed budget for 2008 contains the identical proposal.³⁸

Proposed Sale of Lands Subject to Mining Claims

The Administration’s proposals to sell public lands are disturbing both because of the impacts that the sale of particular parcels may have and because of their

disregard for statutory calls to manage public lands for the benefit of present and future generations. A little-known and ultimately failed legislative proposal to sell public lands, however, provided reason for even greater concern.

In the fall of 2005, Rep. Richard Pombo, then Chairman of the House Resources Committee, circulated a draft bill that would have sold fifteen National Parks. Amid the public outcry that followed, Pombo’s spokesman said the proposal was intended “only to influence lawmakers to support” a provision that would have opened the Arctic National Wildlife Refuge to oil drilling.³⁹ (Pombo’s committee staff had argued that without drilling in the Arctic Refuge, sale and corporate sponsorship of National Parks would be necessary to raise an equal amount of

revenue.)⁴⁰ Both this red herring and the battle over the Arctic Refuge helped obscure a very real provision successfully slipped into the House budget deficit bill by Pombo’s Resource Committee.

The relevant sections of the budget deficit bill

would have lifted an 11-year-old moratorium on the patenting (sale) of federal lands to mining companies for a fraction of their mineral worth.⁴¹ Moreover, the proposal ordered the Interior Department to make available for purchase not only lands subject to mining claims, but also adjacent lands in order to facilitate “economic development.”⁴² Nominally, the major categories of public lands subject to the legislation would have been those managed by the Forest Service and BLM, since it purported to except, among others, lands within the National Park and National Wildlife Refuge Systems.⁴³ Although seemingly calculated to allay public concern, the exception did not satisfy conservation groups that such lands would be protected from sale, given the opening disclaimer that such protections were “subject to valid existing rights.”⁴⁴

Whether or not the named categories of land actually would have been protected, the sheer quantity of

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public lands that would have been eligible for sale under the provisions was, as the deputy director of BLM during President Bush's first term described it, "stunning."⁴⁵ Since the Gold Rush days of the 1800s, federal lands in the West have been subject to millions of mining claims, with more than 3.2 million (averaging 20 acres each) having been filed just since 1976.⁴⁶ The bill did not provide any time limits on the mining claims that would qualify public lands for sale. As John Leshy, DOI Solicitor during the Clinton Administration explained:

At one time or another over the last 130 years, much of the land in the West has had an unpatented mining claim on it . . . [s]o it's very hard to say how many acres are involved in that. But it's potentially a very big number.⁴⁷

The magnitude of the land eligible for privatization under the legislation was no mistake. The author of the provisions, Rep. Jim Gibbons of Nevada – along with Representative Pombo – has complained that the federal government owns too much land in the West.⁴⁸ A dyed-in-the-wool private property rights advocate, Representative Pombo's other efforts to undermine government interventions aimed at protecting the public interest include authoring legislation to roll back critical protections of the Endangered Species Act (ESA). Thus, although Representatives Pombo and Gibbons ultimately withdrew their mining claim provisions after thousands of concerned citizens expressed their opposition,⁴⁹ their underlying convictions virtually ensure similar attempts will follow in the future. Moreover, their slipping of the mining claim provisions into the depths of a deficit reduction bill suggests that future attempts to sell off our collective heritage may well be made covertly, in an attempt to stymie the predictable public outcry.

Concluding Summary

The proposals to sell public lands described herein are unprecedented in scope. Even if not ultimately successful, they represent a dangerous trend. In recognition of the long-term benefits that setting aside and conserving public lands would provide Americans, Congress stipulated that these shared lands be managed in a way that would preserve them for future generations. Circumventing these mandates

through budget proposals and provisions buried in deficit reduction legislation is the ultimate affront to the idea of sustainable management. By regarding these lands as fungible goods to be sold off to finance current budget priorities or promote short-term "economic development," our policymakers abdicate entirely their obligation to act as stewards of our collective legacy of public natural resources.

Degrading Bureau of Land Management Lands through Grazing

Background

Livestock grazing on public lands is concentrated mainly within the confines of eleven western states: Arizona, California, Colorado, Idaho, Montana, New Mexico, Nevada, Oregon, Utah, Washington, and Wyoming. Within those eleven states, 265 million acres of federal lands – nearly the equivalent of all the land area of California and Texas *combined* – are leased for livestock production.⁵⁰ That some 83 percent of BLM and Forest Service lands⁵¹ are being used to supply feed for livestock that eventually end up on dinner tables across the country is seen by many federal land managers as proof positive that they are effectively implementing Congress's mandate that federal lands be put to productive use.

In fact, those numbers tell quite a different story. When considered in the full context of federal land management policy and the practical realities of livestock production, they become disturbing manifestations of BLM and the Forest Service squandering our public resources. In fact, only 2 percent of the feed used for livestock production in the U.S. is derived from this vast expanse of western federal lands.⁵² Western ranchers pay a paltry sum to lease federal public lands – just \$1.35 per AUM⁵³ – as compared with fees paid to lease private lands (which averaged \$8 per AUM in Arizona and Oklahoma and \$23 per AUM in Nebraska).⁵⁴ BLM and the Forest Service spend hundreds of millions of dollars each year to administer the grazing programs, but bring in only a fraction of that amount in revenues.⁵⁵ Grazing on our federal lands has been linked to degraded water quality, loss of freshwater in underground aquifers, loss of wetlands, destruction of habitat for

threatened and endangered species, and an influx of invasive species.⁵⁶

All of this would be unexceptionable if Congress had instructed BLM and the Forest Service to manage our federal lands solely to benefit ranchers; however, the fact is that Congress has expressly instructed them otherwise. The two primary federal statutes governing management of grazing lands – the FLPMA⁵⁷ and the Multiple-Use, Sustained-Yield Act (MUSYA)⁵⁸ – mandate that federal lands be managed to promote multiple beneficial uses that can be sustained over the long term, including “recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values.”⁵⁹ In other words, Congress has directed federal land managers to set policies for all 300 million Americans who rely on federal lands for recreation, valuable ecosystem services, and other natural resources, not just for the roughly 20,000 livestock producers who use the lands for grazing. Congress intended that our natural resources be preserved for all, not squandered on a few.

Squandered Resources

The resources that we waste with mismanaged grazing policies range from the administrative to the ecological. Some – like the administrative resources – are easier to quantify. According to a recent GAO report, federal agencies spent a total of at least \$144 million just to administer grazing programs in fiscal year 2004.⁶⁰ With ranchers paying just \$1.43 per AUM to graze on our lands that year, federal agencies only brought in \$21 million to offset the cost of administering the grazing programs.⁶¹ GAO found that BLM and the Forest Service would have had to charge \$7.64 per AUM and \$12.26 per AUM, respectively, to recover their expenditures.⁶²

Focusing on this imbalance in costs and revenues alone is overly simplistic – rarely does a government program bring in enough revenues to cover its costs of administration. And subsidizing a particular activity can be a legitimate policy goal, if consciously and rationally pursued. However, where the program’s dominant social benefit is to subsidize private economic activity, it is reasonable to scrutinize the costs of administering the program to

determine at least whether another form of subsidy might achieve the same benefits at lower cost. And in the case of grazing, a full assessment of its impacts on public resources entails costs that are difficult to quantify, let alone monetize.

To understand the full extent of the impact of federal land grazing policies on public resources, it is important to look at the broad spectrum of values and resources that are affected, many of which are not easily quantified. Congress mandated that federal lands be managed to promote “a combination of balanced and diverse resources” including “recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values” while “tak[ing] into account the long-term needs of future generations.”⁶³ With this set of values and this standard as a backdrop, we can assess whether the pattern of use of our natural resources comports with Congress’s stated goal and mandate.

At the root of many environmental problems caused by grazing on western federal lands is the fact that cattle did not evolve on a diet that can be sustained by the arid and unpredictable ecosystems of the American west. Cattle are indigenous to temperate climates and ecosystems.⁶⁴ Thus, in the eastern U.S., cattle producers maintain herds on about one acre of land per head of cattle while ranchers in the arid lands of western America must set aside upwards of 100 acres of grazing land for each head of cattle.⁶⁵ The fact that it takes over one hundred times the land area to support an equal number of cattle in the west is just a hint as to the environmental impact caused by grazing on western public lands.

A more detailed picture of the environmental consequences of current federal grazing policies, can be obtained by looking at the places where grazing cattle tend to congregate – near sources of fresh water. Streams are literally the lifeblood of the American west: research suggests that up to 80 percent of the biodiversity in the west can be concentrated in riparian zones (the streams and small bands of highly productive land that surround them).⁶⁶ In addition to providing habitat for many plant and animal species, healthy riparian zones filter rainwater as it migrates to streams, buffer stream flows, act as flood controls, promote proper nutrient

cycling, act as carbon sinks, and provide numerous other important ecosystem services.⁶⁷ Unfortunately, cattle grazing has adverse impacts on each of these.⁶⁸

Most of the problems result from two factors – cattle’s voracious appetite, and their heavy footfalls. When grazing cattle descend on an area, they often leave it a denuded moonscape—devoid of vegetation, with its soils compacted and covered in manure. One immediate effect is on water quality. Because of compaction, ensuing rains no longer filter slowly through the soil to recharge streams. “Moderate and high rainfall events in grazed sites are, therefore, more likely to result in high energy and erosive floods....”⁶⁹ With less water absorbed by the compacted soil, increased overland flow carries excess sediment into the streams and picks up harmful levels of nutrients and biological contaminants from the cow manure.⁷⁰

Excess sediment loading, in turn, harms water quality by depleting dissolved oxygen, decreasing light penetration needed by underwater plants, and scouring streambeds.⁷¹ This is particularly harmful to fish, as sediment can smother their eggs, irritate their gills, and destroy protective mucous on their eyes and scales, making them more susceptible to disease.⁷² Streams carrying excess sediment also erode their banks more rapidly.⁷³ Meanwhile, excess nutrients from manure carried into streams feed algae blooms that further decrease dissolved oxygen.⁷⁴ Finally, rainwater rushing over manure and into streams carries with it *Salmonella*, *E. Coli*, *Cryptosporidium*, *Giardia*, fecal coliform, and other protozoan and bacterial contaminants.⁷⁵ The nationwide spinach recall in September 2006 underscores the danger of cow manure when found in close proximity to food supplies.⁷⁶ In short, grazing livestock can be a serious threat both to clean water and to public health.

In addition to the immediate effects on water quality, overgrazing has long-term effects on the distribution of plant species in riparian zones, preventing regeneration of native species. Decreased vegetative cover and trampled soils result in increased overland flow of rainwater, causing more drastic peak flows that cut deeper stream channels, ultimately leading to a lower water table and drier topsoil when the rain subsides.⁷⁷ Native plant species do not return because their roots do not extend down to the new, lower

water table.⁷⁸ In their place grow more drought-resistant upland plants such as sagebrush and juniper.

The act of grazing also directly interferes with nutrient cycling. Ordinarily, nitrogen and phosphorus taken up by plants is recycled back into the soil as plants naturally die off and decompose or are foraged by smaller animals. But when a herd of heavy grazers such as cattle roams through an area, massive amounts of plant matter are quickly consumed. The nutrients not incorporated into the animals’ bodies are deposited back into the watershed in manure and urine. The combined effect of nutrients being exported from the watershed in the animals’ bodies and being deposited in concentrated areas causes insufficient reconditioning of the soil and excess nutrient loading to both ground and surface water. Changes in soil composition lead to changes in plant populations, generally to the detriment of native species.⁷⁹

In the most arid regions of the American west, there is another important aspect of soil quality that suffers under the hoofs of grazing cattle – the biological crust. A variety of microscopic organisms including cyanobacteria, green algae, fungi, lichens, and mosses exist on and just beneath the soil surface, forming a protective barrier between the soil and the harsh climate.⁸⁰ Intact biological crust performs many functions essential to maintaining a healthy ecosystem. Biological crusts reduce erosion by binding soil particles to one another, they prevent excessive evaporation of soil moisture, they trap and fix atmospheric nitrogen in the soil, and they even prevent germination of invasive species’ seeds.⁸¹

Biological crusts’ ability to block the growth of invasive species is particularly important for controlling wildfires. For example, cheatgrass is an invasive species whose seeds germinate on top of the soil. Biological crusts prevent cheatgrass seed germination, ensuring that fuel for wildfires is distributed unevenly and sparsely in arid lands.⁸² Areas inundated with cheatgrass burn more often and faster than areas that have naturally occurring mini firebreaks made by biological crusts.⁸³ Unfortunately, for all of its important capacity for maintaining healthy ecosystems, the biological crust is extremely fragile. When trampled by wandering cattle during

the relatively wet spring months, regeneration of the crust is hampered. Then, in areas with severe summer thunderstorms, heavy rain on degraded crusts often leads to increased soil erosion and further damage to microbiological communities. And in the dry fall months, fragmentation of the crusts is magnified by the heavy footfalls of cattle. The fact that grazing permits often require resting of grazing lands during the winter is not enough to protect the crusts – studies indicate that it takes several years without disturbance by heavy traffic before biological crusts regain their full productive capacity.⁸⁴

To be sure, the impact of cattle grazing goes well beyond the world of biological crusts, soil nutrient cycles and rainwater flows in riparian zones. Prairie dogs, sage grouse, elk, bighorn sheep, and pronghorn populations are also adversely impacted by cattle grazing, both because of competition for food and habitat made more scarce by grazing cattle.⁸⁵ And predator species like grizzly bears and gray wolves have seen precipitous population declines at the hands of shotgun and trap wielding ranchers intent on protecting their herds. Again, the root of the problem lies with the fact that cattle are not indigenous to the arid west. The animal and plant populations of the west evolved in an ecosystem that relied on a certain amount of grazing by native animal populations, but the level of grazing that accompanied the introduction of cattle in the last 300 years disrupts the symbiotic relationships of native plants and animals. Researchers have been able to link western livestock production with negative impacts on the population of hundreds of species of plants, insects, fish, shellfish, amphibians, birds and mammals, many of which are – or are becoming – endangered.⁸⁶

Law, Regulation, Politics and Grazing

We have allowed cattle and sheep to have free range over western lands not suitable or adapted to livestock grazing despite laws that instruct BLM and

the Forest Service to manage federal lands to ensure that they will be suitable for multiple uses that benefit all sectors of the population for years to come. There are several powerful interest groups that promote this unbalanced status quo. Obviously, the livestock industry benefits from subsidized feed and water for their cattle. The banking industry is the most powerful yet non-obvious supporter of policies that allow overgrazing. Banks loan money to ranchers according to the “value” of their grazing permits, calculating that “value” based on the difference between what the ranchers actually pay for the permits to graze on federal lands and the price a similar grazing opportunity would command in the private arena.⁸⁷ Like ranchers, the banks have an interest in maintaining low grazing fees and high stocking levels so as to minimize the risk of ranchers defaulting on their loans. Additionally, many of the

The animal and plant populations of the west evolved in an ecosystem that relied on a certain amount of grazing by native animal populations, but the level of grazing that accompanied the introduction of cattle in the last 300 years disrupts the symbiotic relationships of native plants and animals.

major research universities in the west are land grant institutions “established with an explicit mission to support agriculture.”⁸⁸ In support of that mission, and as a means of obtaining research funding from the government and livestock industry, much of the

universities’ research focuses on maximizing productivity, not investigating the environmental consequences of grazing.

Perhaps it was coincidence, but it took until the adverse effects of overgrazing literally reached the Capitol before Congress finally passed grazing legislation for BLM lands. In May 1934, strong windstorms in the Midwest blew across fields that had been denuded and trampled by grazing cattle. The winds kicked up dust so far into the atmosphere that some of it did not settle until it reached Europe.⁸⁹ After debate on the bill was interrupted so that legislators could recess to the Capitol balcony and watch suspended Midwestern dust darken the sky at noon, Congress passed, and the president signed, the Taylor Grazing Act.⁹⁰

There are three key aspects of the Taylor Grazing Act that shape current land management practices at BLM. First, the Act authorized the use of permits and fees to limit the number of ranchers and cattle allowed on federal land.⁹¹ Second, it codified the notion that relevant federal lands should be put to utilitarian and productive use.⁹² Third, the statute gave ranchers and local decision makers broad power over land management policies. The Act also authorized the Secretary of the Interior to set up grazing districts in all lands he deemed suitable for livestock production.⁹³ When the Department of the Interior eventually met to draft national grazing regulations in 1940, federal officials relied heavily on representatives from local grazing district advisory boards in developing the Federal Grazing Code.⁹⁴ There was no instruction to preserve marginal lands or sensitive ecosystems, so the first thirty years of grazing regulation were focused mainly on limiting the number of grazing permits and setting fees.⁹⁵

The control granted to ranchers in setting policies and the lack of attention to conserving lands for recreational, wildlife habitat, and ecosystem services values continued unabated until several new laws enacted in the 1970s prompted change. First, in 1974, after Congress passed the Federal Advisory Committee Act (FACA), local grazing district advisory boards were disbanded. Then, in 1976, Congress passed FLPMA, making grazing just one of the multiple uses that would be considered appropriate for relevant BLM lands.⁹⁶ Under FLPMA, grazing permits would be issued pursuant to standardized and multiple-use-oriented national regulations. The strictures of FACA and the Administrative Procedure Act (APA) ensured that FLPMA's implementing regulations would be written with the input and oversight of interest groups other than just the western ranchers.

The past decade has witnessed two administrations with very different approaches to integrating livestock grazing into public land management decisions. Clinton's Secretary of the Interior, Bruce Babbitt, established a multi-tiered approach to grazing regulation.⁹⁷ Babbitt's approach was designed to promote some level of national uniformity in

upholding FLPMA's multiple use mandate while maintaining local officials' primacy over permit writing. The broad national goals governing livestock grazing on all BLM lands were called the "Fundamentals of Rangeland Health."⁹⁸

More specific guidance for permit writers was provided in the "Standards and Guidelines for Grazing Administration." The Standards and Guidelines were to be developed not at the national level by officials at BLM headquarters as were the Fundamentals of Rangeland Health, but rather at the local, state, or regional level by BLM officials in state offices.⁹⁹ The Clinton-era regulations also gave conservationists a more powerful tool for using the market to influence public land use policies, by allowing "conservation use" of grazing allotments for periods of up to ten years.¹⁰⁰

The Bush Administration recently published its own reforms to BLM's grazing policy. Among other changes, the new regulations take a much weaker approach to overgrazing. Instead of calling for immediate corrective actions to prevent environmental damage, the new regulations preclude corrective action until monitoring provides proof that grazing has had adverse environmental consequences.¹⁰¹ This shift effectively removes the regulation's deterrent force, since BLM only sporadically monitors environmental factors and the little monitoring the agency actually does undertake is focused on the amount of forage consumed, not stream quality, biodiversity, or erosion – the qualities meant to be protected by permit restrictions.¹⁰² Moreover, BLM is chronically underfunded, limiting the amount of new monitoring that might happen. These two factors combined suggest that the new regulations will forestall corrective actions indefinitely.¹⁰³ The new regulations also eliminate all enforcement of the Fundamentals of Rangeland Health, leaving only the state-level Standards and Guidelines enforceable. Finally, the new regulations cut down on the amount of public participation in the process of developing grazing permits, deleting members of the interested public from the list of individuals to be consulted when BLM issues, renews, or modifies a grazing permit.¹⁰⁴

Many aspects of the new rules were preliminarily enjoined shortly after they went into effect.¹⁰⁵ In June 2007, a federal district court ruled that these same changes in the new rules violated federal law and enjoined them from taking effect until BLM takes a harder look at their environmental impacts and consults with the Fish and Wildlife Service as to the potential effects on protected species.¹⁰⁶ The provisions of the new rules that have been enjoined include those limiting public involvement, prohibiting enforcement of the Fundamentals of Rangeland Health when state-specific Standards and Guidelines are in place, requiring the use of multi-year monitoring data to prove that grazing has had adverse environmental consequences, and delaying corrective action.

The Clinton and Bush era reforms to federal grazing policies have not done enough to protect our nation's natural resources from destruction wrought by overgrazing livestock. Short of a complete end to grazing on federal lands, which some have suggested, there are many more moderate changes that could eliminate federal subsidies for inefficient livestock husbandry, which has been linked to the loss of valuable ecosystem services, including those detailed herein. If we are committed to preserving these resources and their associated values, it is clear that substantial changes are needed. A key to policies that preserve resources are mandates that ensure accountability through accurate assessment of the impacts policies and permitting practices have on resources.

Concluding Summary

The key principle behind the statutes that govern federal management of grazing lands is to manage these lands so as to promote multiple beneficial uses now and for future generations. If we are committed to these values, it is past time to reconsider the practice of virtually giving away public lands to one group of citizens to use for a single purpose that degrades many other uses and values, including the overarching value of preserving our resources for the long term.

Sacrificing Wild Lands for Energy Extraction

Background

Current U.S. energy policy, as outlined in the National Energy Policy Act of 2005,¹⁰⁷ is focused on developing new domestic energy supplies, both to sate Americans' ever-increasing thirst for low-cost energy and to further the national security goal of decreasing our nation's dependence on foreign oil. Toward these ends, energy companies have begun to explore the non-renewable energy producing capabilities of sensitive federal lands in Alaska and the western continental states. Billions of barrels of oil lie beneath the snow and permafrost of Alaska,¹⁰⁸ and federally owned lands in Colorado, Utah, Wyoming, Montana, and Idaho lie atop large stores of coal (and coal bed methane),¹⁰⁹ natural gas,¹¹⁰ oil shale, and tar sands.¹¹¹

In the rush to develop these domestic energy sources, state and federal officials are paving the way for long-term destruction of some of America's most pristine and sensitive public lands. Although the laws governing the management of federal lands allow for, and even encourage, the extraction and use of the natural resources found on those lands, the unchecked exuberance with which federal officials have approved the expansion of energy development in recent years has overshadowed considerations of preservation, recreation, and ecosystem services benefits that would flow from keeping the lands in their undeveloped state. Administrative judges have struck down BLM permit issuances in Utah for inexplicable failures to take account of ancient archaeological sites before approving oil and gas drilling,¹¹² and the Environmental Protection Agency has criticized federal land managers in Wyoming for approving permits to extract coal bed methane before determining a safe way to treat and dispose of contaminated produced water.¹¹³ But these setbacks have not slowed the push to extract more non-renewable resources from federal lands: over the next 20 years, federal agencies plan to approve permits to drill over 118,000 new wells on federal lands.¹¹⁴ The lands threatened by the onslaught of energy

extraction consist of some of the most unspoiled lands in our country.

Threatened Treasures – The Deserts, the Rockies, and the Arctic

From the canyonlands of southern Utah to the Rocky Mountains of Colorado and Wyoming all the way to the Arctic Circle in Alaska, federal public lands are some of the most pristine wild lands in our country. These lands are managed by a number of government agencies, generally operating under “multiple use” mandates that promote resource extraction alongside resource conservation. This means that federal land managers are in the unenviable position of mediating the ongoing dispute between the energy industry (arguing for opening more public land to development) and conservation and environmental organizations (pressing for preservation of the same lands). It is up to officials at BLM and the Forest Service to determine which lands are suitable for energy development and which are “too wild to drill.”¹¹⁵

Perhaps the most publicly discussed example of federally owned lands threatened by energy development is the Arctic National Wildlife Refuge. The Arctic Refuge was established by Congress in 1960 “for the purpose of preserving unique wildlife, wilderness, and recreational values.”¹¹⁶ In 1980 it was expanded, designated a wilderness area under the 1964 Wilderness Act, and officially linked to four new purposes:

1. to conserve fish and wildlife populations and habitats in their natural diversity;
2. to fulfill the international fish and wildlife treaty obligations of the United States;
3. to provide the opportunity for continued subsistence uses by local residents; and
4. to ensure water quality and necessary water quantity within the refuge.¹¹⁷

Today, the Refuge covers 19.2 million acres of northeastern Alaska, provides a home for 45 species of land and marine mammals and 180 species of birds, and is a rare example of an unbroken continuum of arctic and subarctic ecosystems where

large-scale ecological and evolutionary processes can be observed.¹¹⁸ The Arctic Refuge’s protected lands stretch north from the boreal forests of the Porcupine River plateau, over the glacier-covered Brooks Range, across the coastal plain of northern Alaska, all the way to the barrier islands of the Beaufort Sea.

It is the northernmost reaches of the Arctic Refuge that are the center of intense controversy today. Area 1002 is a 1.5 million acre swath of coastal plain that sits atop several billion barrels of crude oil.¹¹⁹ It is also one of the last unspoiled areas of Alaskan coastal plain in existence, home to the Inupiat and Gwich’in people, an important migration route and calving ground for the Porcupine and Central Arctic Caribou Herds, and habitat for whales, fish, birds, bears, moose, dall sheep, muskoxen, and numerous other species.¹²⁰ These important cultural and ecological values are the reason that Congress designated much of the Arctic Refuge as a wilderness area.

One hundred and fifty miles west of the Arctic Refuge lies another sensitive ecosystem that was once thought to be too sensitive for oil and gas drilling – the Teshekpuk Lake region of the National Petroleum Reserve-Alaska (NPRA). The 315-acre lake is surrounded by hundreds of thousands of acres of complex wetland ecosystems including coastal lagoons, deep water lakes, wet sedge grass meadows, and river deltas.¹²¹ This area provides fertile habitat for fish, migratory birds, and larger mammals such as fox and caribou, as well as traditional hunting grounds for Inupiat subsistence hunters.¹²² Millions of waterfowl and other birds live in the area, great numbers of geese use the area as summer molting-season habitat, and a herd of 45,000 caribou live in the area, providing seven Native communities with subsistence harvests.¹²³ Although it is located within the NPRA, Teshekpuk Lake has for decades been considered off limits to oil and gas drilling because of its immense value as wild land.

In the continental U.S., too, there are millions of acres of public lands that have been protected from extractive industries for years but are now on the slate for new energy development. Most new energy development in the lower 48 states is concentrated in Wyoming, Utah, Colorado, and the surrounding states.

For years, Wyoming's Jonah Field has been pumped for oil and the state's Upper Green River Basin has been mined for coal, and now energy companies seek to explore the untapped resources of the state's Wyoming Range and Red Desert. The Wyoming Range is a 700,000 acre section of remote alpine scenery in the Rocky Mountains of southwestern Wyoming.¹²⁴ The range is known locally as the "Workingman's Mountains" because it is a favorite getaway for locals who wish to avoid the tourist crowds in Yellowstone to the north. It is important habitat and hunting ground for big game such as elk, mule deer, and moose, and is home to all four native species of cutthroat trout and struggling populations of sage grouse and mountain plover.

Just east of the Wyoming Range lies the dry, windswept Red Desert. This six million acre "cold desert" is a truly rare national treasure. It is world renowned for its

pastel-colored hoodoos and it is the site of America's largest active sand dunes.¹²⁵ Visitors to the Red Desert can observe roaming wild horse and elk populations, as well as artifacts of human presence on the land ranging from ancient rock art to wheel ruts that mark the path of the Oregon Trail.¹²⁶ The area boasts fantastic biodiversity, providing habitat for over 350 different species of animal including the largest populations of antelope in the continental U.S. and the nation's largest population of the rare desert elk.¹²⁷ Though attempts to preserve the Red Desert as a wilderness area date back to 1898, today 84 percent of the land is developed¹²⁸ and 50 percent has been leased for oil drilling.¹²⁹

A similar situation exists in Utah. Though over 3 million acres of federal lands in the state have been leased for oil drilling and 1 million acres are in production,¹³⁰ there is a strong push to open more land to development. In southern Utah, energy companies are clamoring to drill new wells among the red rock canyons. Presidential proclamations establishing national monuments such as Grand Staircase-

Escalante prohibit leasing some of Utah's red rock wilderness for energy development.¹³¹ Lengthy permitting and environmental impact assessment processes that must be completed prior to developing national parks slows the development of parklands. But BLM lands that surround and connect the preserved areas, and which are equally stunning, lack strong protection from development.

The Threats – Environmental Effects of Energy Development

Depending on the type of resource being extracted and the methods used for extraction, energy development can have varying effects on land, wildlife, and other ecological resources. Today, coal mining, oil and gas drilling, and coalbed methane extraction are the primary types of energy development on U.S. federal lands.

Perhaps the most publicly discussed example of federally owned lands threatened by energy development is the Arctic National Wildlife Refuge, but in the continental U.S., too, there are millions of acres of public lands that have been protected from extractive industries for years but are now on the slate for new energy development.

A majority of the electricity produced for U.S. consumers is derived from coal. It is by far our country's most plentiful, readily extractable resource and rising oil prices tend to shift power generation from plants that burn oil and gas to those that burn coal. Coal in Wyoming, Montana and other western states exhibits two characteristics that make it economically important for U.S. energy producers: it has low sulfur content and it is found in seams close to the surface.¹³² The low sulfur content helps power producers comply with the Clean Air Act, and the proximity to the surface means that the cheapest method of coal mining – strip mining – is an effective method of extraction. Unfortunately, the low economic cost of extracting shallow coal seams overshadows the practice's high environmental costs. Stripping away all of the land that covers coal seams results in complete disruption of local ecosystems: the plants and animals that rely on stable topsoil for food and habitat are destroyed, hydrologic cycles are interrupted because of the altered landscape and increased erosion to streams, and the overburden left

in “spoil piles” often contains toxic chemicals and heavy metals capable of migrating away from the site through the air and water.

Although coal is our country’s primary source of power today, shifting federal energy policy and rising prices on foreign oil are also spurring a boom in oil and gas leasing on federal lands. Drilling for oil and natural gas brings with it a full host of environmental concerns, including damage to the land, water and air. Even the process of exploring for deposits of these resources – which can involve criss-crossing areas being considered for exploitation in 30-ton “thumper trucks” that pound the ground and record the seismic waves – can cause significant damage to fragile landscapes and distress local wildlife populations.¹³³ Actual development of the field causes much more significant disruption of land and wildlife. For every drill pad, developers need 10 acres of flat, vegetation-free land. With some companies proposing to site up to 64 wells on each square mile of land,¹³⁴ large scale oil and gas development could leave entire swaths of western land leveled and lifeless.¹³⁵ Moreover, web-like networks of roads and pipelines are necessary to provide access to the drilling pads and connect all of the wellheads, thus disturbing even more land.

The effects of oil and gas drilling on aquatic resources can be even more widespread. At the outset, large quantities of water are necessary to begin drilling. In order to keep drill bits clean and efficient, a constant stream of “drilling mud” must flow across them. Though it is recirculated through the drilling apparatus, the mud’s viscosity is adjusted constantly through manipulation of the amount of water and other additives present. Once a well is operational, it continues to demand large quantities of water. In the early life of a well, underground pressure is usually sufficient to force oil to the surface; but at some point, the pressure will fall and pump operators must utilize alternative techniques to improve pump efficiency. Oil companies will often pump water or steam into the ground around the well to force more oil to the surface.¹³⁶ Not only does this process demand a lot of water, but it also produces thousands upon thousands of gallons of contaminated water.¹³⁷

Natural gas production creates a similar problem. Especially in the case of coal bed methane (CBM),

natural gas is often infused in underground water. As the gas is pumped to the surface and separated from the water, a constant stream of “produced water” is created. In some states, regulations mandate that CBM produced water be pumped back into the coal seams; but in Wyoming – the home of the largest CBM deposits – there is no such regulation, and CBM produced water is simply applied to surrounding land or pumped into nearby streams.¹³⁸ The produced water problem is twofold: first, extraction of the produced water lowers the water table around a CBM well, impacting the underground aquifers from which residents may draw their drinking water;¹³⁹ second, once the methane is extracted, the produced water is highly saline and sodic (it has increased levels of sodium relative to calcium and magnesium), greatly limiting its utility as irrigation water.¹⁴⁰

A second water quality issue tied to CBM extraction is potential contamination of underground sources of drinking water. A common method used to maximize production at a CBM well is hydraulic fracturing, or “fracing.”¹⁴¹ Fracing involves reversing the flow on a CBM well for a short time and pumping high pressure mixtures of water, sand and toxic chemicals into the ground. The high pressure liquid fractures the coal seam near the well and the sand props open the crack. The new fractures below ground create pathways for additional CBM to flow to the surface once the direction of flow at the pump is switched back. The problem from a water quality standpoint is that the underground fracturing cannot be completely controlled, and the fractures often extend beyond the coal seams into nearby rock formations that serve as sources of drinking water. Studies show that after fracing is complete and pumps are reversed, anywhere from 18 to 65 percent of the injected chemicals will remain in the rock, potentially contaminating underground sources of drinking water.¹⁴² Nonetheless, when Congress passed the Energy Policy Act in 2005, it included a provision exempting fracing from federal Safe Drinking Water Act regulations.¹⁴³

Last, oil and gas drilling can have deleterious effects on local air quality. The diesel engines used to run onsite mechanical equipment create much of the pollution, spewing nitrous oxides, particulate matter,

carbon dioxide, carbon monoxide, and volatile organic compounds into the air.¹⁴⁴ In the case of gas wells, another problem can arise when a well is too efficient: if more gas is produced than can be sold or used on-site, operators must flare the excess gas.¹⁴⁵ In other words, the excess gas will be burned open and uncontrolled, releasing all of the pollutants directly into the air. Blowouts can also occur during flaring or maintenance, again releasing significant quantities of pollutants into the air.¹⁴⁶ The combined effect of all this air pollution from a large number of wells can be significant: the Jonah Field Infill Project, which would increase the number of gas wells in southwest Wyoming by a factor of four, will likely cause increases in particulate matter emissions large enough to violate the Clean Air Act's National Ambient Air Quality Standards.¹⁴⁷ BLM modeled the air quality impacts of the Infill Project and found that fine particulate matter concentrations near the project will spike to levels of 40 mg/m³,¹⁴⁸ which will exceed the new National Ambient Air Quality Standard of 35 mg/m³.¹⁴⁹

Federal Law and Policy

The passages above describe the impacts on air, water, human health, biodiversity and the landscape from energy development. A key question is whether federal law and policy contemplates this type of environmental degradation of our public lands. For some public lands, the answer is no. By creating national wildlife refuges, wilderness areas, parks and monuments, as well as wilderness study areas and protected roadless areas, Congress has long recognized the importance of preventing development on certain public lands. For example, in the Antiquities Act,¹⁵⁰ Congress granted the president the authority to "reserve" "parcels of land" as national monuments. As originally enacted, the Antiquities Act was meant to preserve archaeological artifacts; however, every president since Theodore Roosevelt has used the powers granted under the Act to protect other natural features such as wildlife habitat and unique geological structures.¹⁵¹

The strongest protections from development occur on lands designated as wilderness areas under the Wilderness Act of 1964.¹⁵² In that statute, Congress stated that "[i]n order to assure that an increasing

population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition, it is hereby declared to be the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."¹⁵³ Some of America's most ecologically valuable lands, by virtue of their designation as national monuments, wilderness areas, parks, and wildlife refuges,¹⁵⁴ are to be managed so as to promote conservation and preservation over all other uses.

Unfortunately, as the price of foreign oil rises, the importance of protecting undisturbed public lands tends to wane in the eyes of some federal officials. The result is a push to open up for energy development protected public lands. The most obvious examples, of course, are the efforts to expand Alaskan oil drilling into the Arctic National Wildlife Refuge and the Teshekpuk Lake region. While the Arctic Refuge's supporters are strong enough that it will take an act of Congress to open the pristine coastal plains of Area 1002 to oil drilling, the fragile wetlands surrounding Teshekpuk Lake do not enjoy the same protections.

Covered by snow and ice for much of the year, the delicate landscape that appears in the summer months is sensitive enough that even James Watt fought to keep it protected from oil and gas drilling in the 1980s. He put over 200,000 acres north of the lake off limits for oil and gas development.¹⁵⁵ When oil and gas development expanded westward from the Prudhoe Bay fields during the 1990s, the Clinton Administration also vowed to keep the Teshekpuk Lake region out of harm's way and roped off another 600,000 acres.¹⁵⁶

The decades of protection for the area ended with the Bush Administration. After a 2004 lease sale on over 1.4 million acres in the nearby Northwest Planning Area,¹⁵⁷ BLM issued a Record of Decision in January 2006 that would have allowed for a lease sale of all remaining lands surrounding Teshekpuk Lake in the Northeast Planning Area.¹⁵⁸ When a coalition of conservation groups sued to stop the lease sale, Judge

Singleton of the U.S. District Court for the District of Alaska found that BLM had violated both NEPA and the ESA by failing to consider the cumulative environmental impacts of widespread drilling around Teshekpuk Lake.¹⁵⁹ However, the threat of extensive drilling in this pristine area did not end with Judge Singleton's decision – shortly after it was released, BLM announced plans to prepare a supplemental environmental impact statement to cure the deficiencies in the environmental review vacated by the District Court and pave the way for a future lease sale.¹⁶⁰

The threats to long-term protection of the environmental quality and landscape of wild lands are not limited to remote areas in Alaska. The Forest Service has considered proposals by a Houston-based energy firm to drill three wildcat wells and construct four miles of roads in an inventoried roadless area within Wyoming's Bridger-Teton National Forest.¹⁶¹ Farther south, in Utah's Desolation Canyon, BLM recently sold mineral leases on land that the Clinton Administration once earmarked as potential wilderness. BLM has even auctioned gas leases near the visitor's center at Dinosaur National Monument.¹⁶²

Particularly in the intermountain west, though, vast expanses of public lands lack the strong protections afforded to national parks, monuments, wildlife refuges, and wilderness areas. Large swaths of federal lands are managed according to a "multiple-use" mandate,¹⁶³ meaning that conservation and energy development are both legitimate land uses.¹⁶⁴ In the FLMPA¹⁶⁵ and NFMA,¹⁶⁶ Congress instructed the federal officials to balance these sometimes competing objectives through the use of Resource Management Plans for BLM lands¹⁶⁷ and Land and Resource Management Plans (LRMPs) for the National Forest System.¹⁶⁸ These are comprehensive documents that inventory all of the important natural resources on a given tract of federal land and outline

how the resources will be managed to promote multiple uses. The drafting and revision of these plans has historically been closely tied to NEPA's environmental impact assessment process, meaning that land use officials are required to assess a number of different management alternatives when crafting the plans – ideally, helping to ensure that land managers are able to design plans that protect ecosystems and, where development is allowed, ensure that it is environmentally sound.

Several factors prevent the management plans from achieving their full potential to ensure truly "mixed-use" management, however, and to safeguard non-commodity uses of these public lands. Most recently, as detailed in the section of this report concerning the National Forest System, the Bush Administration has attempted, by regulation, to remove altogether NEPA assessment from the national forest planning process. Additionally, two important Supreme Court decisions have limited the power of conservation groups to challenge and enforce LRMPs, thus decreasing the plans' utility as tools for ensuring

At a more fundamental level, both NFMA and FLPMA suffer from the pervasive tension inherent in a multiple-use management regime that raises questions about whether multiple-use mandates are adequate to ensure that conservation values are in fact sustained over the long term.

appropriate protection of non-economic values on public lands.¹⁶⁹

At a more fundamental level, both NFMA and FLPMA suffer from the pervasive tension inherent in a multiple-use management regime that raises questions about whether multiple-use mandates are adequate to ensure that conservation values are in fact sustained over the long term. The mandate that multiple uses be preserved for future generations implies that federal officials should make conservative land use and resource development decisions in the short term, but the statutes lack explicit instruction that would tip the balance of multiple uses strongly in favor of conservation. When coupled with constant and well-funded industry pressure for development, the multiple use mandate fails to ensure that sustainable use is achieved.¹⁷⁰

Another factor that limits the utility of federal land use management plans is the inherent problem of trying to manage natural resources according to political – rather than ecological and geological – boundaries. Recent efforts to revise numerous RMPs to account for newly discovered CBM in the Powder River Basin along the Montana-Wyoming border illustrates the problem. The several state and federal agencies ended up with different estimates of the available resources and the environmental consequences of energy development, producing RMPs that provide a poor basis for sound management decisions.

In addition to failing to provide a comprehensive assessment of environmental impacts and failing to produce a balance of uses that preserves environmental uses, values, and services over the long term, the laws governing federal land use fail to ensure that the most environmentally sound techniques are used in energy development activities on public lands. A case in point is the Jonah Field Infill Project in southwest Wyoming. The Jonah Field covers just over 30,000 acres of land in southwest Wyoming, but lies atop rock formations that have trapped some 10.5 trillion cubic feet of natural gas.¹⁷¹ At current prices, this gas could be worth up to \$65 billion.

Not surprisingly, industry representatives have argued that federal officials should clear any and all roadblocks to drilling throughout Jonah Field. Today, there are some 500 wells in the field, at a density of 16 wells per square mile; however, in the rush to extract and sell the gas more quickly, the gas industry has applied for 3,100 new well permits such that there would be 64 wells per square mile.¹⁷² Local conservationists are fighting back, arguing that advances in drilling technology have made it economical for gas companies to greatly reduce the number of well pads they need – and land they destroy. Rather than building one old fashioned vertical drill on each well pad, companies could utilize directional drilling to cluster as many as 32 wells on a single well pad.¹⁷³ Though this newer form of drilling is more expensive and may not be feasible for every acre of the Jonah Field, some estimates suggest that it would only increase the cost of drilling

the entire field from \$6 billion to \$6.6 billion – just a 10 percent increase in cost to save tens of thousands of acres of valuable public land.¹⁷⁴ Since existing laws do not mandate the use of minimally damaging technologies, it is unlikely BLM will insist that the gas companies employ directional drilling in developing the Jonah Field.

In the absence of a statutory mandate to ensure the use of the most environmentally sound development technologies, BLM instead relies on voluntary adoption of best management practices. In mid-2004, BLM issued a policy requiring all field offices to “consider Best Management Practices (BMPs) in NEPA documents to mitigate anticipated impacts to surface and subsurface resources, and also to encourage operators to actively consider BMPs during the application process.”¹⁷⁵ However, the policy repeatedly stresses the notion that BMPs are not “one size fits all” and that they must be considered “on a case-by-case basis depending on their effectiveness, the balancing of increased operating costs vs. the benefit to the public and resource values, the availability of less restrictive mitigation alternatives, and other site specific factors.”¹⁷⁶ This is not a strong policy in favor of mitigating the environmental impacts of energy development.

Environmental protection activities at BLM field offices have fallen drastically in the last seven years due to the fact that officials are being pressured to spend more time approving permits to drill for oil and gas. A GAO review of BLM programs in 2005 revealed that eight field offices visited only met their annual environmental inspection goals about half the time between 1999 and 2005, “due in part to staff spending an increasing amount of time processing drilling permits.”¹⁷⁷ “By not performing these inspections,” GAO concluded, “the field offices have not ensured that the wells in their jurisdictions are being operated in compliance with applicable environmental requirements.”¹⁷⁸

The inadequacies of federal policy with respect to the environmental impacts that occur while drilling takes place are exacerbated by reclamation policies that fail to ensure affected lands are restored once the drilling is finished. Federal law requires reclamation of lands disturbed by drilling and mining,¹⁷⁹ but lax

enforcement of these laws and minimal oversight of their implementation has led to significant shortfalls in protecting sensitive lands. One problem is that BLM regulations lack any strong measures for ensuring that reclamation is done properly. The oil and gas lease regulations include no explicit standards, only a clause requiring well operators to “reclaim the disturbed surface in a manner approved or reasonably prescribed by the authorized officer.”¹⁸⁰ In other words, there is no nationally uniform and objective standard for oil and gas site reclamation – the reclamation requirements in each lease are determined at the discretion of the authorized officer.

A second problem is inadequate bonding requirements. Federal law requires energy companies to provide financial assurance to the government sufficient to ensure that public lands will not be left scarred by energy development.¹⁸¹ However, the law’s requirements are insufficient and taxpayers are often left footing the bill to reclaim their own lands that had been leased for energy development.¹⁸²

Finally, enforcement and oversight of reclamation requirements is often lax. GAO found that increased permitting activity has led to a decrease in the amount of time federal regulators have available to inspect abandoned and existing oil and gas drilling operations.¹⁸³ BLM officials should be inspecting working rigs to ensure that the excess land disturbed during construction that can be reclaimed during operation has been reclaimed (interim reclamation) and that the land surrounding abandoned wells has been returned to its pre-industrial status (final reclamation). GAO found backlogs for interim reclamation oversight at five of the eight BLM field offices and backlogs for final reclamation inspections at seven of the eight field offices.¹⁸⁴ These backlogs were attributed to “significant workloads associated with processing drilling permits.”¹⁸⁵

Many of the natural resource values on which this report focuses may be hard to quantify or monetize. While these qualities do not justify the failure to stop these losses, they help to explain why this pattern of degrading public lands has persisted. However, even the economic values of the oil and gas extracted – values that should be easily monetized and for which the public is entitled to compensation through royalty

payments – are being converted unlawfully to private profits. After the *New York Times* uncovered evidence that oil and gas companies were avoiding payment of billions of dollars in royalties,¹⁸⁶ the Department of Interior’s Inspector General undertook an investigation to determine the extent of the problem. Though the Inspector General avoided putting a dollar amount on the losses to federal coffers, the report outlined numerous problems including poor management and oversight by federal officials and inaccurate reporting by energy companies that has led to severe shortfalls in royalties that should have been paid on natural resources extracted from the Outer Continental Shelf.¹⁸⁷

Failure to collect full royalties due the federal government, combined with the billions of dollars in subsidies that have been approved for energy companies, leads to the incontrovertible conclusion that the American public is paying much more to establish our independence from foreign oil than high gasoline prices at the pump. The Energy Policy Act of 2005 cuts federal revenues by \$12.3 billion between 2006 and 2015, mainly by extending tax credits to utility companies and domestic fossil fuel producers.¹⁸⁸ And although it increases government spending for energy by \$1.6 billion, half of the subsidies are going to promote existing forms of energy that entail significant environmental degradation instead of supporting much-needed development of new renewable energy sources and conservation.¹⁸⁹

Concluding Summary

Our current national energy policy focuses not on working towards next generation clean and renewable energy but towards short term exploitation of domestic fuels and converting public resources into private wealth. This policy coincides with public land management laws that fail to provide an adequate framework for assessing the impacts of energy development on sensitive lands, thus failing to protect our public lands from the degradation caused by energy development activities. The net result is a loss of all the values unspoiled public lands can provide – from wildlife habitat to recreational space to ecosystem services like carbon capture and water

filtration – and a legacy of exploiting irreplaceable public resources for short term economic gain.

Undercutting Non-Timber Values in the National Forests

Background

In addition to the proposed sale of hundreds of thousands of acres of national forest lands detailed earlier in this report, the Bush Administration and Congress have, in recent years, pursued numerous other policies that have the collective result of squandering the public's woodlands. Early actions by the Administration included reversing Clinton-era roadless rule protections and substantially weakening the regulations governing planning under NFMA. More recently, the Administration has finalized its proposal to categorically exclude National Forest plans from the requirements of NEPA, in contravention of NFMA's explicit language. Claiming its approach to the issue still complies with that statute's direction that forest plans comply with NEPA, the Administration argues that NEPA analysis is more appropriately undertaken at the stage at which actual projects (instead of plans) are proposed. In fact, however, the Forest Service has employed other categorical exclusions to 72 percent of vegetation management projects approved from 2003-2005, thereby effectively removing NEPA from the NFMA process altogether.

In November 2003, Congress passed the "Healthy Forests Restoration Act" (HFRA), legislation that the President supported, and which he signed into law the next month. HFRA pushes aside NEPA review for another class of forest management projects – those that seek to remove underbrush, needles, and leaves from areas of forest that pose a particular threat of ignition in the event of a fire. The ostensible purpose of HFRA's provisions is to speed up the process with which such projects can proceed in order to reduce the risk and severity of wildfires. Critics of HFRA worry, however, that its primary effect will be simply to speed up and increase commercial logging in the national forests.

The themes underlying these varied administrative and legislative adjustments are consistent.

Collectively, they shift national forest policy toward increased timber harvesting, and – by removing public participation opportunities and environmental analysis requirements – away from the other uses for which the National Forest System must be managed.

Statutory Mandates: Managing for a Range of Forest Values

The National Forest System encompasses 193 million acres of land, an area equivalent to the size of Texas.¹⁹⁰ Since 1905, the Forest Service, an agency of the Department of Agriculture has been charged with managing the National Forest System.¹⁹¹ The Organic Administration Act of 1897 provided the earliest statutory mandate concerning the purposes for which national forests were to be established:

No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.¹⁹²

This almost singular focus on managing the national forests to ensure timber productivity, however, changed in 1960 when Congress enacted the MUSYA.¹⁹³ Congress explicitly recognized a range of forest values other than timber for which the national forests were established and to be administered: "outdoor recreation, range, timber, watershed and wildlife and fish purposes."¹⁹⁴ Managing for multiple-use and sustained-yield must ensure that forest resources:

are used in the combination that will best meet the needs of the American people . . . with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.¹⁹⁵

The importance of non-monetary values in forest management was further confirmed by the MUSYA with its statement that the "establishment and maintenance of wilderness areas" is consistent with the statute.¹⁹⁶

Prompted by a variety of concerns surrounding timber harvesting on national forest lands, Congress returned to address, in comprehensive fashion, the appropriate management goals for the National Forest System in 1976.¹⁹⁷ NFMA explicitly stated that the National Forest System is “dedicated to the long-term benefit for present and future generations.”¹⁹⁸ Moreover, NFMA both continued and enhanced the MUSYA’s emphasis on the range of uses and values for which the national forests should be managed. In considering the legislation, for example, the Senate took care to emphasize that an integral part of the planning process should be consideration of non-use forest values, including “wildlife and fish habitats, water, air, esthetics [and] wilderness.”¹⁹⁹

To ensure that the Forest Service’s management of the national forests balances diverse and often competing uses and values, NFMA required the agency to develop resource management plans “using a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic and other sciences.”²⁰⁰ The plans were to be developed in accordance with regulations that NFMA charged the Forest Service with promulgating.²⁰¹ Rather than leaving the content of the regulations to the agency’s discretion, however, Congress included seventeen detailed prescriptions for the guidelines that the Forest Service must include in its planning regulations.²⁰² These prescriptions include measures designed to give backbone to the aspiration that values other than timber harvesting receive due consideration during the process of developing and/or revising forest management plans. Specifically, NFMA mandates that the regulations:

- specify procedures to ensure that land management plans are prepared in accordance with NEPA.²⁰³
- provide for diversity of plant and animal communities within each national forest;²⁰⁴
- ensure that timber will be harvested from National Forest System lands only when distinct environmental conditions specified in the Act are met;²⁰⁵ and
- ensure that clearcutting will be used only within the constraints set forth in the Act.²⁰⁶

As one commentator has noted, the requirement that the Forest Service prepare land management plans for each national forest in accordance with NFMA and the regulations the agency was directed to promulgate was the statute’s “central reform.”²⁰⁷ The plans were “designed to force an autonomous, timber-driven agency to look beyond the next clearcut for a period of 15 years, manage for non-timber resources, and involve the public.”²⁰⁸ Indeed, although the 1897 Organic Act, the MUSYA, and NFMA each emphasized management of the national forests to ensure continued health and productivity, the statutes demonstrate increasing sensitivity to and emphasis on non-commodity use and other hard-to-monetize forest values. Thus, while the Forest Service’s original mission focused in large part on managing the national forests for timber harvesting, over the years it has expanded considerably.

In recent years, however, administrative and legislative actions have attempted – albeit indirectly – to shift the balance back towards a primary focus on timber harvesting.

Healthy Forests Restoration Act

In August 2002, President Bush launched the “Healthy Forests Initiative,”²⁰⁹ which culminated with the signing of HFRA in December 2003. The Healthy Forests Initiative was described by the White House as a set of measures designed “to reduce the threat of destructive wildfires while upholding environmental standards and encouraging early public input during review and planning processes.”²¹⁰ The basic premise of the initiative, and of HFRA is that forests today “often have unprecedented levels of flammable materials including . . . underbrush, needles, and leaves” and “are often so dense that they “form huge reservoirs of fuel awaiting ignition”. Accordingly, HFRA provides an expedited process to “remove hazardous fuels and make them unavailable for fire’s inevitable appearance,”²¹¹ efforts referred to by HFRA as “hazardous fuel reduction projects.”²¹²

In the name of “reducing unneeded paperwork” and “shortening the time between when a hazardous fuels project is identified and when it is actually implemented on the ground,”²¹³ however, HFRA eliminates important NEPA review requirements and

opportunities for public participation.²¹⁴ The Bush Administration claimed that it was “joined by a variety of environmental conservation groups” in its support of the legislation that would become HFRA.²¹⁵ Most environmental groups active on forest issues, however, have voiced considerable concern about the bill and the administrative measures put in place to support its goals.²¹⁶ For example, the Natural Resources Defense Council voiced concern that HFRA “reduces environmental review, limits citizen appeals, and pressures judges to quickly handle legal challenges to logging plans, all of which will likely speed up and increase commercial logging on federal forestlands.”²¹⁷

Moreover, the effectiveness of lowering fuel loads as a means of reducing the risk of wildfire is by no means universally accepted. The justification for HFRA was the severe fire seasons in the years just prior to 2003.²¹⁸ The Administration attributes these more severe fire seasons, in part, to the buildup of underbrush, needles and leaves in today’s forests.²¹⁹ However, critics argue that the recent severe fire seasons result from the combination of periods of prolonged drought, lightning, and high winds.²²⁰ Indeed, research documenting the effectiveness of broad-scale fuel reduction treatments for reducing the extent and severity of wildfires is generally lacking.²²¹ Accordingly, critics wonder whether HFRA’s real purpose is to allow timber harvests without the full measure of protections required by NFMA.²²²

Roadless Rule Reversal

Even before the launch of the Healthy Forests Initiative, within days of taking office, the Bush Administration was working to reverse protections put in place by President Clinton for roadless areas of the National Forest System. Beginning in 1924, the Forest Service managed many forest areas as natural, primitive or wilderness areas.²²³ As stated earlier, the MUSYA recognized that establishment and maintenance of wilderness areas is an appropriate use for national forest lands.²²⁴ In 1964, Congress

provided for more permanent, statutory wilderness areas with the 1964 Wilderness Act, which established the National Wilderness Preservation System.²²⁵ That Act directed review of Forest Service-designated primitive areas and other roadless areas to consider their suitability for preservation as wilderness.²²⁶ With respect to the national forests, this review was carried out in the Roadless Area Review and Evaluation (or “RARE”) studies.²²⁷ Roadless areas that were inventoried as part of the RARE studies or as part of subsequent reviews during the NFMA planning process are referred to as “inventoried” roadless areas.²²⁸ The Forest Service has identified approximately 58.5 million acres of inventoried roadless areas, representing 2 percent of the overall land area of the United States, and 31 percent of the area managed by the Forest Service.²²⁹

Even before the launch of the Healthy Forests Initiative, within days of taking office, the Bush Administration was working to reverse protections put in place by President Clinton for roadless areas of the National Forest System.

In recognition of the “strong public sentiment for protecting roadless areas and the clean water, biological diversity, wildlife habitat, forest

health, dispersed recreational opportunities and other public benefits” they provide, the Clinton Administration took an unprecedented step to govern their management.²³⁰ Specifically, the Clinton Forest Service proposed rules in May 2000 designed to put an immediate stop to activities likely to degrade desirable characteristics of inventoried roadless areas.²³¹ The final “Roadless Rule” was issued in January 2001 and prohibited road construction, reconstruction, and timber harvesting in inventoried roadless areas.²³² While praised by many, others criticized the Clinton Roadless Rule as being too restrictive and creating “de facto wilderness.”²³³

The Bush Administration agreed with the interests opposed to the Roadless Rule. Initially postponed as part of an overall regulatory freeze,²³⁴ the Roadless Rule was revisited in July 2001 when the Administration published an advanced notice of proposed rulemaking and request for comments.²³⁵ The action was predicated on concerns raised by states, tribes, organizations and citizens, which were

characterized as indicating a preference for making decisions on management of roadless areas through local planning rather than in accordance with a national rule.²³⁶

In May 2005, the Forest Service issued a final rule that replaced the Roadless Rule's nationwide protection of inventoried roadless areas with a process whereby state governors would have filed petitions with the Secretary of Agriculture to establish management requirements for roadless areas in the national forests within that state (the "State Petitions Rule").²³⁷ Notably, however, the Administration's rule authorized the Secretary of Agriculture to grant or deny such a petition, but lacked standards to govern the exercise of the Secretary's discretion in making that decision.²³⁸ Absent a successful petition, decisions about the activities to be permitted in roadless areas would default back to the uses allowed in each national forest's land management plan—in other words, the state of management that existed prior to the Roadless Rule.²³⁹

In October 2006, in the case of *California ex rel. Lockyer v. U.S. Department of Agriculture*, the United States District Court for the Northern District of California invalidated the State Petitions Rule on the grounds that it violated both NEPA and the ESA.²⁴⁰ In February 2007, the court issued an injunction, which provides that the State Petitions Rule is set aside, and the 2001 Roadless Rule is reinstated.²⁴¹ Litigation in Wyoming may complicate the court's ability to reinstate the Clinton Roadless Rule.²⁴² For now, however, the *Lockyer* court's order prohibits the Forest Service from taking actions contrary to the 2001 Roadless Rule until the agency remedies the State Petitions Rule's violations of NEPA and the ESA.²⁴³

NFMA Planning Regulations

That the land management plans for each national forest were envisioned under the Bush Administration's State Petitions Rule as establishing the kinds of activities that are permitted in roadless areas is but one demonstration of the importance of these plans, and of why the process of developing and revising them is so important. Among other

things, plans designate specific national forest lands for specific uses, establish appropriate levels and locations of timber harvests and determine how the impacts of such uses on wildlife will be monitored.²⁴⁴ In its revision of the NFMA forest planning regulations in 2005, however, the Bush Administration consistently disregarded the importance of forest management plans.

Like its rollback of the Roadless Rule, the Bush Administration's forest planning rule represented the culmination of an effort to undo a significant step forward in national forest policy undertaken by the Clinton Administration late in its second term. Although the Forest Service had attempted to revise the planning regulations several times since 1982 until 2000, the regulations governing national forest planning were those promulgated during the Reagan Administration.²⁴⁵ In 1995, President Clinton's Secretary of Agriculture, Dan Glickman, convened a Committee of Scientists (COS) pursuant to NFMA to "review and evaluate the Forest Service's planning process for land and resource management and to identify changes that might be needed to the planning regulations."²⁴⁶ Based in large part upon the recommendations contained in the 193-page report of the COS to the Forest Service,²⁴⁷ the agency proposed new NFMA planning regulations in 1999,²⁴⁸ and the final rule in 2000.²⁴⁹ Among the changes the new rule made were: 1) an increased emphasis on ecological sustainability in national forest land and resource management; 2) explicit methods for determining where and in what quantities timber could be harvested; 3) a requirement that the Forest Service use the "best available science" in planning; and 4) increased opportunities for public participation throughout the planning process.²⁵⁰

In a sequence of events reminiscent of those that unfolded with respect to the Roadless Rule, the Bush Administration prevented the 2000 NFMA planning rule from ever being implemented, and eventually replaced it with an altogether new set of regulations. Less than three weeks after President George W. Bush took office, the Society of American Foresters wrote to the President's new Secretary of Agriculture, expressing a variety of objections to the 2000 NFMA planning rule.²⁵¹ The concerns had been raised

previously, during the comment period on the proposed rule, but the new Forest Service's response could not have been more different than its predecessor's. On the basis of that letter, others from similar organizations, and a lawsuit, the new Forest Service undertook a review of the 2000 planning rule, which ultimately concluded that the agency could not implement the "flawed" rule.²⁵² The Administration issued interim rules delaying the date by which the 2000 rule would become effective until a new final planning rule was adopted.²⁵³ In 2002, a new proposed rule was published,²⁵⁴ and just over two years later, the final rule followed.²⁵⁵

The 2005 NFMA planning regulations (the "2005 Rule") reversed many of the advances in protecting non-timber values that the Clinton Administration's 2000 planning rule had made. In some respects, the 2005 Rule is considerably less protective of the environment than its 1982 predecessor, promulgated under President Reagan. Although a comprehensive analysis of the many ways in which the 2005 Rule expanded the Forest Service's discretion and makes it less accountable to the public is beyond the scope of this section, several themes are worth noting.²⁵⁶ The 2005 Rule:

- shifted the emphasis in forest management away from ecological sustainability and toward economic sustainability;
- took a distorted and incomplete view of economic sustainability;
- eased hurdles to timber harvests;
- weakened the role of science in forest management and planning;²⁵⁷
- watered down requirements to monitor national forests to ensure that management is achieving desired goals;
- reduced the Forest Service's accountability; and
- diminished opportunities for public participation.²⁵⁸

Perhaps the most significant change contributing to the new planning rule's diminished opportunity for public participation was its proposal to categorically

exclude national forest plans, plan amendments, and plan revisions from NEPA documentation.²⁵⁹ That proposal was finalized in December 2006.²⁶⁰ As stated earlier, NFMA requires that the land management planning regulations promulgated by the Forest Service specify procedures to ensure that land management plans are prepared in accordance with NEPA.²⁶¹ NEPA, in turn, requires that for "major federal actions significantly affecting the quality of the human environment," the federal agency undertaking the action prepare an environmental assessment (EA) or environmental impact statement (EIS).²⁶² Both the 1982 and 2000 planning rules responded to Congress's charge that plans be prepared in accordance with NEPA by requiring an EIS to be prepared for each forest plan.²⁶³ Accordingly, the public was able to participate in the development of the land management plan for a given national forest not only through the avenues provided in the planning regulations, but also through the NEPA/EIS process for that plan.²⁶⁴

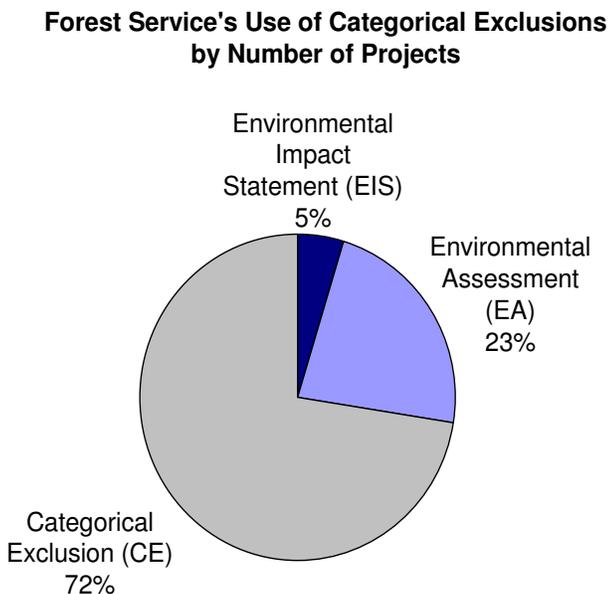
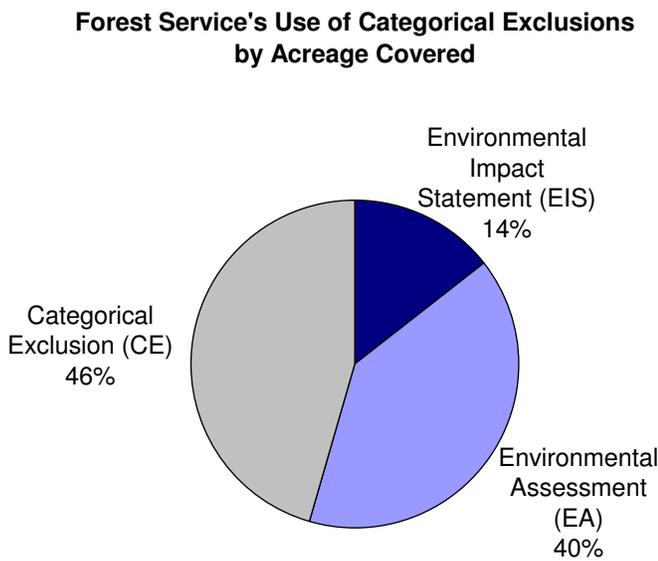
The Bush Administration, however, eliminated these additional opportunities for public participation when it categorically excluded NFMA management plans from NEPA. According to the Administration's reasoning, a forest plan "only has an environmental effect if it is knocked off the table and lands on the ground."²⁶⁵ Thus, since NEPA's requirements apply to actions that affect the quality of the environment, only when on-the-ground projects that emerge from long-term forest management plans actually take place is NEPA analysis necessary.²⁶⁶ This argument, however, seemed to ignore the plain language of NFMA, which directs that "land management *plans*" be prepared in accordance with NEPA.²⁶⁷

Not only did the Forest Service, in the 2005 Rule, provide that NFMA management plans would be categorically excluded from NEPA analysis, but it also applied another categorical exclusion from NEPA to the rule itself. That is, the Forest Service did not undertake any NEPA analysis as to the environmental impacts of the 2005 Rule, which the agency itself declared a "paradigm shift in forest planning."²⁶⁸ In March 2007, the United States District Court for the Northern District of California found that in failing to conduct any environmental analysis of the 2005 Rule,

the Forest Service violated NEPA.²⁶⁹ The court also found that the Forest Service violated the ESA by failing to undertake any type of consultation with the Fish & Wildlife Service or the National Marine Fisheries Service,²⁷⁰ as required by Section 7 of the ESA.²⁷¹ Finally, the court ruled that the Forest

Service had violated the APA because aspects of the final 2005 Rule were so different from the proposed rule that the agency was required to afford the public the opportunity to comment on the changes, which it failed to do.²⁷² Thus, the court enjoined the Forest Service from implementing or using the 2005 Rule until the agency “has fully complied with the pertinent statutes.”²⁷³

Figure 2: Forest Service’s Use of Categorical Exclusions to Approve Vegetation Management Projects (Calendar Years 2003 through 2005)²⁸¹



Source: U.S. Gov’t Accountability Office

Playing a Shell Game with NEPA Analysis

Apart from the ways in which the 2005 Rule has been found to violate the law, there is another reason to be troubled by the Forest Service’s new approach to complying with NEPA in the national forest planning process. The agency claims that excluding plans from NEPA analysis, as it tried to do in its 2005 Rule, would merely defer environmental impact analysis to the project stage. However, a recent report by the Government Accountability Office (GAO) provides reason for skepticism as to whether NEPA analysis would in fact occur at the project stage.²⁷⁴

A categorical exclusion (CE) from NEPA allows an agency to bypass an EA or a more detailed EIS for those actions that the agency determines are comprised of activities that fall within a category of activities it has already determined have no significant environmental impact.²⁷⁵ As of 2003, the Forest Service had only one CE for use in approving projects involving vegetation management activities – for projects undertaken for timber stand or wildlife habitat improvement.²⁷⁶ That year, however, in furtherance of the President’s Healthy Forests Initiative, the Forest Service added four new vegetation management CEs: 1) hazardous fuels reduction; 2) limited timber harvests of live trees; 3) salvage of dead or dying trees; and 4) removal of trees to control insects and disease.²⁷⁷

At the request of Rep. Tom Udall of New Mexico, the GAO conducted an analysis concerning use of CEs by the Forest Service for vegetation management projects from 2003-2005.²⁷⁸ Its investigation revealed that during those two calendar years, the Forest Service approved 3,018 vegetation management projects, which covered 6.3 million acres of national forest land.²⁷⁹ As seen in Figure 2, the Forest Service used CEs to approve 72 percent of those projects,

covering slightly less than half of the total acreage represented – 2.9 million acres, while 28 percent of projects (covering 3.4 million acres) were approved using an EA or an EIS.²⁸⁰ Given the Forest Service's demonstrated predilection to use CEs at the project level, it appears that excluding NFMA plans from NEPA analysis to conduct that analysis only at the project level will often result in no NEPA analysis.

Concluding Summary

Without question, the cumulative impact of the various national forest policies pursued by the Bush Administration takes forest management back in time, away from protecting non-economic forest values and toward the primacy of timber harvesting. Taken together, a consistent theme emerges. Consider: 1) HFRA, which eliminates procedural "hurdles" in the name of removing "fuel" for wildfires; 2) the reversal of protections for roadless areas; 3) the many and varied ways in which the 2005 forest planning rule flouts both the letter and spirit of NFMA; and finally 4) the effective excising of NEPA analysis for both plans and on-the-ground vegetation management projects. It becomes clear that the Bush Administration has paid less heed to the Senate's call nearly twenty years ago for forest management to give due consideration to "wildlife and fish habitats, water, air, esthetics [and] wilderness,"²⁸² and instead taken a cue from Congress's directive more than a century ago that the national forests be managed "to furnish a continuous supply of timber."²⁸³ This nineteenth-century view of our national forests virtually ensures that NFMA's aspiration that the national forests (and their many and varied values) will be available for the benefit of future generations will go unfulfilled.

Neglecting National Parks

Background

The national parks attract approximately 300 million visitors each year. Data maintained by the DOI show that since 1998, the parks have consistently enjoyed an approval rating in excess of 95 percent – one of the highest for any federal program. Accordingly, in 2000, when George W. Bush was running for President, his promises to direct renewed efforts and attention to the National Park System were no doubt

met with near universal approval. In a rare campaign mention of an environmental topic, candidate Bush challenged then Vice President Al Gore on his own commitment to the environment, charging that the Clinton Administration had seriously neglected the upkeep of the national parks. At the time, candidate Bush charged that the Clinton Administration had been devoting too much money toward creating new national parks, pointed to the nearly \$5 billion backlog of necessary maintenance work, and promised to eliminate it with \$3.75 billion in additional federal money over five years.

Two years into President Bush's second term in office, the \$5 billion backlog remains, and may now be as large as \$9.7 billion. Moreover, the National Park Service faces an annual \$800 million shortfall in operations funding. President Bush's proposed 2007 budget called for \$100 million in cuts to park appropriations – or, as the Bush Administration asked park superintendents to refer to them prior to the 2004 election "service level adjustments." In early 2007, the Administration changed course, and received much praise for a proposal to significantly increase operations funding for the NPS in its FY 2008 budget. However, the majority of the money has merely been shifted from other NPS programs, and the overall proposed increase in appropriations is a tiny fraction of the funds needed to narrow the funding gap. Recent reports by the Government Accountability Office and the Coalition of National Park Service Retirees (CNPSR) confirm that the parks have suffered the effects of funding shortfalls – effects that provide backing for the very solutions advocated by those interested in greater privatization of the national parks.

Instead of providing the funding the parks so desperately need, political operatives in the Bush Administration have instead attempted to meddle in park management for the gain of special interest constituencies. Under the management of former Secretary Gale Norton, DOI spearheaded an unprecedented attempt to reverse a nearly-century old mantra governing management of the national parks – putting conservation first so as to leave the parks unimpaired for future generations. Although the immediately obvious effect of the proposed reversal

would have been to open up parks to increased use by motorized recreational vehicles (as long sought by that industry's lobbyists), the impacts would have extended much farther.

The leak of an initial draft of the revised guidelines, authored by a political appointee inside DOI – sparked outrage inside the Park Service, among advocacy groups including the National Parks Conservation Association (NPCA), CNPSR, and the public at large. An outpouring of more than 50,000 public comments made clear the public's fury at the politically-motivated attempt to open treasured national parks to the kind of short-sighted recreation that will lead to the exact result the Park Service's Organic Act prohibits: impairing the parks for future generations.

In summer 2006, after less than a month in office, Interior Secretary Dirk Kempthorne rejected the controversial proposal in favor of policies drafted by the Park Service. Secretary Kempthorne's decision drew universal praise from conservationists and retired Park Service professionals. Though the highly visible crisis over the management policies has passed, the political forces that proposed the change in the first place remain committed to their goals of opening the parks to greater commercialized recreation and economic development.

The American public has made its preferences concerning National Parks clear – political attempts to squander these most treasured of public lands will not be tolerated. However, this latest round of efforts to allow commercial encroachment into the national parks will not be the last. Sustained public vigilance will be necessary to ward off the inevitable continued efforts by those who stand to gain financially from co-opting a shared public resource meant to last for generations for the short-term benefit of a select (politically well-connected) few.

Maintenance Backlog and Strained Operations Funding

The NPS Organic Act provides that the fundamental purpose of the national parks is “to conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of

the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.”²⁸⁴ The mandate is clear – the national parks are to provide opportunities for the American public to enjoy park resources in a manner that will allow future generations the same opportunity. On the presidential campaign trail, then-candidate Bush ostensibly recognized the importance of park resources, musing that the parks contain “America's memories and America's grandeur.”²⁸⁵

Running against former Vice President Al Gore, Bush promised to succeed where he charged the Clinton Administration had failed – eliminating a roughly \$5 billion backlog of necessary maintenance work in the parks.²⁸⁶ The term “maintenance backlog” refers to the accumulation of unmet maintenance needs throughout the national park system's 390 park units, a problem that Park Service officials have highlighted for years.²⁸⁷ Park facilities and other assets in the Park System's more than 84 million acres include “over 18,000 permanent structures, 8,000 miles of roads, 1,800 bridges and tunnels, 4,400 housing units, about 700 water and wastewater systems, over 400 dams, and 200 solid waste operations,” valued at over \$35 billion.²⁸⁸ As the GAO explained in recent congressional testimony, “[p]roper care and maintenance of the national parks and their supporting infrastructure is essential to the continued use and enjoyment of our national treasures by this and future generations.”²⁸⁹

DOI claims on its website that “[t]remendous headway has been made” in addressing the maintenance backlog, thanks to a total investment of \$3.9 billion in funds committed by President Bush.²⁹⁰ An analysis by the GAO reveals that since 2001, the Park Service has indeed made reducing its maintenance backlog a high priority, but increased emphasis on reducing the maintenance backlog unaccompanied by sufficiently increased funding has resulted in cuts in other areas. Specifically, the Park Service set a goal to spend the majority of its visitor fees on deferred maintenance projects—\$75 million in 2002 increasing to \$95 million in 2005.²⁹¹

However, officials at several park units analyzed by the GAO stated that the visitor fee-funded projects

require additional administrative and supervisory tasks, which “add to the workload of an already-reduced permanent staff.”²⁹² This policy shift, along with increased costs and a decline in overall funding for daily operations (when adjusted for inflation)²⁹³ have resulted in parks reducing daily operations spending by, for example, reducing spending on personnel and cutting back on visitor center hours, educational programs, basic custodial duties and law enforcement operations.²⁹⁴

This strain to park operations has been heaped onto the Park Service at a time when it was already struggling to fulfill operational goals despite an annual funding shortfall of hundreds of millions of dollars. Specifically, in 2001 the NPCA conducted an analysis that concluded that the Park Service faced a total operating shortfall of \$600 million.²⁹⁵ By the end of fiscal year 2006, the NPCA estimated that the annual shortfall in operations funding exceeded \$800 million.²⁹⁶

Moreover, the GAO still estimates the Park Service’s maintenance backlog at over \$5 billion,²⁹⁷ while the Congressional Research Service estimated in 2005 that the backlog was between \$4.52 billion and \$9.69 billion, with a mid-range figure of \$7.11 billion.²⁹⁸ The sum total of the Administration’s progress towards addressing the maintenance backlog seems to be that while individual maintenance projects have commenced, overall the backlog remains, and other services have suffered. Specifically, CNPSR’s analysis of the GAO report concluded that staff reductions “could lead to wildlife poaching, defacing and theft of archaeological sites, and destruction of park resources.”²⁹⁹ In addition to the loss of such invaluable park resources, Bill Wade, former superintendent of Shenandoah National Park in Virginia (now chair of the CNPSR Executive Council) pointed out that visitor services also suffer as the result of the strained park budgets:

This is not just about some more litter and some outhouses being locked. This has now escalated to visitor safety . . . Visitors and resources will be put at greater risk . . . due to extensive full-time emergency and law enforcement staff cuts.³⁰⁰

Recent Budget Proposals

To this already strained record of funding for one of the government’s most popular of public resources, President Bush’s budget for 2007 proposed cutting the Park Service’s budget by 5 percent – one hundred million dollars.³⁰¹ Moreover, the Administration asked each park to develop budgets based on a 20-30 percent reduction in appropriation support to be implemented over the next five years.³⁰² “Talking points” distributed in April 2006 to all park superintendents urged them to “begin ‘honest and forthright’ discussions with the public about smaller budgets, reduced visitor services and increased fees.”³⁰³ (The instruction to be “honest and forthright” marks a change from the lead-up to the 2004 Presidential election, when park officials were ordered to avoid mention of budget cutbacks and instead use the euphemism “service level adjustments.”)³⁰⁴

The 2006 talking points encouraged park officials to emphasize that the NPS, “like most agencies, is tightening its belt as our nation rebuilds from Katrina, continues the war on terrorism and strives to reduce the deficit.”³⁰⁵ Some observers wondered whether the cuts were the result of an inevitable government-wide “tightening of the belt” or whether they were indicators of a push to set the stage for privatization. A *New York Times* editorial noted that “[v]iewed cynically, deliberately underfinancing the parks could create the necessary cover for opening the parks to more commercial activity.”³⁰⁶

In early 2007, the Bush Administration unveiled the National Parks Centennial Initiative, a ten-year effort to “strengthen visitor services and other programs in parks and to prepare to address the needs of the public in time for the NPS centennial in 2016.”³⁰⁷ The first step toward achieving these goals was laid out in the President’s proposed budget for FY2008, which, if passed, would represent the largest operating increase in the National Park System’s 90-year history.³⁰⁸ The Administration has received widespread acclaim for this much-needed increase in park funding.³⁰⁹

Along with praise for the proposal, however, Parks advocates have noted several concerns. The CNPSR

points out that although the budget proposes a \$230 million “increase” in park operations, \$211 million of that sum has come by shifting money away from other park priorities.³¹⁰ The actual increase in appropriations (that is, new money to go into the Park Service) is only about 2 percent above actual 2006 levels.³¹¹

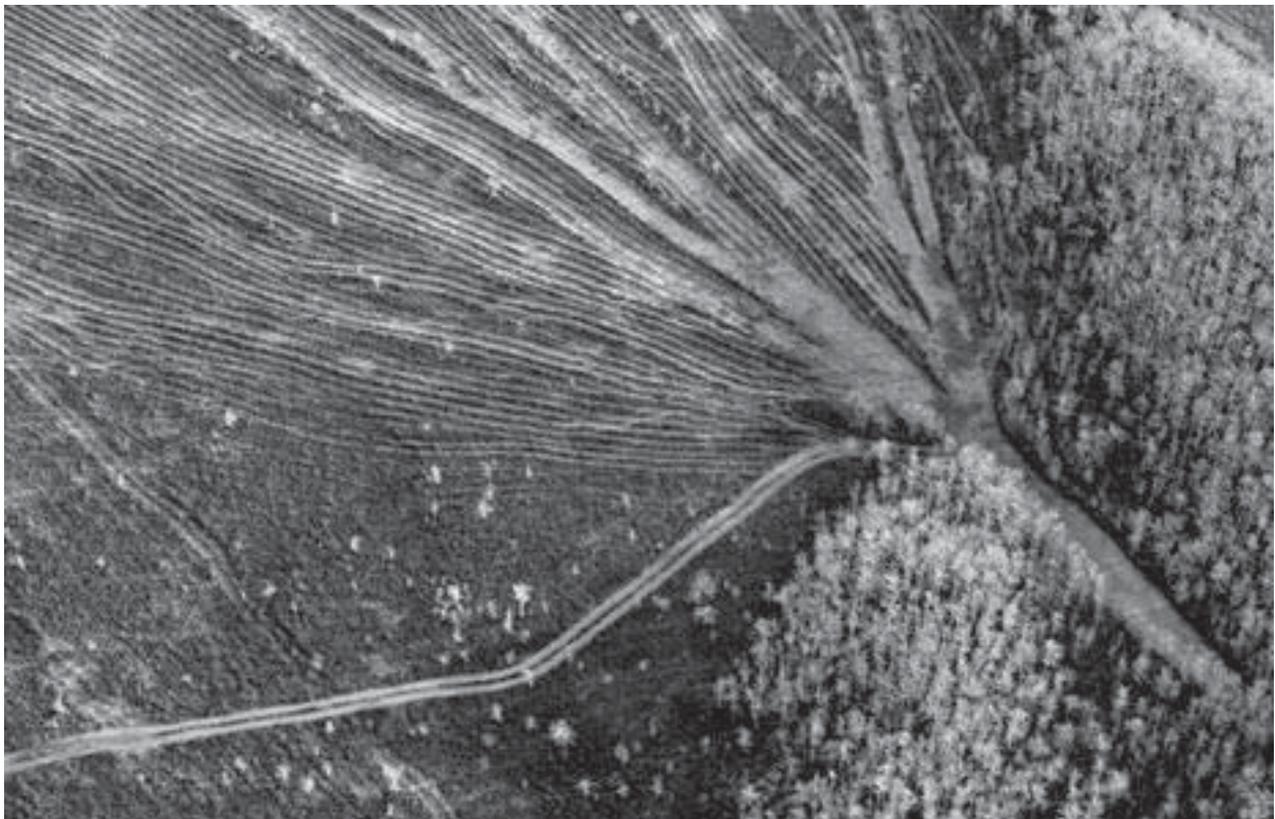
Of equal (or greater) concern is a provision in the proposed budget stipulating that if the public contributes at least \$100 million per year to the parks, the federal government will match the contributions with additional \$100 million.³¹² The CNPSR notes that the matching funds provision lacks any safeguards that would limit the contributions to bona fide non-profit “friends groups” and foundations.³¹³ Without such safeguards, CNPSR explains, park managers could be tempted to expand their efforts to seek donations beyond appropriate philanthropic ones, thus opening the door to privatization of the parks.³¹⁴ An Editorial in the *Baltimore Sun* expressed similar concerns, stated more starkly:

Private entities already have such influence that the National Park Service refuses to ban snowmobiles from the beloved Yellowstone, granddaddy of all national parks, despite three successive studies documenting damage to air quality, wildlife habitat and peace and quiet. The Bush Administration has proved unduly sympathetic to the recreational vehicle industry, which contends its customers aren’t content to tool through nearby forests but want to be able to ride up Old Faithful. Soliciting donations to the parks from those and other businesses, as well as foundations and individuals, raises the prospect that such influence will only grow.³¹⁵

Attempting to Redefine ‘Impairment’: The Revised NPS Management Policies

In 2005, a much-publicized (though originally not-intended-for-public-consumption) draft rewrite of the NPS management policies revealed the extent of the

Figure 3: Destructive results of ORV use in Big Cypress National Preserve, Florida³¹⁶



Source: *National Geographic Magazine*. Photo by Michael Melford.

Bush Administration's sympathy to the recreational vehicle industry's aspirations for the parks. The overall effect of the changes proposed was to "shift the management focus from the park service's central mission – preserving natural resources for the enjoyment of future generations – to commercial and recreational use of the park for today's generation."³¹⁷ The proposed changes ultimately failed after sustained public resistance. Nevertheless, their saga serves an indicator of the kind of changes the Administration may yet attempt to pursue via other avenues, particularly if the influence of private industries on parks policies grows with the President's matching funds initiative.

Though free to change the management policies at any time, DOI and the Park Service have only amended the policies twice – last in January 2001, during the final days of the Clinton Administration.³¹⁸ Officials in the new Administration's DOI quickly undertook a new round of revision, since the 2001 policies were apparently perceived as a "Clinton thing."³¹⁹ By the time the draft revisions were leaked during the summer of 2005, they had apparently been in the drafting stages for two years.³²⁰

Paul Hoffman, then DOI's deputy assistant secretary for fish, wildlife, and parks, was the nominal author of the revised policies. Hoffman was a political appointee, hand-picked by then-Secretary of the Interior, Gale Norton,³²¹ and he prepared the proposed revisions without consulting the very agency that stood to be bound by the changes: NPS.³²² The myriad of changes that elicited furor from inside the Park Service as well as from the general public can perhaps best be summed up by the change of a single sentence.³²³ Hoffman struck out the longstanding core declaration, grounded in the NPS Organic Act, that "when there is a conflict between conserving resources and values and providing for enjoyment of them, *conservation is to be predominant.*"³²⁴ Instead, Hoffman declared, the guiding principle of the new management policies would be that the NPS "must *balance* the sometimes competing obligations of conservation and enjoyment in managing the parks."³²⁵

Along the same lines, another important change in the Hoffman rewrite's language would have effectively

eviscerated the Organic Act's directive that the parks be left unimpaired for future generations. The 2001 management policies gave wide latitude to park officials to exercise their judgment in order to prevent "impairment" to the parks, defining the term as "an impact to any park resource or value [that] may constitute an impairment."³²⁶ Hoffman's draft would have raised the bar significantly, changing the definition of impairment to an impact that could be proved to "permanently and irreversibly adversely [affect] a resource or value."³²⁷

One final change bears particular mention. The 2001 management policies specifically recognized that "[i]n addition to their natural values, natural sounds, such as waves breaking on the shore, the roar of a river, and the call of a loon, form a valued part of the visitor experience."³²⁸ Hoffman's draft proposed to enshrine the opportunity for visitors to have a very different kind of experience, replacing that language with the following:

There are many forms of mechanized equipment, and mechanized modes of travel, and improved technology has increased the frequency of their use. In some areas and under certain conditions, the use of mechanized equipment and mechanized modes of travel may be determined to be an appropriate use.³²⁹

Critics characterize these changes not as the reflection of Hoffman's personal agenda or "an attempt to start a dialogue" (the Park Service's official position after the draft was leaked).³³⁰ Instead, they charge, Hoffman is "the appointee who . . . carried out his superior's wishes—the embodiment of what the Bush Administration feels about national parks, and how it wants them changed."³³¹ The Administration's goals for the parks were personified in the President's choice for the post of Interior Secretary, Gale Norton. Norton's "absolutist views on property rights and her hostility to environmental protections" were said to have "place[d] her far outside the mainstream of even conservative legal scholarship on these issues."³³² Certainly Hoffman's ties to the Administration are at the highest levels – before coming to DOI, he served for twelve years as Executive Director of the Cody,

Wyoming Chamber of Commerce—and before that as a congressional aide to Dick Cheney in the 1980s.³³³

Moreover, Hoffman’s attempt at permanently protecting the right to use off-road vehicles (ORVs) instead of the Park Service’s ability to conserve the parks themselves is a reflection of the close ties between the Administration and the ORV industry. Secretary Norton is said to have frequently availed herself of the counsel of William Horn, a lawyer and lobbyist who previously served as Assistant Secretary of the Interior for Fish, Wildlife, and Parks during the last three years of the Reagan Administration.³³⁴

Horn currently represents, among others, the International Snowmobile Manufacturers Association.³³⁵ While the NPS itself did not have a voice in the preparation of Hoffman’s draft policies, the International Snowmobile Manufacturers Association did—William Horn has said that he “weighed in with opinions” on the draft “when he could.”³³⁶

In November 2005, Horn testified before the Senate Subcommittee on National Parks in support of a revised version of Hoffman’s proposed management policies, which the Park Service issued following the public outrage at the original version.³³⁷ His testimony, which included prominent mention of his past experience at DOI, omitted reference to his current representation of the International Snowmobile Manufacturers Association.³³⁸ Horn argued that the 2001 management policies were “overtly hostile to traditional visitor use” and that “Congress has never intended that parks be managed as “biospheres under glass” or managed in an “exclusionary” manner.”³³⁹

Horn’s characterization of the 2001 management policies, however, ignored the fact that despite being unable to engage in some uses prohibited inside the parks, 300 million annual visitors still give the parks a 95 percent approval rating.³⁴⁰ Rather than concern for the enjoyment of visitors, the true motivation behind the push to open the parks to more ORV use seems to have been to increase the market for the ORV industry. As noted by the former superintendent of Yellowstone National Park, Mike Finley, whenever Hoffman “talked about ‘use,’ it always had a commercial connotation.”³⁴¹

In the end, the revised management policies for the NPS failed. Following Gale Norton’s departure from DOI, Secretary Dirk Kempthorne – after less than a month on the job – abandoned the draft revision and restored “the longtime standard that national parks must emphasize preservation over any other activity.”³⁴² Outcry from the media, the public (more than 50,000 comments on the revised draft were filed – “one of the most significant outpourings of public concern about a park issue in the 90-year history of the system”),³⁴³ and from within the park service may have played a pivotal role in the Administration’s reversal.

The public is left to wonder, however, what other less visible, perhaps more incremental, but nonetheless destructive institutional changes are being pushed at DOI. The Administration has made clear its resolve to continue pushing its agenda through executive branch initiatives as he is confronted with a Democratic majority in the 110th Congress. According to White House spokesman Tony Snow, the President has

been calling all his Cabinet secretaries and telling them, ‘You tell me administratively everything you can do between now and the end of the presidency. I want to see your to-do list and how you expect to do it.’ We’re going to try to be as ambitious and bold as we can possibly be.”³⁴⁴

While two of the publicly-known faces of the failed attempt to write conservation out of the national park management policies have since departed DOI, Paul Hoffman remains, though now exercising less direct control over the park system.³⁴⁵ Both Congress and the public need remain vigilant to ensure that the special interests who have the Administration’s ear do not achieve their goals at the expense of our shared park legacy.

Concluding Summary

The Bush Administration fully appreciates the public’s desires for our national parks. The President’s campaign promise to eliminate the maintenance backlog, and the recently unveiled Centennial Initiative demonstrate this understanding.

Yet the Administration's record on national parks – characterized by its failure to fix the maintenance backlog, cuts in operations funding and attempted political meddling in park management – stands in contrast to the public's wishes.

Secretary Kempthorne's rejection of Paul Hoffman's proposed management policy rewrite is a welcome affirmation of the public's desires for our shared parks, as is the increase in public funding proposed in the President's proposed budget for FY2008.

However, the economic forces arguing in favor of increased 'use' of the parks for the enjoyment of today's visitors will remain strong in the coming years. If safeguards are not put in place, private donations in furtherance of the Centennial Initiative's matching funds program could further strengthen the influence of these private industries on our public parks policies.

In the long-term, Congress and the public need remain vigilant to ensure that those charged with managing our national parks adhere to the statutory mandate that today's enjoyment of the parks be the kind that leaves them "unimpaired for the enjoyment of future generations." In the short-term, the Administration and Congress should work together to pass – and surpass – the federal funding levels stipulated in the President's FY2008 budget proposal. Moreover, if Congress chooses to pass the "matching funds" provision of the Administration's centennial initiative, it must ensure that appropriate safeguards are in place to prevent the privatization of our public National Park System.

The Unfulfilled Promise of the National Wildlife Refuge System

Background

The 100-year old, 100-million acre National Wildlife Refuge System (NWR System) provides sanctuary to wildlife, including many endangered species, in refuge units located in every state. Among the federal public lands, they are singularly accessible to people, with at least one refuge located within an hour of every major metropolitan area in the country. Yet, the refuges are also "the under-appreciated, quiet, middle child in the family of federal public lands."³⁴⁶ While the issues

affecting the better-known, better-funded national parks and forests are well known to many, the serious challenges facing the wildlife refuges often go untold. Among those challenges are the issues discussed herein – namely, the struggle of the refuges to overcome past problems and coalesce into a true network of conservation lands, and the policy and financial burdens that hamper their ability to do so.

The National Wildlife Refuge System in Historical Context

In 1903, President Theodore Roosevelt took the first step in building what would become one of the "world's premier network of wildlife habitats": the NWR System.³⁴⁷ That year, by Executive Order, President Roosevelt established the 3-acre Pelican Island, situated off Florida's Atlantic coast, as a preserve and breeding grounds for native birds, including brown pelicans, egrets and great blue herons.³⁴⁸ Over the years, additional areas were added to the system of wildlife refuges, in a variety of ways. "Units were created in response to crises, personal preferences of high-ranking officials (and legislators), funding availability, social program priorities, donations, and, of course, wildlife needs."³⁴⁹

Today, the sum of these individual additions is a refuge system that consists of some 550 units, totaling 95 million acres.³⁵⁰ Although the bulk of refuge lands are in Alaska, there is at least one National Wildlife Refuge in every state, and at least one within an hour's drive of every major metropolitan area in the U.S.³⁵¹ Accordingly, the NWR system is among the most accessible of public lands, providing important opportunities for urban and suburban residents to access nature.

As varied as the ways of establishing refuges were the purposes for which individual units were established.³⁵² Individual refuge purposes range from the very narrow (such as preserving and managing habitat for a single species) to the more generic (such as providing habitat for waterfowl or fulfilling international migratory bird treaty obligations).³⁵³ Accordingly, although the wildlife refuges were frequently termed a "system," prior to 1997 the units could in fact be more accurately viewed as "independently managed entities sharing a common

mission.”³⁵⁴ That common mission was (and is) to manage wildlife refuges primarily to preserve and enhance wildlife resources.³⁵⁵ Thus, like the national parks, and in contrast to multiple-use public lands such as the national forests, they are a system of public lands governed by a “dominant use” policy.³⁵⁶ However, although Congress passed numerous pieces of legislation that established funding mechanisms for the expansion of, and parameters governing, the refuges,³⁵⁷ it did not codify a system-wide mission until it enacted the Refuge Improvement Act of 1997 (the “1997 Act”).³⁵⁸

Impetus for the 1997 Act: Incompatible Uses Harming Refuges

In the years prior to passage of the 1997 Act, “[a] combination of austere funding, lax oversight, limited jurisdiction and local political pressure gave rise to widespread incompatible uses on refuges.”³⁵⁹ By the late 1980s, concern over “declining populations of migratory waterfowl and other wildlife,” prompted Congress to ask the GAO to investigate management of the nation’s wildlife refuges.³⁶⁰ The GAO’s findings, contained in a 1989 report, revealed that secondary uses were occurring on 92 percent of all refuges, with at least one use harmful to wildlife interests occurring on 59 percent of refuges.³⁶¹

These findings stood in stark contrast with the “compatibility” standard, an important component of refuge management incorporated in the laws governing the wildlife refuges.³⁶² Uses not directly related to the primary conservation purpose (*i.e.*, secondary uses) of the refuge were, and still are,³⁶³ prohibited unless the U.S. Fish and Wildlife Service (“FWS” or the “Service”) determines such uses to be compatible with the refuges’ purposes of protecting and enhancing wildlife and their habitat.³⁶⁴ Nonetheless, the GAO discovered that harmful secondary uses, including mining, military exercises,

use of off-road vehicles, airboats and large power boats (among others) were occurring on more than half the nation’s wildlife refuges.³⁶⁵

The reasons identified by refuge managers as to why these harmful uses were occurring despite the compatibility mandate were twofold. First, in many cases, the uses were being allowed in response to political or community pressures.³⁶⁶ Indeed, as noted by the GAO, “[t]he pressure on FWS to allow secondary uses on refuges is often intense.”³⁶⁷ Second, in some cases, the FWS lacked full ownership of, or control over, refuge land, water, or resources.³⁶⁸

The 1997 Act and a System-wide Mission

The GAO report prompted a new wave of efforts to reform conservation of refuge resources.³⁶⁹ A

congressional hearing to evaluate the findings of the report led to a number of reform bills, which addressed topics that were included in an executive order issued by President Clinton, and ultimately, the 1997 Act.³⁷⁰ As Professor Robert Fischman, an authority on the National

Like other organic statutes referred to in this report, the mission for the NWR System set forth in the 1997 Act specifically contemplates long term sustainability by referring to conservation of fish, wildlife and plant resources for the benefit of both present and future generations of Americans.

Wildlife Refuge System has noted, “[w]hile the national parks, national forests and [BLM] lands received concentrated attention from Congress in the 1970s,” only with enactment of the 1997 Act did the refuges acquire updated organic legislation for coordinated management.³⁷¹

Organic legislation, according to Professor Fischman, “seeks to organize management among diverse public land units so that, together, they can achieve more than just the sum of their parts. In other words, it aims to transform collections of resources into organic systems.”³⁷² Requiring this transformation by statute is especially important to the national wildlife refuges, given the history of opportunistic acquisition of units and varying individual refuge purposes. Among the reforms instituted by the 1997 Act is the adoption of a system-wide mission, which clearly establishes conservation as its goal:

The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.³⁷³

Like other organic statutes referred to in this report, this mission specifically contemplates long term sustainability by referring to conservation of fish, wildlife and plant resources for the benefit of *both present and future generations* of Americans.³⁷⁴

Confirming the ecological focus of the refuges is the phrase “national network of lands and waters,” which recognizes a key lesson of conservation biology: in order to effectively contribute toward wildlife conservation, preserves must be interconnected.³⁷⁵ Thus, the mission set forth in the 1997 Act serves as a reminder of the advances in conservation science since President Roosevelt’s establishment of the Pelican Island preserve, and the gradual incorporation of those lessons into policy.³⁷⁶ The system-wide mission’s significance goes beyond historic interest, however – in short, it makes clear that the NWR System is to serve as more than a collection of individual units. Instead the network of refuges is integral to sustaining wildlife resources for future generations. Thus, the 1997 Act “finally provided a unifying mission for a system that retains a disparate set of establishment purposes for individual refuges.”³⁷⁷

At an operational level, although the individual purposes for which refuges were established retain importance,³⁷⁸ the system-wide mission is critical because it establishes a “bottom line for management.”³⁷⁹ The compatibility standard, which long governed refuge management, “finally grew sharp teeth” in the 1997 Act and the subsequent compatibility policy, issued by the Clinton Administration.³⁸⁰ Those regulations require not only that recreational uses be compatible with the mission, but also that commercial development satisfy a higher standard—specifically, such development must affirmatively contribute to attaining the conservation mission.³⁸¹

Against this backdrop, the debate over whether to develop the potential oil field underlying the Arctic National Wildlife Refuge (discussed elsewhere in this report) should – but often does not – address the impacts of the outcome on the National Wildlife Refuge System as a whole. Instead, “debates over drilling in the refuge are almost completely devoid of systemic concerns, and instead discuss the refuge as though it were unconnected to a larger web of reserves managed for large-scale conservation goals.”³⁸²

Failures That Threaten the Potential of the NWR System to Achieve its Mission

The challenges to fulfilling the new statutory mission for the Refuge System extend beyond the failure by those debating whether to drill in the Arctic Refuge to recognize its identity as but one part of the 93 million acre system. Certainly, a shift in the popular consciousness to viewing each individual refuge as but one part of a whole will be important to achieving the refuge system’s goal of serving as a true network of habitats, sustaining wildlife in this generation and beyond. That shift in consciousness, however, may depend upon a visible transformation in the management of individual refuges—which, in turn, will depend on the seemingly mundane but absolutely essential realities of day-to-day management by the FWS. Chief among those realities are: 1) the implementation of the 1997 Act by FWS policies and regulations; and 2) funding for the NWR System. Both matters provide cause for concern.

Policies

As mentioned earlier, the Clinton Administration issued a policy implementing the 1997 Act’s compatibility criterion.³⁸³ The Compatibility Policy was one of three policies issued by the Clinton Administration from May 2000 to January 2001.³⁸⁴ In fact, President Clinton’s FWS had proposed three more draft policies, but its time had run out, and the draft policies were left to the new Bush Administration to revise.³⁸⁵ Five years later, in 2006, President Bush’s FWS issued the three policies in final form: 1) the Goals and Refuge Purposes Policy; 2) the Appropriate Uses Policy; and 3) the Wildlife-Dependent Recreation Policy.³⁸⁶ A recent detailed

analysis of these policies by Professor Fischman makes clear that overall, the policies make less of a departure from the Clinton-era drafts than other Bush Administration public lands policies³⁸⁷ (for example, the NFMA planning regulations and Roadless Rule examined earlier in this report).

They do, however, “bear the prints of an administration less oriented toward ecosystem protection and more concerned with both sustaining existing refuge activities and deferring to state wildlife management preferences.”³⁸⁸ States, in turn, are still oriented principally toward promoting game and sport fish.³⁸⁹ Both activities have long histories on the national wildlife refuges.³⁹⁰ However, this deference to states on the part of the Bush Administration means that the policies will do more to perpetuate promotion of the older, individual refuge purposes than to advance the new system-wide, ecologically-focused conservation mission for the national wildlife refuges. Strains of this same theme are seen in each of the three 2006 policies.

The Goals and Refuge Purposes Policy

The Goals and Refuge Purposes Policy helps define two critical benchmarks for comprehensive planning and compatibility determinations – whether activities fulfill the mission of the refuge system and the individual units affected.³⁹¹ Although the policy fleshes out the system-wide mission established in the 1997 Act with five goals, which “provide an excellent, progressive statement of what a national network of public property can accomplish beyond fulfilling individual, site-specific purposes,”³⁹² the policy’s elevation of individual unit purposes higher than necessary undercuts the potential of the refuges to coalesce into a true system instead of merely a collection of units. Essentially, the FWS designed the Goals and Refuge Purposes Policy to make serving the system goals a luxury instead of a core necessity, while privileging (sometimes outdated) individual purposes.³⁹³

Professor Fischman’s study points us to an indication as to why, in the explanatory material prefacing the policy. There, the Service stresses its commitment to work cooperatively with state fish and wildlife

agencies.³⁹⁴ While such cooperative federalism is a theme in the 1997 Act,³⁹⁵

beneath the surface . . . is a tension between the restoration- and preservation-oriented view of the wildlife refuges as ecological networks, and the promotion of hunting and fishing. State wildlife and fish agencies derive much of their funding and most of their political support from the hunting and fishing constituencies. The individual refuge purposes are less beholden to the more modern ecological conceptions of conservation embodied in . . . the 1997 Act and more responsive to the priorities of these groups.³⁹⁶

The decision to favor individual purposes over the system mission reflects a prioritization of more traditional “hook and bullet” objectives over the ecological principles of systemic organization.³⁹⁷ Although arising in a different context, this prioritization of one special interest over the general public interest brings to mind the influence wielded by special interests in other Bush Administration public lands policies – particularly those related to the national forests and parks. It also recalls the 1989 GAO report and its findings that: 1) harmful uses were occurring on the majority of refuges; and 2) one of the principle reasons the harmful uses were being allowed was in response to political or community pressures.³⁹⁸ Congress’s response to those findings was to pass the 1997 Act, with its new emphasis on a systemic, ecologically-focused mission. The 2006 Goals and Refuge Purposes Policy may hamper the 1997 Act’s vision of transforming the refuges “from a collection of disparate reserves to a coordinated system of continental-scale ecological conservation.”³⁹⁹

Appropriate Uses Policy

The 2006 Appropriate Uses Policy also gives an unusual amount of deference to state fish and wildlife agencies. The 2006 Appropriate Uses Policy establishes four categories of activities that need not pass through appropriate use analysis before either receiving approval or moving on to compatibility analysis.⁴⁰⁰ Significantly, the Appropriate Uses Policy

defines one of these categories – “refuge management activity” – to include actions by state fish and wildlife agencies when they meet any one of three criteria.⁴⁰¹ Although states often have special avenues for inserting their priorities in federal land management, according actual federal equivalence to state actions “represents a significant movement beyond the normal cooperative relationship.”⁴⁰² With this exemption, the Bush Administration has “opened a back door for state agencies to conduct activities on the refuges with no more scrutiny than a memorandum of agreement.”⁴⁰³

Wildlife-Dependent Recreation Policy

The third of the three 2006 wildlife refuge policies mirrors another one of the major shortcomings of the Goals and Refuge Purposes Policy – an emphasis on traditional “hook and bullet” uses on refuges over other interests. Wildlife-dependent uses, as defined in the 1997 Act are: “hunting, fishing, wildlife observation and photography, or environmental education and interpretation.”⁴⁰⁴ While the Wildlife-Dependent Recreation Policy devotes 5 and 6 pages of text to hunting and fishing, respectively, the remaining four of the “big six” wildlife-dependent recreational uses receive only 2-3 pages of guidance each.⁴⁰⁵

Professor Fischman suggests that the disproportionate treatment is likely due in part to the activities’ “deep history” on the refuges, and the fact that they deal with state and federal regulation.⁴⁰⁶ However, the disparity in emphasis contradicts the Service’s statement in its explanatory material accompanying issuance of the policy that “the six wildlife-dependent recreational uses are equal.”⁴⁰⁷ Precisely due to the extensive history of hunting and fishing on wildlife refuges, refuge managers typically are familiar with the issues they present, and often may be formally trained in sport fish and wildlife management.⁴⁰⁸ The “non-hunting-and-fishing” uses, on the other hand – such as environmental education and interpretation – are those in need of more guidance from the Policy.⁴⁰⁹ In this regard, however, the 2006 policies pass on another opportunity to embrace the new vision charted by the 1997 Act.

Funding

Whether and to what extent the FWS is able to realize the vision established by the 1997 Act’s system-wide mission is dependent not only on the language of the implementing policies but on the funding it receives to manage the refuges. The funding situation facing the refuges today can accurately be described as a crisis, and is not only the greatest threat to achieving the lofty goals of the 1997 Act but also to even being able to maintain the status quo. As a recent *Los Angeles Times* article aptly put it, the NWR System “was created a century ago to provide a haven for the most imperiled species,” but today it “is itself jeopardized by budget constraints.”⁴¹⁰

The wildlife refuges face an uphill battle in achieving needed funding. Of all the federal public lands, the NWR System receives the smallest per acre appropriations.⁴¹¹ By comparison, “national parks receive nearly six times the tax support that wildlife refuges obtain while national forests receive more than twice the appropriations level for refuges.”⁴¹² Moreover, the system’s “relatively low national profile makes it less able to compete for monies in this period of austere federal natural resource budgets.”⁴¹³

Funding for the national wildlife refuges, currently about \$380 million annually, has remained relatively constant since 2003, while salaries and other operating costs have continued to rise.⁴¹⁴ The refuges now face a budget shortfall in excess of \$2.5 billion – made up by backlogs in both operations and maintenance.⁴¹⁵ These financial realities, together with the prospect of continuing federal emphasis on alternative budget priorities, have prompted the FWS to eliminate jobs, cut back on programs and leave more than 200 refuges – that is, more than a third of refuges – unstaffed.⁴¹⁶ Specifically, by 2009, the FWS plans to cut 565 jobs from the refuges – a 20 percent reduction.⁴¹⁷

The Service’s official position is that the job cuts will “increase efficiency and free up funding for refuge management and operations,” but refuge advocates are concerned that the more likely results will be decreases in habitat management, restoration projects and educational programs.⁴¹⁸ According to the results of a survey conducted by Public Employees for

Environmental Responsibility (PEER), refuge managers feel that shortfalls in funding and staff are adversely impacting the ability of the refuges to fulfill their functions.⁴¹⁹ PEER sent surveys to all 337 managers charged with oversight of all units in the system, and received responses from 52 percent of managers.⁴²⁰ Of those, nearly two in three (62 percent) responded that the refuge system is not “currently accomplishing its missions,”⁴²¹ and nearly four of five (79 percent) believe that the NWR System is headed in the wrong direction.⁴²²

The impacts of the funding shortfalls and staffing cuts are many, but chief among them is the inability of refuge staff to adequately stave off the onslaught of invasive species on refuge lands. Such invaders often negatively impact the very native species the refuges were designed to protect. For example, at the Antioch Dunes refuge near the San Joaquin River in California, the first national wildlife refuge established specifically to protect endangered plants and insects,⁴²³ budget constraints have contributed to a steep decline in the endangered Lange’s metalmark butterfly, a subspecies found only on that refuge.⁴²⁴ Refuge staff were unable to dedicate sufficient time and resources to curbing invasive plants on the refuge, with the result that the invaders overran the buckwheat that sustains the butterflies.⁴²⁵ Consequently, the butterfly population has plummeted from 2,300 eight years ago to about 100 today – a population that is no longer sustainable in the wild.⁴²⁶

As in the national parks, inadequate funding also translates into visitor safety issues. At the Desert National Wildlife Refuge in southern Nevada, for example, a washed-out section of a 75-mile dirt road from Las Vegas across the Mojave Desert waits for repair, while the refuge staff wait for the funds to fix it.⁴²⁷ According to refuge manager Amy Sprunger-Allworth, some visitors insist on driving through the closed section and get stranded – “I just hope someone does not die before I have the opportunity to fix it,” she recently said.⁴²⁸

Illegal activities on the refuges cause problems for both people and wildlife and, as refuge law enforcement personnel are given responsibility for larger and larger swaths of land, become more

difficult to control. In southwestern Arizona, the Cabeza Prieta National Wildlife Refuge has become a throughway for smugglers of both contraband and undocumented workers.⁴²⁹ In 2001, fourteen people died as they attempted to enter the United States from Mexico when the group’s guide became lost and stranded the immigrants in the deserts of the refuge.⁴³⁰ Testifying before Congress, refuge manager Roger DiRosa explained that traffic – both pedestrian and vehicular – associated with smuggling operations can also harm the wildlife the refuge is charged with protecting.⁴³¹ The endangered Sonoran pronghorn antelope, for example, requires undisturbed habitat.⁴³² However, hundreds of miles of illegal trails and roads have been created from undocumented workers crossing through refuge lands, and these throughways damage vegetation, disrupt re-vegetation efforts, disturb wildlife and habitat, and cause soil compaction and erosion.⁴³³

Lack of adequate law enforcement officers is not only a problem in border states. In the Pacific region, six officers are responsible for patrolling a four-state area, while in Oregon, one full-time officer patrols the entire coastline, home to six refuges.⁴³⁴ Indeed, the funding crisis affects refuges in every state. The Cooperative Alliance for Refuge Enhancement (CARE), has compiled fact sheets that detail impacts of the funding crisis such as those described herein at refuges in states across the country.⁴³⁵

CARE has also recently released a report that estimates what would be necessary to address the impacts of the funding crisis. In order to meet the NWR System’s top tier needs, CARE estimates that an annual budget of \$765 million is required.⁴³⁶ The National Wildlife Refuge Association estimates that merely to cover cost-of-living and inflationary needs so that the budget for Fiscal Year (FY) 2008 matches the “modest” FY 04 budget, an appropriation of \$451.5 million would be required.⁴³⁷ President Bush’s proposed budget for FY08, however, requests only \$398 million for the NWR System.⁴³⁸ Refuge advocates are hopeful that Congress will appropriate more funds and begin the process of restoring the nation’s wildlife refuges.⁴³⁹

Concluding Summary

The national wildlife refuges are an important component of the nation's public lands system, providing opportunities for visitors to engage in wildlife-dependent recreation and access natural ecosystems. They are also critical to ensuring the long-term survival of species that live within refuge borders as well as those that depend on the refuges as they move between other areas. After years of erring too far on the side of allowing uses secondary to the refuges' conservation mission, the FWS was given a new mandate by Congress – manage the refuges to achieve a system-wide, ecologically focused conservation mission. The ability of the FWS to achieve this mission, however, has been impeded by policies that fail to embrace fully the new mission and hew closely to old ways, and perhaps most damaging of all, a sustained funding crisis. If the NWR System is to be truly able to conserve fish, wildlife, and plant resources and their habitats for the benefit of present and future generations of Americans,⁴⁴⁰ Congress must meet the financial needs of the refuges, and the FWS must rise to the challenge and manage the refuges according to policies that truly implement the 1997 Act's mandate.

The Failure to Appropriate Funds for Conservation Land Acquisition

Background

In the years following World War II, population growth, increased levels of disposable income, more leisure time, and greater mobility combined to create skyrocketing demand for public outdoor recreational opportunities in the U.S. The National Park Service saw attendance increase by 232 percent between 1946 and 1960, and the National Forest System and state parks saw increases of 416 percent and 180 percent, respectively, during that same time.⁴⁴¹

However, the same factors that increased demand for recreational opportunities increased demand for land that could be used for new homes, roads, schools, industrial sites, and airports. Recognizing the tension created by the competing demands to preserve and to develop the nation's open spaces, Congress in 1958 established the Outdoor Recreation Resources Review Commission, a bipartisan group tasked with assessing the growing population's outdoor recreational needs, predicting how these needs would grow over the next 40 years, and providing Congress with policy and program recommendations “to ensure that the [outdoor recreational] needs of the present and future are adequately and efficiently met.”⁴⁴²

After three years of research the Commission produced a report – “Outdoor Recreation for America” – that outlined the Commission's findings and recommendations. The main thrust of the findings was that the quarter billion acres of public

land designated as outdoor recreation areas was “considerable” but that “either the location of the land, or restrictive management policies, or both, greatly reduce the effectiveness of the land for recreation use by the bulk of the population.”⁴⁴³ Since most of the land was located in the West and in

Though the idea of the LWCF enjoys great support from across the political spectrum, certain peculiarities in the federal budget process and insufficient public accountability limit the law's effectiveness in expanding recreational resources and protecting existing resources at both the federal and state level.

Alaska, and not near the majority of Americans who live in urban centers, it was “of little use to most Americans looking for a place in the sun for their families on a weekend.”⁴⁴⁴ Thus, the Commission recommended a federal grant-in-aid program that “would stimulate the expansion of outdoor recreation resources and programs.”⁴⁴⁵ Following the Commission's recommendation, President Kennedy sent to Congress proposed legislation that would eventually become the Land and Water Conservation Fund Act of 1964 (LWCFA).⁴⁴⁶

The LWCFA was designed to funnel certain federal revenue streams into a fund that is used by federal, state, and local governments to purchase new outdoor recreational lands and waters throughout the United

States (the Land and Water Conservation Fund, or LWCF).⁴⁴⁷ Revenues come from user fees at existing national parks, the federal motorboat fuel tax, sales of surplus federal property, and a percentage of royalties from offshore oil drilling.⁴⁴⁸ “In choosing the various sources of revenues to be collected into the Fund, Congress apparently relied on two basic principles: that those who use outdoor recreation facilities should be expected to pay their own way, at least in part, and that if the federal government sells publicly-held resources to private owners, the revenues derived from such sales should be devoted to the purchase of new resources which will be of at least equal benefit to the public.”⁴⁴⁹

The funds are distributed according to statutorily defined formulas, with a certain minimum percentage (40 percent) of annual appropriations going to four federal agencies and the remainder going to state and local governments in the form of matching grants.⁴⁵⁰ The four federal agencies that receive LWCF money are the Park Service, the BLM, the FWS, and the Forest Service. The state grants are distributed according to a statutory formula based primarily on population. Though the idea of the LWCF enjoys great support from across the political spectrum, certain peculiarities in the federal budget process and insufficient public accountability limit the law’s effectiveness in expanding recreational resources and protecting existing resources at both the federal and state level.

Squandering Resources at the Federal Level

The LWCF created a special account in the Federal Treasury from which the Secretary of the Interior is authorized to draw funds for the purpose of fulfilling the goals of the Act.⁴⁵¹ User fees from national parks, the federal motorboat fuel tax, and revenues from the sale of surplus federal property form the base of the Fund.⁴⁵² In order to reach the fully authorized level of \$900 million per year, those revenues are to be augmented by revenues earned through the sale of offshore oil and gas leases.⁴⁵³

Only twice has Congress actually spent the full \$900 million to purchase or develop new parks.⁴⁵⁴ The problem is the Fund is authorized at \$900 million

every year, but *authorizing* money for a certain purpose does not mean that Congress is required to *appropriate* that money for the same purpose. Congress has the discretionary authority to appropriate anywhere from \$0 to \$900 million for purchasing new parkland through the LWCF. Whatever is left over remains in the federal Treasury for any other purpose that Congress sees fit.⁴⁵⁵

From 1965 through 2006, roughly \$29 billion has been credited to the LWCF account; however, only about half that amount (\$14.3 billion) has actually been appropriated.⁴⁵⁶ The end result is that Congress tends to use the LWCF as a sort of slush fund. In lean years Congress appropriates little of the \$900 million authorized under the LWCF for parkland, opting instead to use a majority of the money to fund other budget priorities. During the mid-1990s crunch to balance the federal budget, appropriations under the LWCF reached what were at the time their lowest levels in history – only \$159 million of the \$900 million authorized was appropriated in 1997.⁴⁵⁷ In response to the drastic fluctuations in LWCF appropriations over the years, some members of Congress attempted to reform the LWCF during the late 1990s. The Conservation and Reinvestment Act (CARA) sought to re-tool the LWCF in the style of a private sector trust fund, where appropriations would be set at a fixed annual amount.⁴⁵⁸ Unfortunately for conservationists, the measure failed and the LWCF still requires that Congress annually debate the amount of funds that will actually be appropriated, increasing the temptation to hold the money in abeyance to address other priorities.

There are several reasons why Congress has rarely utilized all of the funds authorized under the LWCF. One shortcoming is that the statute does not specifically allow Congress to use LWCF money for maintenance or operations at existing national parks.⁴⁵⁹ This creates a disincentive for Congress to use LWCF funds to purchase new parkland since after the purchase is made, the cash-strapped DOI will have to seek more funds from other sources to keep these new parks functioning, a difficult task in the absence of new revenue streams. Compounding the budgetary problem is the fact that many in Congress believe that more federal money should be spent on

addressing the \$5 billion maintenance backlog that plagues national park officials, rather than purchasing additional land.⁴⁶⁰

These issues have prompted some legislators to call for increased private sector involvement in preserving open space. Given the maintenance backlog for federally owned parks, many argue that the federal government should purchase conservation easements instead of going after outright ownership of lands in fee.⁴⁶¹ They argue that this will advance Congress's desire to preserve open space while minimizing management costs for the federal government. But while the use of conservation easements might lead to decreased management costs and the reduced costs could lead to increased open space acreage, this tactic may also reduce public control of and access to the LWCF-funded lands.

Squandering Resources at the State Level

From the perspective of the states, the primary problem with the LWCF is a lack of predictability.⁴⁶² Year in and year out, the money appropriated to state and local governments through the LWCF shifts wildly. Under the Clinton Administration, there were several years where state appropriations were at levels that only maintained administrative programs.⁴⁶³ Actual congressional appropriations for state grants in the last five years have ranged from \$143.9 million in FY2002 to \$29.6 million in FY2006.⁴⁶⁴ In federal fiscal years 2006 and 2007, the Bush Administration did not request a single dollar for state grants through the LWCF.⁴⁶⁵ This uncertainty in the availability of federal funds makes state legislators hesitant to appropriate state funds for land acquisition, as they are never sure whether federal matching grants will materialize. Furthermore, state officials lacking definite numbers for out-year LWCF grants cannot develop legitimate statewide comprehensive outdoor recreation plans, as required by the LWCF for a state to receive any funding from the federal matching program. Arguing in favor of amending the LWCF to create a stable trust fund, Senator Bob Graham of Florida explained the states' perspective:

I will say, from my own experience as a legislat[or] and then governor of a state which had a very expansive land acquisition

program, it was our finding that unless you had a dedicated source that could be depended upon in which people had confidence, that a land program tended to become an annual fight within the political entities as to who could get on the train that was leaving town that day because there was no confidence that there was gonna be another train leaving on the following day . . . One of the benefits of having an ensured source of funding is not only the adequacy of the funds, but the fact that it allows you to do intelligent planning and the establishment of priorities. People who look at that list and say, I'm on the priority list, but I'm five years downstream, will have enough confidence that the program will exist five years from now, that they will be willing to defer their aspirations until their time has come.⁴⁶⁶

'Conversions'

One shortcoming of the LWCF is the process through which it addresses "conversions." The drafters of the LWCF were aware of the potential that lands acquired using LWCF monies might well turn out to be valuable real estate in the future. In order to prevent these lands from being sold to private developers and to ensure that the LWCF's goal of preserving our natural resources for future generations would be upheld, they inserted a clause that limits conversion of LWCF parklands to other uses. Section 6(f)(3) of the LWCF, the anti-conversion clause, states:

[n]o property acquired or developed with assistance under this section shall, without the approval of the Secretary, be converted to other than public outdoor recreation uses. The Secretary shall approve such conversion only if he finds it to be in accord with the then existing comprehensive statewide outdoor recreation plan and only upon such conditions as he deems necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location.⁴⁶⁷

Since the conversion prohibition only applies to property acquired or developed under that section, which in turn covers only the state-side LWCF program, the anti-conversion clause does not apply to federal lands purchased with LWCF money.

The process of converting LWCF-funded lands to anything other than public outdoor recreational uses involves two key decision points. First, whether a proposed new use is a “conversion” within the meaning of the Act; and second, if a conversion has been proposed, whether the conversion meets the standards outlined in § 6(f)(3). Unfortunately, Congress failed to prescribe any specific process through which the Secretary of the Interior should answer these questions. The statute does not even define “conversion” or elaborate on the meaning of “other than public outdoor recreation uses.” In fact, the only guidance Congress provided as to the § 6(f)(3) conversion process is a clause stating that wetlands shall be regarded as adequate substitution for any converted parkland.⁴⁶⁸ As a result of Congress’s reluctance to define any procedures for dealing with conversions, the Secretary of the Interior has great discretion in defining those procedures.

Unfortunately for conservationists, the procedures developed by the Secretary lack the opportunities for public involvement in the decision making process that should be expected when publicly-financed recreational areas are converted to non-public or non-recreational uses. The process is described in regulation⁴⁶⁹ and more fully developed in guidance.⁴⁷⁰ States are required to submit to the appropriate Park Service Regional Director an application for conversion that includes a narrative description of the proposed conversion, all alternatives considered and rejected, appraisals showing the value of the parkland and the proposed substitution property, appropriate maps, an environmental assessment, and an explanation of any coordination with other governmental organizations.⁴⁷¹ But while the regulations and guidance mandate specific pieces of information states must submit to the Park Service, they do not mandate any public disclosure of the proposed conversion.

That is not to say that there is no opportunity for public involvement in the conversion process.

Rather, public participation in the conversion process only occurs by way of the EA that states must document in the conversion application. The Park Service’s LWCF regulations and guidance state that satisfactory completion of environmental evaluation guidelines is a prerequisite to approval of a proposed conversion.⁴⁷² The environmental evaluation guidelines, contained in the LWCF Grants Manual, state that all LWCF Grant actions are subject to the provisions of NEPA.⁴⁷³ Thus any proposed conversion requires either an EA or a full EIS, conducted according to NEPA regulations. NEPA, in conjunction with the APA, requires public participation in the environmental assessment process, giving the public the opportunity to comment on the conclusions reached in an environmental assessment.

The problem with relying on NEPA and the APA to provide opportunities for public involvement in the LWCF conversion process is that public participation is too limited. Under this scheme, the public has the opportunity to comment on the potential environmental impacts of the proposal, but misses the opportunity to weigh in on two other key decision points. First, the public misses the opportunity to provide input to the threshold question of whether a proposed new use is a conversion. Second, the public does not have the opportunity to comment on whether a proposal is in accord with the state’s comprehensive outdoor recreation plan. Moreover, NEPA has been interpreted not to impose any substantive environmental standards,⁴⁷⁴ thus public participation can at most force a more complete assessment of the environmental consequences of a decision, not compliance with any particular substantive standard.

Congress’s failure to provide for meaningful public oversight of the conversion process at the front end is especially problematic because the broad discretion and lack of accountability built into the statute precludes strong judicial review on the back end. Since the LWCF Act does not define what it means for an area to be “converted to other than public outdoor recreation uses,” the Secretary is afforded great deference in making that determination.⁴⁷⁵ Any aggrieved party who wishes to challenge the

Secretary's determination that a proposed new use is or is not a "conversion" thus has a heavy burden of proof. The scant case law on the issue underscores this point. In one case, the Eighth Circuit essentially rubber stamped the Secretary's decision that exploratory drilling in an LWCF-funded park was an allowable, temporary, non-conforming use, not a "conversion."⁴⁷⁶ However, in the only other case directly on point, the Second Circuit rejected the Secretary's finding that a conversion did not occur when a conservation easement purchased with LWCF funds was amended so as to allow a private company to operate a golf course on the property burdened by the easement.⁴⁷⁷ (The Second Circuit did not afford the Secretary the same deference typically afforded in other post-*Chevron* statutory interpretation cases, perhaps because *Chevron* was new precedent and not fully understood at the time.)

When a proposed new use of an LWCF-funded area is deemed a conversion, the statute only allows the conversion to go forward if the Secretary of the Interior finds: (a) that the conversion is in accord with the state's then-existing comprehensive outdoor recreation plan; and (b) that it meets the conditions she has deemed "necessary to assure the substitution of other recreation properties of at least equal fair market value and of reasonably equivalent usefulness and location."⁴⁷⁸ Again here, the statute grants the Secretary such broad discretion that the general administrative goal of public accountability cannot be achieved. Requiring the Secretary to find that a conversion is "in accord" with a state's comprehensive outdoor recreation plan is a malleable and subjective standard subject only to the most deferential judicial review.⁴⁷⁹ Courts will only look to see that the Secretary has considered the relevant factors and did not make a clear error in judgment when reviewing her findings.⁴⁸⁰ The same standard of review applies to the Secretary's findings as to the adequacy of the new property obtained to offset the converted LWCF-funded property.⁴⁸¹

Lack of public input and broad discretion granted to the Secretary of the Interior are not the only problems with the conversion process. The statutory design also creates environmental and social justice concerns. The statute requires that any converted

parkland be replaced by parkland of equal market and recreational value, or by wetlands.⁴⁸² This loose standard gives the government and private parties significant flexibility in mitigating LWCF parkland loss, sidestepping difficult public policy questions. For instance, LWCF parkland in an urban area can be replaced by setting aside wetlands or a new park in a rural or suburban area. While the ecosystem services and other values provided by the new parkland might be equal or superior to those of the urban park, the recreational value of the new parkland or wetland benefits a different sector of the population, raising environmental and social justice concerns. The social justice concerns are magnified by the fact that there is no statutorily mandated process for considering input from affected communities at the front end of the conversion process.

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Concluding Summary

As long as the LWCF is not a dedicated and consistent source of funding, as long as it cannot be used for maintenance or operations at existing parks, and as long as the oversight of the “conversion” decisions is so lax, the LWCF will never meet its goal of preserving valuable open space for public outdoor recreation.

Conclusion

It is time to respond to the evidence of chronic, pervasive, and powerful pressures from economic interests who seek to use public natural resources in a manner that is often unsustainable and in tension with other less easily quantified uses and values of the public lands. Even under progressive leadership, our laws and policies have failed to achieve our stated objectives with respect to our public lands. Under the current Administration, with increased attention and voice given to corporate interests, we have seen how far from the goals of sustainable use and conservation we can quickly be driven. If we are serious about sustaining the resources on our public lands – the non-economic values, uses and services as well as the economic – we will need to strengthen our laws to provide:

- Stronger substantive standards to ensure sustainable use and protection of non-economic values
- Better monitoring of the impacts of private activities on public natural resources
- Greater and more effective opportunities for public participation

- Reinstated environmental review for significant decisions affecting natural resources on the public lands
- Adequate funding for federal land and resource management agencies
- Systematic and rigorous evaluation of subsidies to ensure that they serve the public good.

The commitment such changes would entail is substantial. But the rewards for this and future generations would be substantial and concrete. Our national parks, forests, BLM lands, refuges, and other wild lands are too valuable to squander in pursuit of short-term economic gain. To liquidate them to ease short-term budget pressures or convert them to sources of short-term private profit, at the expense of the broader public’s interest in their non-economic values, represents a short-sighted strategy at odds with our stated commitments and values. Recent experience has shown that current laws, policies, and funding levels fail to prevent these outcomes.

In the late 19th Century, visible abuses and degradation caused by private land speculators helped spark the movement for conservation of what became our National Forests and National Parks, and our commitment to preserving these areas of beauty and grandeur. Today, some of the practices that pose the greatest threat to our public lands are more insidious and less visible – inadequate legal standards, lack of monitoring, limits on public participation and environmental review, underfunding of agencies, and complex subsidies. Therefore, we urge Congress to undertake a complete investigation of these and other practices that are destroying the natural resource legacy left to us by our forebears.

Notes

¹ George Cameron Coggins and Robert L. Glicksman, 1 PUB. NATURAL RES. LAW §§1.3-1.4 (2007).

² *Id.* at §1.3. 1.5.

³ Alaska National Interest Lands Conservation Act, 16 U.S.C. §3101(a) (2006)(purpose/goal) (“In order to preserve for the benefit, use, education, and inspiration of present and future generations certain lands and waters”); Clean Air Act, 42 U.S.C. §7651(a)(5) (2006)(findings) (“The Congress finds that . . . (5)current and future generations of Americans will be adversely affected by delaying measures to remedy the problem [of acid deposition];”; Coastal Zone Management Act, 16 U.S.C. §1451(b) (2006); Estuarine Protection Act, 16 U.S.C. §1221 (2006); National Environmental Policy Act, 42 U.S.C. §42 4331(a) and (b)(1) (2006); National Forest Management Act, 16 U.S.C. §1609(a); National Marine Sanctuaries Act, 16 U.S.C. §1431(a)(4)(C) (2006); National Park Service Concessions Management Act, 16 U.S.C. §5951(a); National Park Service Organic Act, 16 U.S.C. §1 (2006); National Recreation Act, 16 U.S.C. §4601 (2006); National Wildlife Refuge System Administration Act, 16 U.S.C. §668dd(a)(2) and (a)(4)(B) (2006); Emergency Wetlands Resources Act, 16 U.S.C. §3901 (2006); Wild and Scenic Rivers Act, 16 U.S.C. §1271 (2006); Wilderness Act, 16 U.S.C. §1131(a).

⁴ *See, e.g.*, U. S. GOV’T ACCOUNTABILITY OFFICE, FOREST SERVICE: USE OF CATEGORICAL EXCLUSIONS FOR VEGETATION MANAGEMENT PROJECTS, CALENDAR YEARS 2003 THROUGH 2005, GAO-07-99 (Oct. 2006), *available at* <http://www.gao.gov/new.items/d0799.pdf> (last visited Jun. 18, 2007) (hereinafter, GAO: USE OF CEs FOR VEGETATION MANAGEMENT PROJECTS); U. S. GOV’T ACCOUNTABILITY OFFICE, NAT’L PARK SERV.: MAJOR OPERATIONS FUNDING TRENDS AND HOW SELECTED PARK UNITS RESPONDED TO THOSE TRENDS FOR FISCAL YEARS 2001 THROUGH 2005, (Mar. 2006), *available at* <http://www.gao.gov/new.items/d06631t.pdf> (last visited Oct. 2, 2006) (hereinafter, GAO: NPS FUNDING TRENDS); U. S. GOV’T ACCOUNTABILITY OFFICE, OIL AND GAS DEVELOPMENT: INCREASED PERMITTING ACTIVITY HAS LESSENED BLM’S ABILITY TO MEET ITS ENVIRONMENTAL PROTECTION RESPONSIBILITIES, GAO-05-418 (June 2005), *available at* <http://www.gao.gov/new.items/d05418.pdf> (last visited June 25, 2007) (hereinafter, GAO: INCREASED OIL AND GAS PERMITTING ACTIVITY REPORT); U.S. GEN. ACCOUNTING OFFICE, PUBLIC RANGELANDS: SOME RIPARIAN AREAS RESTORED BUT WIDESPREAD IMPROVEMENT WILL BE SLOW, GAO/RCED-88-105 (June 1998), *available at* <http://archive.gao.gov/d16t6/136218.pdf> (last visited June 25, 2007) (hereinafter, GAO: RIPARIAN RESTORATION); U.S. GOV’T ACCOUNTING OFFICE, NAT’L WILDLIFE REFUGES: CONTINUING PROBLEMS WITH INCOMPATIBLE USES CALL FOR BOLD ACTION, GAO/RCED-

89-196 (Sept. 1989), *available at* <http://archive.gao.gov/d26t7/139500.pdf> (last visited Jun. 18, 2007) (hereinafter, GAO: INCOMPATIBLE USES ON WILDLIFE REFUGES); U.S. GEN. ACCOUNTING OFFICE, RANGELAND MANAGEMENT: MORE EMPHASIS NEEDED ON DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS, GAO/RCED-88-80 (June 1988), *available at* <http://archive.gao.gov/t2pbat17/136027.pdf> (last visited June 25, 2007) (hereinafter, GAO: DECLINING AND OVERSTOCKED GRAZING ALLOTMENTS); COALITION OF NATIONAL PARK SERVICE RETIREES, *Reality Check: What Visitors to America’s National Parks Will Experience During Summer 2006*, <http://www.npsretirees.org/node/13> (last visited June 20, 2007) (hereinafter, CNSPR: *Reality Check 2006*); THE WILDERNESS SOC’Y, *Too Wild to Drill*, <http://www.tws.org/OurIssues/Energy/TooWildToDrill.cfm> (last visited June 18, 2007) (hereinafter, TWS: *Too Wild to Drill*).

⁵ *See, e.g.*, Sharon Nappier, *Lost in the Forest: How the Forest Service’s Misdirection, Mismanagement, and Mischief Squanders Your Tax Dollars* (2002), *available at* http://www.forestadvocate.org/pdf/lost_in_the_forest.pdf (last visited Jun. 18, 2007); George Wuerthner and Mollie Matteson, eds., *WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST* (2002); Karyn Moskowitz, *Economic Contributions and Expenditures in the National Forests* (Jan. 1999), *available at* http://www.forestadvocate.org/pdf/NF_Contributions_Economic.pdf (last visited Jun. 18, 2007).

⁶ *See, e.g.*, Juliet Eilperin, *Interior Department’s No. 2 Resigns after Controversial Tenure*, WASH. POST, Dec. 8, 2004, at A10, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A45180-2004Dec7.html> (last visited June 16, 2007).

⁷ 16 U.S.C. § 1600-1687.

⁸ 16 U.S.C. § 1609(a) (emphasis added).

⁹ 43 U.S.C. § 1701-1785.

¹⁰ 43 U.S.C. § 1702(c) (emphasis added).

¹¹ *Id.* (emphasis added).

¹² Janet Wilson, *Large Sale of Forest Planned*, L. A. TIMES, Feb. 11, 2006, *available at* 2006 WLNR 6965646.

¹³ Apparently, the Forest Service anticipates “only” about 175,000 acres would actually need to be sold to raise the \$800 million required by the President’s budget. Noelle Straub, *Bush Plan to Sell Public Lands*, MONT. STANDARD, Mar. 2, 2006, *available at* http://enn.com/today_PF.html?pid=9980 (last visited Jul. 11, 2006) (quoting Under Secretary of Agriculture Mark Rey).

¹⁴ Wilson, *supra* note 12 (quoting Dr. Char Miller, professor of environmental history at Texas’s Trinity University, who has written extensively about the Forest Service).

¹⁵ USDA FOREST SERV., *Secure Rural Schools and Lands Initiative; Notice; request for comments*, 71 Fed. Reg. 10004, 10005 (Feb. 28, 2006) (FY 2007 information); USDA FOREST SERV.,

Summary of Lands Potentially Eligible for Sale, available at http://www.fs.fed.us/land/staff/spd_summary.html (page modified Feb. 5, 2007) (last visited Feb. 8, 2007).

¹⁶ Wilson, *supra* note 12. Congress mandated the payments from the federal treasury in 2000, following declines in the timber industry and the local revenues it generated. *Id.* That appropriation, which expires in 2006, is the subject of a bipartisan effort in the Senate to extend the payments. *Id.*

¹⁷ *Id.* (noting that: Sen. Dianne Feinstein (D-CA) believes “a stable funding source must be provided, but not at the expense of our wilderness”; Sen. Ron Wyden (D-OR) deems the general fund the appropriate source of funding for rural roads and schools – not public land sales; and Sen. Larry Craig (R-ID) has concerns as “public lands are an asset that need to be managed and conserved.”).

¹⁸ Eve Byron, *Sale of Public Lands Resurrected*, HELENA INDEP. RECORD (Mont.), Feb. 2, 2007 (available at <http://www.helenair.com/articles/2007/02/07/montana/000sale.txt>) (last visited Mar. 7, 2007).

¹⁹ USDA FOREST SERV., *Payments to States—President’s FY08 Budget Proposal – National Forest Land Adjustment for Rural Communities Act*, available at http://www.fs.fed.us/land/staff/rural_schools.shtml (last visited Feb. 8, 2007) (hereinafter, FOREST SERV., *President’s FY08 Budget*).

²⁰ Bruce Henderson, *National Lands Face Sale Again*, CHARLOTTE OBSERVER (N.C.) (Feb. 8, 2007), available at <http://www.charlotte.com/mld/observer/news/local/16648902.htm> (last visited Feb. 8, 2007). The precise purposes for which the retained funds could be used, according to the Forest Service, are “the acquisition of land and access for the NFS system, conservation education, and wildlife and fish habitat restoration.” FOREST SERV., *President’s FY08 Budget*, *supra* note 19.

²¹ For example, Rep. Robin Hayes (R-NC, 8th Dist.) opposes the proposal, and, in a letter to the President, wrote that the sales could threaten Montgomery County, North Carolina’s economy, which increasingly relies on environmental tourism. Henderson, *supra* note 20. Similarly, Rep. Jo Ann Emerson (R-MO, 8th Dist.) denounced the plan, saying “[t]his is an old idea that has already earned a thumbs-down from me and the rest of Congress and I will not support the inclusion of this sale in this year’s budget either.” Sam Hananel, ASSOCIATED PRESS, *Bush Budget Plan Revives Forest Sale Scheme*, KansasCity.com, available at <http://www.kansascity.com/mld/kansascity/news/politics/16630025.htm> (Feb. 5, 2007) (last visited Feb. 8, 2007). And, “for the second year in a row, Democrats pronounced the plan dead on arrival.” *Id.*

²² Byron, *supra* note 18.

²³ David Gorn, *Rural Schools Affected by Battle over Bush Plan*, ALL THINGS CONSIDERED (Nat’l Pub. Radio), Mar. 6, 2007 available at <http://www.npr.org/templates/story/story.php?storyId=7742675> (last visited Mar. 7, 2007).

²⁴ *Id.*

²⁵ Wilson, *supra* note 12.

²⁶ WHITE HOUSE OFFICE OF MGMT. AND BUDGET, *The Budget Message of the President, FY2007*, 42 (Feb. 6, 2006), available at <http://www.whitehouse.gov/omb/budget/fy2007/pdf/budget/agriculture.pdf> (site visited Jul. 18, 2006). The Administration uses similar language to characterize the 273,806 acres identified for sale in accordance with the FY2008 proposal, noting that the parcels to be sold are “already identified in existing national forest plans as suitable for conveyance, because they are isolated or inefficient to manage.” USDA, FY 2008 BUDGET SUMMARY AND ANNUAL PERFORMANCE PLAN, 112, available at <http://www.obpa.usda.gov/budsum/fy08budsum.pdf> (last visited Feb. 14, 2007).

²⁷ Wilson, *supra* note 12. Another concern is the possibility that the land sales could lead to construction of homes along scenic stretches of wild rivers. *Id.*

²⁸ See Alyson Flournoy, *et al.*, *Regulations in Name Only: How the Bush Administration’s National Forest Planning Rule Frees the Forest Service from Mandatory Standards and Public Accountability*, Center for Progressive Reform White Paper No. 508 (Jun. 2005), available at http://www.progressivereform.org/articles/Forests_508.pdf (last visited Jul. 26, 2006).

²⁹ From 1976 to 1994, Mark Rey worked for timber industry organizations including the National Forest Products Association, the American Paper Institute, the American Forest Resources Alliance, and the American Forest and Paper Association. See, e.g. SOURCEWATCH, A PROJECT OF THE CENTER FOR MEDIA & DEMOCRACY, available at http://www.sourcewatch.org/index.php?title=Mark_Rey (last visited Feb. 14, 2007).

³⁰ Wilson, *supra* note 12.

³¹ Wilson, *supra* note 12.

³² BUREAU OF LAND MGMT., *What We Do: Does the Federal Government ever sell public land?* (Mar. 14, 2000), available at <http://www.blm.gov/nhp/what/lands/realty/pubs/land4sal/> (last visited Jul. 11, 2006). As a basis of comparison, in 2005 the agency sold about 8,409 acres of land, raising \$16 million. Associated Press, *Bush Budget Would Sell Land to Raise \$1 Billion* (Feb. 13, 2006), available at <http://www.msnbc.msn.com/id/11257181/print/1/displaymode/1098/> (last visited Jul. 11, 2006).

³³ See WHITE HOUSE OFFICE OF MGMT. AND BUDGET, *The Budget Message of the President, DOI, FY 2007*, 164 (Feb. 6, 2006), available at <http://www.whitehouse.gov/omb/budget/fy2007/pdf/budget/interior.pdf> (site visited Jul. 18, 2006) (hereinafter, OMB, *DOI Budget FY 2007*).

³⁴ ASSOCIATED PRESS, *Bush Budget Would Sell Land to Raise \$1 Billion* (Feb. 13, 2006), available at <http://www.msnbc.msn.com/id/11257181/print/1/displaymode/>

1098/ (last visited Jul. 11, 2006); *see also* White House Office of Mgmt. and Budget, The Budget Message of the President, 164 (Feb. 6, 2006), *available at* <http://www.whitehouse.gov/omb/budget/fy2007/pdf/budget/interior.pdf> (site visited Jul. 18, 2006).

³⁵ OMB, *DOI Budget FY 2007*, *supra* note 33, at 164.

³⁶ *Id.*

³⁷ THE WILDERNESS SOC'Y, *Statement: Public Lands Conservation Programs Underfunded in President's FY2008 Budget*, *available at* <http://www.wilderness.org/NewsRoom/Statement/20070205b.cfm> (last visited Feb. 8, 2007).

³⁸ U.S. DEP'T OF THE INTERIOR, FISCAL YEAR 2008 BUDGET IN BRIEF, BUREAU HIGHLIGHTS: BUREAU OF LAND MGMT., BH-8, *available at* <http://www.doi.gov/budget/2008/08Hilites/BH005.pdf> (last visited Feb. 8, 2007) (explaining that “[l]ike the 2007 President's Budget, the 2008 budget proposes to amend the FLTFA to: allow BLM to use updated management plans to identify areas suitable for disposal; allow a portion fo the receipts to be used by BLM for restoration projects; return 70 percent of the net proceeds from the sales to the Treasury; and cap receipt retention by the Department at \$60.0 million per year.”).

³⁹ Zachary Colie, *No Arctic Oil Drilling? How About Selling Parks?*, S.F. CHRON., Sept. 24, 2005, *available at* 2005 WLNR 15054567.

⁴⁰ *Id.*

⁴¹ Bettina Boxall, *Some Fear a Vast Sell-Off of U.S. Land*, L.A. Times, Nov. 16, 2005, *available at* 2005 WLNR 23355553. Although the bill would increase the patent fees from \$2.50 or \$5 an acre to \$1,000 an acre, the price would still exclude mineral worth, “which can amount to billions of dollars.” *Id.*

⁴² *Id.*; Deficit Reduction Act of 2005, H.R. 4241, 109th Cong., §§ 6204(b), (c).

⁴³ Deficit Reduction Act of 2005, H.R. 4241, 109th Cong., § 6207 (“*Subject to valid existing rights*, nothing in sections 6202, 6203, 6204, 6205, and 6206 of this subtitle shall be construed as affecting any lands within the boundary of any unit of the National Park System, National Wildlife Refuge System, National Wild and Scenic Rivers System, or National Trails System, or any National Conservation Area, any National Recreation Area, any National Monument, or any unit of the National Wilderness Preservation System as of the date of the enactment of this Act.”) (emphasis added).

⁴⁴ *Id.*; *See* EARTHWORKS, NAT'L WILDLIFE FED'N, THE WILDERNESS SOC'Y & ENVTL. WORKING GROUP, *Deficit Reduction Act of 2005: Fact & Fiction About the Mining Subtitle in the Deficit Reduction Act*, 1, *available at* <http://www.wilderness.org/Library/Documents/upload/Factsheet-MiningFactFiction-DeficitReduxAct2005.pdf> (last visited Jul. 27, 2006) (arguing that, “[t]he mining subtitle specifically allows the selling of preexisting claims (*i.e.* valid existing

rights) in these areas. In the National Parks alone, according to the National Park Service, more than 18,000 acres of mining claims predate this mining subtitle and are available for purchase.”).

⁴⁵ Boxall, *supra* note 41 (quoting Mat Millenbach).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ FORESTS FOREVER, *Press Release: Pombo/Gibbons Public-Lands Giveaway Defeated* (Dec. 14, 2005), *available at* <http://www.forestsforever.org/pombogibbons.html> (last visited Jul. 27, 2006).

⁵⁰ George Wuerthner and Mollie Matteson, eds., WELFARE RANCHING: THE SUBSIDIZED DESTRUCTION OF THE AMERICAN WEST, 5 (2002) (hereinafter, WELFARE RANCHING).

⁵¹ *Id.*

⁵² *Id.*

⁵³ U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., *BLM and Forest Service Announce 2007 Federal Grazing Fee* (February 2, 2007), *available at* http://www.blm.gov/wo/st/en/info/newsroom/2007/february/NR0702_3.html (last visited March 27, 2007). “AUM” means “animal unit month.” It is the equivalent of one cow-calf pair, one bull, one steer, one horse, or five sheep.

⁵⁴ U.S. GOV'T ACCOUNTABILITY OFFICE, LIVESTOCK GRAZING: FEDERAL EXPENDITURES AND RECEIPTS VARY, DEPENDING ON THE AGENCY AND THE PURPOSE OF THE FEE CHARGED, 38 (September 2005), *available at* <http://www.gao.gov/newitems/d05869.pdf> (last visited June 25, 2007) (hereinafter GAO: GRAZING FEES).

⁵⁵ *Id.*

⁵⁶ *See generally*, WELFARE RANCHING, *supra* note 50, at 162-257

⁵⁷ 43 U.S.C. § 1701 *et seq.*

⁵⁸ 16 U.S.C. § 528 *et seq.*

⁵⁹ 43 U.S.C. § 1702(c).

⁶⁰ GAO: GRAZING FEES, *supra* note 54, at 5.

⁶¹ *Id.* at 6.

⁶² *Id.* at 38.

⁶³ 43 U.S.C. § 1702(c).

⁶⁴ Joy Belsky, *et al.*, *What the River Once Was: Livestock Destruction of Waters and Wetlands*, in WELFARE RANCHING, *supra* note 50, at 180.

⁶⁵ GAO: RIPARIAN RESTORATION, *supra* note 4, at 12 (explaining that “BLM's New Mexico state office has estimated that, on average, 13.7 acres of land is required to support one animal for 1 month for all public lands within BLM grazing districts in the West”).

- ⁶⁶ Jack W. Thomas, *et al.*, *Wildlife Habitats in Managed Rangelands – The Great Basin of Southeastern Oregon: Riparian Zones*, 2 (U.S. Dep’t of Agric. Forest Serv. General Technical Report PNW-80) (1979), available at http://www.srs.fs.usda.gov/pubs/gtr/gtr_pnw080.pdf (last visited June 8, 2007).
- ⁶⁷ GAO: RIPARIAN RESTORATION, *supra* note 4, at 10.
- ⁶⁸ See generally, WELFARE RANCHING, *supra* note 50, at 175-197.
- ⁶⁹ Joy Belsky, *et al.*, *Survey of Livestock Influences on Stream and Riparian Ecosystems in the Western United States*, 54 J. SOIL AND WATER CONSERVATION 419, 427 (1999).
- ⁷⁰ *Id.* at 429.
- ⁷¹ WATER ON THE WEB, *Understanding Water Quality: Non-Point Pollution*, (May 11, 2004), at <http://waterontheweb.org/under/waterquality/sediment.html> (last visited April 11, 2007).
- ⁷² *Id.*
- ⁷³ Belsky, *et al.*, *supra* note 69, at 427.
- ⁷⁴ *Id.* at 429.
- ⁷⁵ Howard *et al.*, *Cattle Grazing Impact on Surface Water Quality in a Colorado Front Range Stream*, 38 J. SOIL AND WATER CONSERVATION 124 (1983).
- ⁷⁶ See Statement of Robert E. Brackett, Ph. D., Director of the Center for Food Safety and Applied Nutrition, Food and Drug Administration, before the Committee on Health, Education, Labor and Pensions of the U.S. Senate, Nov. 15, 2006, available at <http://www.fda.gov/ola/2006/foodsafety1115.html> (last visited June 25, 2007) (noting that a “joint FDA/State of California field investigation found the same strain of *E. coli* O157:H7 as was involved in the illness outbreak in samples taken from a stream and from feces of cattle and wild pigs present on ranches implicated in the outbreak”).
- ⁷⁷ Belsky, *et al.*, *supra* note 69, at 427.
- ⁷⁸ *Id.*
- ⁷⁹ Katherine D. LeJeune and Timothy R. Seastedt, *Centraurea Species: The Forb That Won the West*, 15 CONSERVATION BIOLOGY 1568, 1572 (2001).
- ⁸⁰ George Wuerthner, *The Soil’s Living Surface: Biological Crusts*, in WELFARE RANCHING, *supra* note 50, at 199.
- ⁸¹ *Id.*
- ⁸² Kaltenecker *et al.*, *Biological Soil Crusts: Natural Barriers to Bromus tectorum L. Establishment in the Norther Great Basin, USA*, PROCEEDINGS OF THE VI INTERNATIONAL RANGELAND CONGRESS, 109-11 (D. Eldridge and D. Freudenberger, eds.) (1999).
- ⁸³ James P. Menakis, Dianne Osborne, and Melanie Miller, *Mapping Cheatgrass-Caused Departure from Historical Natural Fire Regimes in the Great Basin, USA*, USDA FOREST SERV. PROCEEDINGS RMRS-P-29 (2003), available at http://www.fs.fed.us/rm/pubs/rmrs_p029/rmrs_p029_281_288.pdf (last visited June 25, 2007); Kris Zouhar, *Bromus Tectorum*, USDA Forest Service Fire Effects Information System, at <http://www.fs.fed.us/database/feis/plants/graminoid/brotec/all.html> (last visited June 25, 2007).
- ⁸⁴ U.S. DEP’T OF THE INTERIOR, *Biological Soil Crusts: Ecology and Management*, 56 (Technical Reference 1730-2) (2001), available at <http://www2.nature.nps.gov/geology/soils/biological%20soil%20crusts.pdf> (last visited June 25, 2007).
- ⁸⁵ See generally WELFARE RANCHING, *supra* note 50, at 207-57.
- ⁸⁶ U.S. DEP’T OF THE INTERIOR, *Rangeland Reform ‘94 Final Environmental Impact Statement*, 26 (1995)..
- ⁸⁷ WELFARE RANCHING, *supra* note 50, at 17.
- ⁸⁸ *Id.* at 16.
- ⁸⁹ Marc Reisner, *CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER* 156 (1986).
- ⁹⁰ 48 Stat. 1269-1275; 43 U.S.C. § 315 *et seq.*
- ⁹¹ 43 U.S.C. § 315b.
- ⁹² See 43 U.S.C. § 315a.
- ⁹³ *Id.*
- ⁹⁴ Thomas L. Fleischner, *Land Held Hostage: A History of Livestock and Politics*, in WELFARE RANCHING, *supra* note 50, at 35-36.
- ⁹⁵ *Id.*
- ⁹⁶ For national forests, this was mandated in the Multiple Use and Sustained Yield Act of 1960.
- ⁹⁷ See Bruce M. Pendery, *Reforming Livestock Grazing on the Public Domain: Ecosystem Management-Based Standards and Guidelines Blaze a New Path for Range Management*, 27 ENVTL. L. 513, 558-600 (1997).
- ⁹⁸ The Fundamentals of Rangeland Health instructed BLM officials at the state level to undertake the actions necessary to achieve four national goals relating to the environmental health of rangelands:
- Watersheds are in, or are making significant progress toward, properly functioning physical condition, including their upland, riparian-wetland, and aquatic components; soil and plant conditions support infiltration, soil moisture storage, and the release of water that are in balance with climate and landform and maintain or improve water quality, water quantity, and timing and duration of flow.
 - Ecological processes, including the hydrological cycle, nutrient cycle, and energy flow, are maintained or there is significant progress toward their attainment, in order to support healthy biotic populations and communities.
 - Water quality complies with State water quality standards and achieves, or is making significant progress toward

achieving, established BLM management objectives such as meeting wildlife needs.

- Habitats are, or are making significant progress toward being, restored or maintained for Federal threatened and endangered species, Federal proposed, Category 1 and 2 Federal candidate and other special status species.

43 C.F.R. § 4180.1 (2005).

⁹⁹ 43 C.F.R. § 4180.2(a) (2005).

¹⁰⁰ 43 C.F.R. § 4130.2(g) (2005). The provision for “conservation use” was struck down by the Tenth Circuit in *Public Lands Council v. Babbitt*, 167 F.3d 1287 (10th Cir. 1999), and this part of the Tenth Circuit’s decision was not appealed to the Supreme Court. However, another Babbitt amendment, deleting the requirement that permittees be “engaged in the livestock business,” was affirmed by the Supreme Court. *Public Lands Council v. Babbitt*, 529 U.S. 728 (2000).

¹⁰¹ 43 C.F.R. § 4180.2(c)(1) (2006).

¹⁰² Joseph M. Feller, *Ride ‘em Cowboy: A Critical Look at BLM’s Proposed New Grazing Regulations*, 34 ENVTL. L. 1123, 1134-37 (2004).

¹⁰³ *Id.*

¹⁰⁴ See BUREAU OF LAND MGMT., *Grazing Administration – Exclusive of Alaska*, 71 Fed. Reg. 39,402, 39,469-71 (July 12, 2006) (discussing elimination of requirement for consultation with the interested public in issuing and renewing grazing permits); *id.* at 39,473-75 (discussing elimination of requirement for consultation with the interested public in modification of existing permits); *id.* at 39,478-80 (discussing elimination of requirement for consultation with the interested public in issuing nonrenewable permits and leases); *id.* at 39,448 (discussing elimination of requirement for consultation with the interested public in designating allotment boundaries); *id.* at 39,454 (discussing elimination of requirement for consultation with the interested public in implementing changes to active uses).

¹⁰⁵ *Western Watersheds Project v. Kraayenbrink*, Slip Copy, 2006 WL 2348080 (D. Idaho 2006); *Western Watersheds Project v. Kraayenbrink*, Slip Copy, 2006 WL 2735772 (D. Idaho 2006).

¹⁰⁶ *Western Watersheds Project v. Kraayenbrink*, Slip Copy, 2006 WL 1667618 (D. Idaho 2006).

¹⁰⁷ P.L. 109-58, August 8, 2005, 119 Stat. 594.

¹⁰⁸ U.S. GEOLOGICAL SURVEY, *U.S. Geological Survey 2002 Petroleum Resource Assessment of the National Petroleum Reserve in Alaska (NPR)*, 1 (2002), available at <http://pubs.usgs.gov/fs/2002/fs045-02/fs045-02.pdf> (last visited June 25, 2007).

¹⁰⁹ U.S. ENVTL. PROT. AGENCY, *Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs*, 1-2 Fig. 1-1 (June 2004), available at

http://www.epa.gov/safewater/uic/cbmstudy/pdfs/completestudy/ch1_6-4-04.pdf (last visited June 25, 2007).

¹¹⁰ U.S. DEP’T. OF THE INTERIOR, AGRIC., AND ENERGY, *Scientific Inventory of Onshore Federal Lands’ Oil and Gas Resources and the Extent and Nature of Restrictions or Impediments to Their Development*, xxiv – xxx (2006), available at <http://www.blm.gov/epca/phase2/EPCA06full72.pdf> (last visited June 25, 2007).

¹¹¹ J. Bartis et al., RAND Corp., *Oil Shale Development in the United States: Prospects and Policy Issues*, ix (2005), available at http://www.rand.org/pubs/monographs/2005/RAND_MG414.pdf (last visited June 25, 2007) (hereinafter, RAND Corp.: *Oil Shale*).

¹¹² U.S. DEP’T OF THE INTERIOR, *Interior Board of Land Appeals, Southern Utah Wilderness Alliance and Natural Resources Defense Council*, 164 IBLA 1 (November 10, 2004), available at http://www.suwa.org/site/DocServer/IBLADecision_Nov04.pdf?docID=1521 (last visited June 25, 2007).

¹¹³ Letter from Robert E. Roberts, Regional Administrator, U.S. Env’tl. Prot. Agency, Region 8, to Sherry Barnett, Acting State Director, BLM Mont. State Office, Jan Sensibaugh Director, Mont. Dep’t of Env’tl. Quality, and David Ballard, Chairman, Mont. Board of Oil and Gas Conservation, May 15, 2002, available at <http://www.epa.gov/Region8/compliance/nepa/nepadocs/mt/MontanaDEISMAY15.pdf> (last visited June 25, 2007).

¹¹⁴ THE WILDERNESS SOC’Y, *News Release: More Than 118,000 New Wells Planned in Rockies*, October 18, 2006, available at <http://www.wilderness.org/NewsRoom/Release/20061018.cfm> (last visited June 25, 2007).

¹¹⁵ TWS, *Too Wild to Drill*, *supra* note 4.

¹¹⁶ U.S. DEP’T. OF THE INTERIOR, Public Land Order 2214, Alaska – Establishing the Arctic National Wildlife Refuge, 25 Fed. Reg. 12,598 (December 6, 1960), available at http://library.fws.gov/Pubs7/ANWR_plo.pdf (last visited June 25, 2007).

¹¹⁷ Alaska National Interest Lands Conservation Act, P.L. 96-487 § 303(2)(B); 94 Stat. 2371.

¹¹⁸ U.S. FISH & WILDLIFE SERV. – ALASKA, *Arctic National Wildlife Refuge, Overview*, available at <http://www.fws.gov/refuges/profiles/index.cfm?id=75600> (last visited June 25, 2007).

¹¹⁹ U.S. GEOLOGICAL SURVEY, *Undiscovered oil resources in the Federal portion of the 1002 Area of the Arctic National Wildlife Refuge: an economic update*, Open-File Report 2005-1217 (2005), available at <http://pubs.usgs.gov/of/2005/1217/pdf/2005-1217.pdf> (last visited June 25, 2007).

¹²⁰ U.S. FISH & WILDLIFE SERV. – ALASKA, *Arctic Refuge Brochure*, available at <http://arctic.fws.gov/descrip.htm> (last visited June 25, 2007).

¹²¹ THE WILDERNESS SOC'Y, *Too Wild to Drill – Teshekpuk Lake*, at <http://www.wilderness.org/WhereWeWork/alaska/twtd-teshekpuk.cfm> (last visited June 25, 2007).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ GREATER YELLOWSTONE COALITION, *The Wyoming Range – A Hidden Gem Threatened by Oil and Gas Drilling*, at <http://greateryellowstone.org/issues/issue.php?threatID=30> (last visited June 25, 2007).

¹²⁵ THE WILDERNESS SOC'Y, *Too Wild to Drill – Red Desert, Wyoming*, at <http://www.wilderness.org/WhereWeWork/wyoming/twtd-reddesert.cfm> (last visited June 25, 2007).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ FRIENDS OF THE RED DESERT, *Desert Values*, at <http://www.reddesert.org/values/index.php> (last visited June 25, 2007).

¹²⁹ THE WILDERNESS SOC'Y, *Too Wild to Drill – Red Desert, Wyoming*, *supra* note 125. Moreover, an internal BLM memo uncovered by a *Seattle Times* reporter instructs Wyoming staff to ignore Clinton-era memos calling for review of Red Desert lands for potential wilderness protections. Craig Welch, *For Good or Ill, Bush Clears Path for Energy Development*, SEATTLE TIMES, Sept. 26, 2004, available at http://seattletimes.nwsourc.com/html/nationworld/2002046456_bushenergy26m.html (last visited June 25, 2007).

¹³⁰ SOUTHERN UTAH WILDERNESS ALLIANCE, *The Facts About Oil and Gas Development on Utah's Public Lands* (January 5, 2007), available at http://www.suwa.org/site/DocServer/O_GFactSheet_Aug06.pdf?docID=281 (last visited June 25, 2007).

¹³¹ See Presidential Proclamation 6920, "Establishment of the Grand Staircase-Escalante National Monument (September 18, 1996), available at <http://www.americantrails.org/resources/fedland/escalantenmproc.html> (last visited June 25, 2007).

¹³² See U.S. DEP'T OF ENERGY, ENERGY INFORMATION ADMINISTRATION, *The Effects of Title IV of the Clean Air Act Amendments of 1990 on Electric Utilities: An Update* (October 21, 2002), available at http://www.eia.doe.gov/cneaf/electricity/clean_air_upd97/exec_sum.html (last visited June 25, 2007) (noting that sales of low sulfur coal from the Powder River Basin of Wyoming and Montana increased by 78 million tons after passage of the 1990 Clean Air Act Amendments).

¹³³ See ENVIRONMENTAL NEWS SERVICE, *Oil and Gas Thumper Trucks Set to Disturb Wyoming Wilderness*, Mar. 22, 2005, at <http://www.ens-newswire.com/ens/mar2005/2005-03-22-03.asp> (last visited June 25, 2007).

¹³⁴ U.S. DEP'T. OF THE INTERIOR, BUREAU OF LAND MGMT., *Final Environmental Impact Statement: Jonah Infill Drilling Project Sublette County, Wyoming*, 2-14 (January 2006), available at <http://www.blm.gov/style/medialib/blm/wy/nepa/pfodocs/jonah.Par.7761.File.dat/01volume1.pdf> (last visited June 25, 2007) (discussing oil companies' proposal to go forward with the Jonah Field Infill Drilling Project with 64 wells per section (one section is one square mile)).

¹³⁵ One square mile is 640 acres.

¹³⁶ SOC'Y OF PETROLEUM ENGINEERS, *How are Oil and Natural Gas Produced?*, available at http://www.spe.org/spe/jsp/basic/0,,1104_1008218_1109305,00.html (last visited Mar. 23, 2007).

¹³⁷ *Id.* (explaining that oil wells in the U.S. produce between 8 and 100 barrels of produced water per barrel of oil).

¹³⁸ See Thomas F. Darin and Amy W. Beatie, *Debunking the Natural Gas "Clean Energy" Myth: Coalbed Methane in Wyoming's Powder River Basin*, 31 ENVTL. L. REP. 10566, 10575 (2001).

¹³⁹ *Id.* at 10575-76.

¹⁴⁰ *Id.* at 10576-77.

¹⁴¹ See U.S. ENVTL. PROT. AGENCY, *What is Hydraulic Fracturing?*, at <http://www.epa.gov/safewater/uic/cbmstudy/hfracdef.html> (last visited June 25, 2007).

¹⁴² WYO. ORG. OF RES. COUNCILS, *Hydraulic Fracturing Fact Sheet*, available at <http://www.worc.org/pdfs/3-Frac'ing%20Factsheet%20dr2.pdf> (last visited June 25, 2007).

¹⁴³ P.L. 109-58, § 322.

¹⁴⁴ See Paulette Middleton, *Air Quality Impacts of Oil & Gas Drilling in the Green River Valley*, Nov. 1, 2002, available at http://www.uppergreen.org/library/docs/Middleton_AQreport.pdf (last visited June 25, 2007) (summarizing the air quality impacts of oil and gas production as explained in various BLM and USFS environmental impact studies).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See THE WILDERNESS SOC'Y, *Double the Air Pollution: Particulate Matter From Upper Green's Jonah Field Infill Project Will Be Nearly Twice EPA's New Allowable Maximum*, Oct. 9, 2006, available at <http://www.wilderness.org/NewsRoom/Release/20061009.cfm> (last visited June 25, 2007).

¹⁴⁸ U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., *Final Environmental Impact Statement, Jonah Infill Drilling Project, Sublette County, Wyoming*, Appendix J, Table J-5 (January 2006), available at <http://www.blm.gov/style/medialib/blm/wy/nepa/pfodocs/jonah.Par.8046.File.dat/25J.pdf> (last visited June 25, 2007).

¹⁴⁹ U.S. ENVTL. PROT. AGENCY, *National Ambient Air Quality Standards for Particulate Matter*, 71 Fed. Reg. 61144 (Oct. 17, 2006).

¹⁵⁰ 16 U.S.C. §§ 431 *et seq.*

¹⁵¹ See Rasband *et al.*, NATURAL RESOURCES LAW AND POLICY 593-600 (2004). See also, e.g., Presidential Proclamation 8031 – Establishment of the Northwestern Hawaiian Islands Marine National Monument (June 15, 2006), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=139> (last visited June 25, 2007) (setting aside as a National Monument over 139,000 square miles of coral islands, seamounts, banks, and shoals because the “diverse ecosystem is home to many species of coral, fish, birds, marine mammals, and other flora and fauna including the endangered Hawaiian monk seal, the threatened green sea turtle, and the endangered leatherback and hawksbill sea turtles”). See also, e.g., Presidential Proclamation 6920 – Establishment of the Grand Staircase-Escalante National Monument (September 18, 1996), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=51948> (last visited June 25, 2007) (noting that the monument is a “geological treasure”).

¹⁵² 16 U.S.C. §§ 1131 *et seq.*

¹⁵³ 16 U.S.C. § 1131.

¹⁵⁴ For more on the National Park System and National Wildlife Refuge System, see the sections of this report detailing those public lands, the statutes that govern their management, and current threats to achieving the statutory mandates to preserve them for the benefit of future generations.

¹⁵⁵ THE WILDERNESS SOC’Y, *Too Wild to Drill – Teshekpuk Lake*, *supra* note 121.

¹⁵⁶ *Id.*

¹⁵⁷ EARTHJUSTICE, *Selling Off an Arctic Treasure Piece by Piece* (September 25, 2006), at http://www.earthjustice.org/our_work/policy/2006/page.jsp?itemID=28329221 (last visited June 25, 2007).

¹⁵⁸ U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., *Amendment to the Northeast National Petroleum Reserve Integrated Activity Plan/Environmental Impact Statement – Record of Decision* (January 11, 2006), available at http://www.blm.gov/ak/nenpraeis/rod/nerod_122205final.pdf (last visited June 25, 2007).

¹⁵⁹ *Nat’l Audubon Soc’y v. Kempthorne*, No. 1:05-cv-00008-JKS (D. Alaska, 2006), available at http://www.blm.gov/ak/nenpraeis/memorandumdecisiondkt_107.pdf (last visited June 25, 2007).

¹⁶⁰ DEP’T OF THE INTERIOR, *Notice of Intent to Prepare a Supplement to the Northeast National Petroleum Reserve-Alaska Amended Integrated Activity Plan/Environmental Impact Statement*, 71 Fed. Reg. 70,422 (Dec. 4, 2006).

¹⁶¹ THE WILDERNESS SOC’Y, *Too Wild to Drill – Wyoming Range*, available at <http://www.wilderness.org/WhereWeWork/Wyoming/TWTD-WyomingRange.cfm> (last visited June 25, 2007).

¹⁶² Welch, *supra* note 129.

¹⁶³ 43 U.S.C. § 1732(a) (instructing the Secretary of the Interior to “manage public lands under principles of multiple use and sustained yield”); 16 U.S.C. § 528 (stating that “[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes”).

¹⁶⁴ 43 U.S.C. § 1702(c); 16 U.S.C. § 528. For additional discussion of the MUSYA, see the sections of this report concerning the National Forest System (*infra*) and BLM lands used for grazing (*supra*).

¹⁶⁵ 43 U.S.C. §§ 1701 *et seq.*

¹⁶⁶ 16 U.S.C. §§ 1600 *et seq.*

¹⁶⁷ 43 U.S.C. § 1712 (requiring the Secretary of Interior to develop land use plans to guide management of lands under her supervision); 43 C.F.R. Part 1600 (BLM regulations for development, approval, maintenance, amendment and revision of RMPs).

¹⁶⁸ 16 U.S.C. § 1604 (requiring the Secretary of Agriculture to develop land use plans to guide management of lands under her supervision (including National Forests)); 36 C.F.R. Part 219 (Forest Service regulations for developing, amending, and revising LRMPs).

¹⁶⁹ In *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726 (1998), the Supreme Court held that the ripeness doctrine prohibits judicial review of the substance of LRMPs. The Court viewed LRMPs, as “tools for agency planning or management,” do not mandate any immediate site-specific action but rather provide non-binding guidance for future management decisions. As such, the Court held that an LRMP itself does not provide grounds for a justiciable suit; rather, conservation groups must await a subsequent site-specific decision based on the plan in order to have sufficient facts to present a court with a legitimate case or controversy. Thus, the Sierra Club was unable to obtain judicial review of a management plan that would have allowed for logging on 8,000 acres of a 178,000 acre forest (including 5,000 acres of clearcutting). The Court held that the group would have to wait until individual logging permits were issued. This holding hurts conservationists’ ability to minimize the cumulative impacts allowed by a management plan by forcing them to engage in piecemeal litigation. The Supreme Court has also held that federal law does not allow conservation groups to bring a lawsuit to compel agency action in accordance with a management plan. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004). Focusing again on the fact that an LRMP under FLPMA “guides and constrains actions, but does not (at least in the usual case) prescribe

them,” the Court held that LRMPs lack legally binding commitments that are enforceable through the APA. *Id.* at 71-72. A group may be able to challenge agency actions that are inconsistent with the plan, *Id.* at 69, but it cannot, through the courts, force an agency to act. For example, the Supreme Court rejected the Southern Utah Wilderness Alliance’s claim that the Bureau of Land Management should be compelled to develop an off-road vehicle monitoring program, even when the applicable LRMP stated that an area open to ORV traffic “will be monitored and closed if necessary.” *Id.* at 67-72.

¹⁷⁰ The Wyoming Range provides an example of how a multiple use management strategy can fail to ensure that today’s resources are conserved for future generations. Located within the Bridger-Teton National Forest, the Wyoming Range has long been managed to support recreation and wildlife conservation uses; but the promise of new jobs and increased tax revenues for the state has prompted federal officials recently to relax restrictions on energy development in the Range. THE WILDERNESS SOC’Y, *Too Wild to Drill – Wyoming Range*, *supra* note 161. The Forest Service has proposed leasing some 44,600 acres of the forest to oil and gas developers. *Id.*

¹⁷¹ BIODIVERSITY CONSERVATION ALLIANCE, *The Jonah Field: A Disaster for Wyoming*, available at http://www.voiceforthewild.org/blm/jonah_field/index.html (last visited June 25, 2007).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MGMT., *Instruction Memorandum No. 2004-194, Subject: Integration of Best Management Practices into Application for Permit to Drill Approvals and Associated Rights-of-Way*, June 22, 2004, available at <http://www.blm.gov/nhp/efoia/wo/fy04/im2004-194.htm> (last visited June 25, 2007).

¹⁷⁶ *Id.*

¹⁷⁷ GAO: INCREASED OIL AND GAS PERMITTING ACTIVITY REPORT, *supra* note 4, at 23 (footnotes omitted).

¹⁷⁸ “Taken as a whole, the eight BLM field offices we visited met their annual environmental inspection goals only about half of the time during the past 6 years (from fiscal years 1999 through 2004), due in part to staff spending an increasing amount of time processing drilling permits. Specifically, two field offices—Glenwood Springs, Colorado, and Carlsbad, New Mexico—were able to meet their environmental inspection goals during the entire 6-year span. The success of the remaining six field offices ranged from achieving their annual environmental inspection goals in 5 out of the 6 years in the Pinedale, Wyoming, field office, to only once being able to achieve their annual goal in the 6-

year period in both the Buffalo, Wyoming, and Vernal, Utah, field offices—the two field offices with the largest increases in permitting activity. These two field offices last met their annual environmental inspection goals in fiscal years 2000 and 1999, respectively. Furthermore, the Buffalo, Wyoming, field office—the field office with the highest drilling permit workload—was able to complete only 27 percent of its environmental inspection goals in fiscal year 2004.” *Id.* at 23 (footnotes omitted).

¹⁷⁹ 30 U.S.C. § 1202.

¹⁸⁰ 43 C.F.R. § 3162.5-1.

¹⁸¹ 30 U.S.C. § 1259.

¹⁸² See WESTERN ORG. OF RESEARCH COUNCILS, *Filling the Gaps: How to Improve Oil and Gas Reclamation and Reduce Taxpayer Liability* (August 2005), available at <http://www.worc.org/pdfs/Filling%20the%20Gaps.pdf> (last visited June 25, 2007).

¹⁸³ GAO: INCREASED OIL AND GAS PERMITTING ACTIVITY REPORT, *supra* note 4.

¹⁸⁴ *Id.* at 25.

¹⁸⁵ *Id.*

¹⁸⁶ Edmund L. Andrews, *As Profits Soar, Companies Pay U.S. Less for Gas Rights*, N.Y. TIMES, A1, Jan. 23, 2006.

¹⁸⁷ See U.S. DEP’T OF THE INTERIOR, OFFICE OF THE INSPECTOR GENERAL, *Investigative Report On the Lack of Price Thresholds in Gulf of Mexico Oil and Gas Leases*, available at <http://www.doi.oig.gov/upload/MMS%20ROI%20REDACTED.pdf> (last visited June 25, 2007).

¹⁸⁸ See Letter from Douglas Holtz-Eakin, Director, Congressional Budget Office, to Hon. Joe Barton, Chairman, Committee on Energy and Commerce, U.S. House of Representatives (July 25, 2005), available at <http://www.cbo.gov/ftpdocs/65xx/doc6581/hr6prelim.pdf> (last visited June 25, 2007) (providing CBO’s cost estimate for H.R. 6, the Energy Policy Act of 2005).

¹⁸⁹ *See id.*

¹⁹⁰ U.S. DEP’T OF AGRIC., FOREST SERV., *About Us: Meet the Forest Service*, available at <http://www.fs.fed.us/aboutus/meetfs.shtml> (last visited Mar. 19, 2007).

¹⁹¹ *Id.*; See also Ross W. Gorte *et al.*, *Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service*, Cong. Research Serv. Report No. RL33596 (Oct. 2006), at 2.

¹⁹² 16 U.S.C. § 475.

¹⁹³ 16 U.S.C. §§ 528-531.

¹⁹⁴ 16 U.S.C. § 528.

¹⁹⁵ 16 U.S.C. § 531(a).

¹⁹⁶ 16 U.S.C. § 529.

¹⁹⁷ The growth in timber sales authorized by the Forest Service, expansion of the use of clearcutting, and, on the other hand, a court opinion that interpreted the 1897 Organic Act to severely restrict the timber that was permitted to be harvested from national forest lands were among the concerns prompting Congress's consideration of new legislation to address management of the National Forest System. See Flournoy, *et al.*, *supra* note 28, at 2-3.

¹⁹⁸ 16 U.S.C. § 1609(a).

¹⁹⁹ S. REP. NO. 94-893 at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6662, 6671.

²⁰⁰ 16 U.S.C. §§ 1604(a), (b).

²⁰¹ 16 U.S.C. § 1604(a).

²⁰² 16 U.S.C. §§ 1604(g)(3)(A)-(F).

²⁰³ 16 U.S.C. § 1604(g)(1).

²⁰⁴ 16 U.S.C. § 1604(g)(3)(B).

²⁰⁵ 16 U.S.C. §§ 1604(g)(3)(E)(i)-(iv).

²⁰⁶ 16 U.S.C. §§ 1604(g)(3)(F)(i)-(v).

²⁰⁷ Mike Leahy, *EMS Ignores True Nature of Planning*, THE ENVTL. FORUM (Jan./Feb. 2004), at 31, available at <http://www.fs.fed.us/emc/nepa/ems/includes/smokey.pdf> (last visited Mar. 21, 2007).

²⁰⁸ *Id.*

²⁰⁹ WHITE HOUSE, *Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities* (Aug. 2002), available at http://www.whitehouse.gov/infocus/healthyforests/Healthy_Forests_v2.pdf (last visited June 25, 2007).

²¹⁰ WHITE HOUSE, *Policies in Focus: Healthy Forests – An Initiative for Wildfire Prevention and Stronger Communities*, available at <http://www.whitehouse.gov/infocus/healthyforests/> (last visited Mar. 22, 2007).

²¹¹ HEALTHYFORESTS.GOV, *Overview: What is the Healthy Forests Initiative?*, available at <http://www.healthyforests.gov/initiative/introduction.html> (last visited Mar. 22, 2007).

²¹² See, e.g., HFRA § 2(1), 16 U.S.C. § 6501(1) (enumerating purposes of HFRA, the first of which is to “reduce wildfire risk to communities, municipal water supplies, and other at-risk Federal land through a collaborative process of planning, prioritizing, and implementing hazardous fuel reduction projects”).

²¹³ HEALTHYFORESTS.GOV, *Overview: What is the Healthy Forests Initiative?*, *supra* note 211.

²¹⁴ William W. Buzbee, *et al.*, *Regulatory Underkill: The Bush Administration's Insidious Dismantling of Public Health and Environmental Protections*, 22, Center for Progressive Reform White Paper No. (Feb. 2005), available at http://www.progressivereform.org/articles/Underkill_503.pdf (last visited Mar. 22, 2005).

²¹⁵ WHITE HOUSE, *Policies in Focus: Healthy Forests – An Initiative for Wildfire Prevention and Stronger Communities*, *supra* note 210.

²¹⁶ As further discussed *infra*, in notes 274-80 and accompanying text, in furtherance of its Healthy Forests Initiative the Bush Administration's Forest Service established (and has been liberally using) four new categorical exclusions from NEPA analysis for vegetation management projects in national forests.

²¹⁷ Robert Perks, Natural Resources Defense Council, *Rewriting the Rules: The Bush Administration's Assault on the Environment*, 3rd Annual Edition, 54 (Apr. 2004), available at <http://www.nrdc.org/legislation/rollbacks/rr2004.pdf> (last visited June 25, 2007). See also Buzbee *et al.*, *Regulatory Underkill*, *supra*, n. 214, at 22 (citing HFRA §§ 104(d)(1)-(2), 105(a)(1)-(2), 106(b)-(c) (16 U.S.C. §§ 6514(d)(1)-(2), 6515(a)(1)-(2), 6516(b)-(c)).

²¹⁸ See, e.g., HEALTHYFORESTS.GOV, *Overview: What is the Healthy Forests Initiative?*, *supra* note 211; WHITE HOUSE, *Policies in Focus: Healthy Forests – An Initiative for Wildfire Prevention and Stronger Communities*, *supra* note 210; Ross W. Gorte, *Wildfire Protection in the 108th Cong.*, Cong. Research Serv. Report No. RS22024 (Jan. 2005), at 1.

²¹⁹ HEALTHYFORESTS.GOV, *Overview: What is the Healthy Forests Initiative?*, *supra* note 211.

²²⁰ Gorte, *supra* note 218, at 1.

²²¹ *Id.*

²²² See, e.g., Jesse B. Davis, Comment, *The Healthy Forests Initiative: Unhealthy Policy Choices in Forest and Fire Management*, 34 ENVTL. L. 1209 (2004).

²²³ Pamela Baldwin & Ross Gorte, *The National Forest System Roadless Areas Initiative*, Cong. Res. Serv. Report No. RL30647 (Sept. 2006), at 6.

²²⁴ *Supra*, note 196.

²²⁵ 16 U.S.C. §§ 1131 *et seq.*

²²⁶ 16 U.S.C. §§ 1132(b), (c).

²²⁷ Baldwin & Gorte, *supra* note 223, at 6.

²²⁸ *Id.*

²²⁹ *Id.*; See also U.S. DEP'T OF AGRIC., FOREST SERV., *Roadless Area Conservation: Where Are We Now?*, “Quick Numbers,” available at <http://roadless.fs.fed.us/> (last visited Mar. 19, 2007).

²³⁰ Robert L. Glicksman, *Traveling in Opposite Directions: Roadless Area Management Under the Clinton and Bush Administrations*, 34 ENVTL. L. 1143, 1155 (2004) (quoting U.S. DEP'T OF AGRIC., FOREST SERV., *Special Areas; Roadless Area Conservation*, 65 Fed. Reg. 30,276 (May 10, 2000)).

²³¹ *Id.*

²³² *Id.* (citing U.S. DEP'T OF AGRIC., FOREST SERV., *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. 3244 (Jan. 12, 2001)).

²³³ Baldwin & Gorte, *supra* note 223, at 1.

²³⁴ Upon taking office, the Bush Administration postponed for 60 days the effective date of all regulations that had been published in the Federal Register but that had not yet taken effect – including the Roadless Rule. See Glicksman, *supra* note 230, at 1165 (citing *Memorandum for the Heads and Acting Heads of Executive Departments and Agencies* from Chief of Staff Andrew H. Card, Jr., 66 Fed. Reg. 7702 (Jan. 24, 2001)).

²³⁵ *Id.* at 1166 (citing U.S. DEP'T OF AGRIC., FOREST SERV., *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. 35,918 (Jul. 10, 2001)).

²³⁶ *Id.* (citing U.S. DEP'T OF AGRIC., FOREST SERV., *Special Areas; Roadless Area Conservation*, 66 Fed. Reg. 35,918 (Jul. 10, 2001)).

²³⁷ U.S. DEP'T OF AGRIC., FOREST SERV., *Special Areas; State Petitions for Inventoried Roadless Area Management*, 70 Fed. Reg. 25654 (May 13, 2005); see Glicksman, *supra* note 230, at 1171 n. 131 (describing proposed rule).

²³⁸ *Special Areas; State Petitions for Inventoried Roadless Area Management*, 70 Fed. Reg. 25654, 25661 (May 13, 2005) (to be codified at 36 C.F.R. §§ 294.12-13). Though the Forest Service received public comments “requesting that the final rule include a specific standard or criteria that the Secretary will apply when reviewing petitions,” it declined to add such criteria in its final rule. *Id.* at 25658. Its reasoning was that “[t]here is no single factor that can assess how to best accomplish” the Service’s stated goal of improving the system for protecting roadless areas, and “no one criteria can be identified given the diverse circumstances that apply across the National Forest System.” *Id.*

²³⁹ Glicksman, *supra* note 230, at 1171 n. 131 (describing proposed rule).

²⁴⁰ *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F.Supp.2d 874 (N.D. Cal. 2006).

²⁴¹ *California ex rel. Lockyer v. U.S. Dep't of Agric.*, No. 05-03508-EDL (N.D. Cal. filed Feb. 6, 2007), available at http://www.fs.fed.us/emc/roadless/judge_laporte_fio_020607.pdf (last visited Jun. 12, 2007).

²⁴² See *Wyo. v. U.S. Dep't of Agric.*, No. 01-CV-86-B (D. Wyo. Jun. 7, 2007). Before the Bush Administration’s State Petitions Rule was issued, the State of Wyoming sued the USDA in federal district court, challenging the Clinton Roadless Rule. In July 2003, the court ruled that the Clinton Roadless Rule was promulgated in violation of NEPA and enjoined the rule. Intervenor environmental organizations appealed the decision to the U.S. Court of Appeals for the Tenth Circuit. Before the federal appeals court could rule on

the matter, the Bush Administration issued the State Petitions Rule. Accordingly, that court dismissed the appeal as moot. After the *Lockyer* litigation was brought, the State of Wyoming, concerned that the litigation in California could result in the “revival” of the Roadless Rule, petitioned the Tenth Circuit to change its decision in light of these developments, but the court declined to do so, and instead ordered the Wyoming District Court to dismiss the case without prejudice, which the District Court did. Following the *Lockyer* decision, the State of Wyoming asked the District Court to vacate its order of dismissal. The court declined to do so, on the ground that it was bound by the Tenth Circuit’s order, but stated that Wyoming’s proper remedy is to inform the Tenth Circuit of the California ruling in *Lockyer* and ask that court to recall its mandate to the Wyoming District Court. In his Order denying Wyoming’s Motion for Relief from Judgment, Judge Brimmer stated that “this Court is extremely perplexed over how the California Court could resurrect the Clinton Roadless Rule” and that the “Court is troubled and questions the authority of the California court to raise this rule back to life and force.” *Id.* at 5. “Clearly,” wrote District Judge Brimmer,

a California Magistrate Judge could have no right, by way of appeal, to reverse this Court’s decision, which still stands, even though the Tenth Circuit ordered the case dismissed. This Court’s opinion, that the Clinton Administration did not comply with NEPA, was not reversed. The case was dismissed for mootness and not because the opinion was wrong. Aside from the question of whether a magistrate can reverse the opinion of a district court, Judge Laporte plainly did not have authority to do so or the power to revive a once dead rule.

Id. at 5-6.

²⁴³ *California ex rel. Lockyer v. U.S. Dep't of Agric.*, No. 05-03508-EDL (N.D. Cal. filed Feb. 6, 2007), available at http://www.fs.fed.us/emc/roadless/judge_laporte_fio_020607.pdf (last visited Jun. 12, 2007).

²⁴⁴ Mike Leahy, *EMS Ignores True Nature of Planning*, THE ENVTL. FORUM (Jan./Feb. 2004), at 31, available at <http://www.fs.fed.us/emc/nepa/ems/includes/smokey.pdf> (last visited Mar. 21, 2007).

²⁴⁵ For a summary of the 1982 planning regulations, see Alyson Flournoy, *et al.*, *Regulations in Name Only: How the Bush Administration’s National Forest Planning Rule Frees the Forest Service from Mandatory Standards and Public Accountability*, Center for Progressive Reform White Paper No. 508 (June 2005), at 3-4 (text accompanying notes 37-63), available at http://www.progressivereform.org/articles/Forests_508.pdf (last visited Mar. 19, 2007).

²⁴⁶ Committee of Scientists, *Sustaining the People’s Lands: Recommendations for Stewardship of the National Forests and*

Grasslands into the Next Century, (Mar. 15, 1999), at xiii, available at http://www.fs.fed.us/news/news_archived/science/cossynop.pdf (last visited Mar. 14, 2005); *See also* 16 U.S.C. § 1604(h)(1).

²⁴⁷ For more on the composition of the COS and the process it undertook to develop its report to the Forest Service, *see* Flournoy, *et al.*, *supra* note 28, at 4-5 (text accompanying notes 69-73).

²⁴⁸ U.S. DEP'T OF AGRIC., FOREST SERV., *National Forest System Land and Resource Management Planning: Proposed Rule*, 64 Fed. Reg. 54074 (Oct. 5, 1999).

²⁴⁹ U.S. DEP'T OF AGRIC., FOREST SERV., *National Forest System Land and Resource Management Planning: Final Rule*, 65 Fed. Reg. 67514 (Nov. 9, 2000).

²⁵⁰ For a fuller explanation of these and other measures included in the 2000 NFMA planning regulations, *see* Flournoy, *et al.*, *supra* note 28, at 5 (text accompanying notes 75-98).

²⁵¹ *See id.* at 5-6 (text accompanying notes 99-105).

²⁵² *See id.* at 6 (text accompanying notes 106-118).

²⁵³ *See id.* at 6 (text accompanying notes 122-125).

²⁵⁴ U.S. DEP'T OF AGRIC., FOREST SERV., *National Forest System Land and Resource Management Planning: Proposed Rule*, 67 Fed. Reg. 72770 (Dec. 6, 2002). For a summary and discussion of the proposed rule, *see* Flournoy, *et al.*, *supra* note 28, at 7 (text accompanying notes 126-137).

²⁵⁵ U.S. DEP'T OF AGRIC., *News Release: Forest Service Publishes Planning Rule for Better Management of National Forests and Grasslands* (December 22, 2004), available at <http://www.fs.fed.us/common/scripts/print.php> (last visited Feb. 15, 2005). The final rule was published in the Federal Register on January 5, 2005. U.S. DEP'T OF AGRIC., FOREST SERV., *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023 (Jan. 5, 2005).

²⁵⁶ For a comprehensive analysis and discussion of the 2005 NFMA planning regulations, *see* Alyson Flournoy, *et al.*, *supra* note 28, at 9-15 (text accompanying notes 155-236).

²⁵⁷ Among the ways in which the Forest Service weakened the role of science in the planning process was its failure to convene a Committee of Scientists (COS) before promulgating the 2005 regulations, as required by NFMA. *See* 16 U.S.C. § 1604(h)(1). Although the agency claimed that it based the proposed rule on the major recommendations from the 1999 Committee of Scientists Report, the rule's provisions belie the claim. *See* Flournoy, *et al.*, *supra* note 28, at 11-12 (text accompanying notes 179-191). For example, one recommendation of the COS that the Forest Service completely rejected was the recommendation for implementing NFMA's diversity requirement. The 1999 COS had recommended retaining the Reagan-era approach to ensuring species diversity. Without supporting scientific

analysis, the 2005 rule eliminated the use of focal species and instead established the concept of "ecosystem diversity" as the "primary means by which a plan contributes to sustaining ecological systems," supported only by a vague instruction that "plan components . . . establish a framework to provide the characteristics of ecosystem diversity in the plan area." U.S. DEP'T OF AGRIC., FOREST SERV., *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1059 (Jan. 5, 2005). This provision of the rule was among the reasons the United States District Court for the Northern District of California held that the 2005 regulations violated NEPA and the Endangered Species Act. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F.Supp.2d 1059 (N.D. Cal. 2007). Additionally, the Forest Service has lost numerous other cases in the last few years in which its compliance with NFMA's diversity requirement was at issue. *See Utah Envtl. Cong. v. Richmond*, 483 F.3d 1127 (10th Cir. 2007); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147 (9th Cir. 2006); *Onachita Watch League v. Jacobs*, 463 F.3d 1163 (11th Cir. 2006); *Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057 (9th Cir. 2005); *Utah Envtl. Cong. v. Bosworth*, 372 F.3d 1219 (10th Cir. 2004); *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957 (9th Cir. 2002); *Sierra Club v. Martin*, 168 F.3d 1 (11th Cir. 1999).

²⁵⁸ For a comprehensive analysis and discussion of the 2005 NFMA planning regulations, *see* Flournoy, *et al.*, *supra* note 28, at 9-15 (text accompanying notes 155-236).

²⁵⁹ U.S. DEP'T OF AGRIC., FOREST SERV., *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1032 (Jan. 5, 2005); *See also* U.S. DEP'T OF AGRIC., FOREST SERV., *National Environmental Policy Act Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion*, 70 Fed. Reg. 1062 (Jan. 5, 2005).

²⁶⁰ U.S. DEP'T OF AGRIC., FOREST SERV., *National Environmental Policy Act; Documentation Needed for Developing, Revising, or Amending Land Management Plans; Categorical Exclusion*, 71 Fed. Reg. 75481 (Dec. 15, 2006).

²⁶¹ 16 U.S.C. § 1604(g)(1).

²⁶² 42 U.S.C. § 4332(C). Generally, agencies such as the Forest Service evaluate the likely environmental impacts of projects they propose using an environmental assessment (EA), or if the projects likely would significantly affect the environment, a more detailed EIS. *See, e.g.*, GAO: USE OF CEs FOR VEGETATION MANAGEMENT PROJECTS, *supra* note 4, at 6.

²⁶³ 36 C.F.R. § 219, *passim*, *see, e.g.*, § 219.10 (stating that the forest supervisor is responsible for preparing and implementing the forest plan and preparing the EIS for the plan) (July 1, 2000) (1982 rule); *See also, e.g.*, 36 C.F.R. § 219.9(d) (July 1, 2001) (2000 rule) (requiring responsible official to publish Notice of Intent to prepare an EIS to add,

modify, remove, or continue in effect decisions in a plan as part of plan revision process).

²⁶⁴ Specifically, NEPA regulations required the preparation of a draft and final EIS, each of which had to be supplemented if the Forest Service made substantial changes to the forest plan. See 40 C.F.R. § 1502.9 (July 1, 2006). Additionally, to comply with NEPA regulations, the Forest Service had to circulate the draft EIS and invite public comment on it (40 C.F.R. §§ 1502.19, 1503.1 (July 1, 2006)) and provide a formal response to public comments in the final EIS (40 C.F.R. § 1503.4(a) (July 1, 2006)).

²⁶⁵ DeAnn Zwright, *Smokey and the EMS*, THE ENVTL. FORUM (Jan./Feb. 2004), at 28, 31, available at <http://www.fs.fed.us/emc/nepa/ems/includes/smokey.pdf> (last visited Mar. 21, 2007). At the time of publication, the author was an Assistant Director for Planning in the Forest Service's Ecosystem Management Coordination Staff. See also David Goldstein, *New Policy Limits Environmental Scrutiny, Public Appeals*, CONTRA COSTA TIMES (Cal.), Dec. 17, 2006, available at <http://www.contracostatimes.com/mld/cctimes/news/nation/16258461.htm> (last visited Mar. 21, 2007) (quoting Fred Norbury (Associate Deputy Chief for the National Forest System) as saying “[a] plan doesn’t cause any change in the environment . . . [p]lans are intended to focus on what your goals and objectives for the land are and to provide some guidance.”).

²⁶⁶ See, e.g., *id.* (quoting Fred Norbury (Associate Deputy Chief for the National Forest System) as assuring that “[p]rojects that emerge from long-term management plans still would be subject to environmental analysis and public appeal.”).

²⁶⁷ 16 U.S.C. § 1604(g)(1) (emphasis added).

²⁶⁸ U.S. DEP’T OF AGRIC., FOREST SERV., *National Forest System Land Management Planning: Final Rule*, 70 Fed. Reg. 1023, 1024 (Jan. 5, 2005).

²⁶⁹ *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F.Supp.2d 1059, 1090 (N.D. Cal. 2007).

²⁷⁰ *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F.Supp.2d at 1097.

²⁷¹ 16 U.S.C. § 1536(a)(2) (requiring federal agencies to “insure that any action, authorized, funded, or carried out by [the] agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”).

²⁷² *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F.Supp.2d at 1076.

²⁷³ *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F.Supp.2d at 1100. The Forest Service has filed a motion with the court to alter or amend judgment, but in the meantime plans “to take additional comment on the 2005

rule, undertake additional environmental analysis, and take additional actions to address the Court’s rulings regarding ESA compliance.” U.S. DEP’T OF AGRIC., FOREST SERV., *Compliance with District Court Decision in Citizens for Better Forestry v. USDA and Defenders of Wildlife v. Johanns*, Apr. 27, 2007, available at http://www.fs.fed.us/r1/projects/plan_rule/wo_compliance_ltr_rfs_4_27_07.pdf (last visited Jun. 12, 2007).

²⁷⁴ GAO: USE OF CEs FOR VEGETATION MANAGEMENT PROJECTS, *supra* note 4.

²⁷⁵ *Id.* at 6. To establish CEs, the agency must determine that the categories of activities proposed do not individually or cumulatively have a significant impact on the environment, subject to public review and comment. *Id.*

²⁷⁶ *Id.* at 8.

²⁷⁷ *Id.* (citing 68 Fed. Reg. 33814 (June 5, 2003) and 68 Fed. Reg. 44598 (July 29, 2003)). These CEs were part of the Bush Administration’s Healthy Forests Initiative, discussed *supra*, text accompanying notes 209-222. See U.S. DEP’T OF AGRIC., *et al.*, *Administrative Actions to Implement the President’s Healthy Forests Initiative*, Dec. 11, 2002, at 3-4, available at http://www.whitehouse.gov/ceq/hfi_usda-doi_fact_sheet_12-11-02.pdf (last visited Mar. 21, 2007).

²⁷⁸ GAO: USE OF CEs FOR VEGETATION MANAGEMENT PROJECTS, *supra* note 4, at 1-2.

²⁷⁹ *Id.* at 3.

²⁸⁰ *Id.*

²⁸¹ Source data: GAO: USE OF CEs FOR VEGETATION MANAGEMENT PROJECTS, *supra* note 4, at 12, Table 2.

²⁸² S. REP. NO. 94-893 at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6662, 6671.

²⁸³ 16 U.S.C. § 475 (Organic Administration Act of 1897).

²⁸⁴ 16 U.S.C. § 1 (emphasis added).

²⁸⁵ Frank Bruni, *Bush Challenges Clinton-Gore Record on Protecting the Environment*, N.Y. TIMES, Sept. 14, 2000, A23.

²⁸⁶ *Id.*

²⁸⁷ GAO: NPS FUNDING TRENDS, *supra* note 4, at 1 (reporting that the National Park Service manages 390 park units as of March 31, 2006); U.S. GEN. ACCOUNTING OFFICE, NATIONAL PARK SERVICE: EFFORTS UNDERWAY TO ADDRESS ITS MAINTENANCE BACKLOG, 3 (Statement of Barry T. Hill, Director Natural Resources and Environment, Testimony Before the Subcommittee on National Parks, Recreation and Public Lands, Committee on Resources, House of Representatives), available at <http://www.gao.gov/new.items/d031177t.pdf> (last visited Oct. 2, 2006) (hereinafter, GAO: EFFORTS UNDERWAY TO ADDRESS NPS MAINTENANCE BACKLOG).

²⁸⁸ GAO: NPS FUNDING TRENDS, *supra* note 4, at 1 (reporting that the National Park Service’s 390 park units cover over

84 million acres as of March 31, 2006); GAO: EFFORTS UNDERWAY TO ADDRESS NPS MAINTENANCE BACKLOG, *supra* note 287, at 3.

²⁸⁹ *Id.*

²⁹⁰ U.S. DEP'T OF THE INTERIOR, IMPROVING NATIONAL PARKS – MAINTENANCE BACKLOG, available at <http://www.doi.gov/initiatives/parks.html> (last visited Oct. 2, 2006) (calculating total committed “over last three years” plus amount in proposed FY2005 budget).

²⁹¹ GAO: NPS FUNDING TRENDS, *supra* note 4, at 31.

²⁹² *Id.*

²⁹³ *Id.* at 4.

²⁹⁴ *Id.* at 6-7.

²⁹⁵ NAT'L PARKS CONSERVATION ASS'N, *Park Funding: NPCA Analysis of the Parks' \$800 Million Annual Shortfall*, available at http://www.npca.org/media_center/fact_sheets/funding_shortfall.html (last visited Feb. 8, 2007). The estimate, drawn from analysis of data collected through the National Parks Business Plan Initiative program, was based on comparison of dollars required to conduct all park operations versus dollars for operations available through congressional appropriations and other revenue. *Id.*

²⁹⁶ *Id.* The updated estimate is based on the 2001 analysis, adjusted to reflect annual cost-of-living adjustments for park staff, conversion from the prior retirement benefits system to the new system, congressional appropriations in the intervening years, as well as reports from the parks concerning both additional required operational funding and measures of cost savings. *Id.*

²⁹⁷ GAO: EFFORTS UNDERWAY TO ADDRESS NPS MAINTENANCE BACKLOG, *supra* note 287, at 1; *See also* GAO: NPS FUNDING TRENDS, *supra* note 4, at 2 (noting that the Park Service has recently set a goal to spend the majority of its visitor fees on reducing its estimated \$5 billion maintenance backlog).

²⁹⁸ Carol Hardy Vincent, *National Park Management*, Cong. Research Serv. Issue Brief No. 10145 (2005), 6.

²⁹⁹ Julie Cart, *Park Service's Budget Strain Felt in Safety, Maintenance, Report Says*, L.A. TIMES, June 16, 2006, A17 (citing CNSPR, *Reality Check 2006*, *supra* note 4).

³⁰⁰ Cart, *supra* note 299 (quoting Bill Wade).

³⁰¹ John G. Mitchell, *Threatened Sanctuaries*, NATIONAL GEOGRAPHIC (Oct. 2006), 96; *See also* Editorial, *Crossroads in the National Parks*, N.Y. TIMES, Feb. 27, 2006 (“President Bush’s new budget calls for \$100 million cut in park appropriations.”).

³⁰² PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, *News Release: Secret Plan to Cut National Park Funding by 30% in Five Years*, available at <http://www.peer.org/news/>

[news_id.php?row_id=673](http://www.peer.org/news_id.php?row_id=673) (last visited Nov. 9, 2006) (hereinafter, PEER, *Secret Plan to Cut Park Funding*).

³⁰³ *Id.* Full “talking points” available at http://www.peer.org/docs/nps/06_17_4_talkingpoints.pdf (last visited Nov. 9, 2006).

³⁰⁴ PEER, *Secret Plan to Cut Park Funding*, *supra* note 302; *See also* Timothy Egan, *Political Parties See Votes in National Parks, and Park Veterans Join Debate*, N.Y. TIMES, June 19, 2004 (reporting that “[w]ary of the fallout that a ragged park system could mean to the president, the Bush Administration has asked park superintendents to call budget cuts ‘service level adjustments’ and has provided them with talking points on how Mr. Bush has been good for parks.”).

³⁰⁵ PEER, *Secret Plan to Cut Park Funding*, *supra* note 302.

³⁰⁶ Editorial, *Crossroads in the National Parks*, *supra* note 301. *See also, e.g.*, Michael Shnayerson, *Who's Ruining Our National Parks?*, Vanity Fair (June 8, 2006), available at <http://www.vanityfair.com/commentary/content/articles/060612roco01?page=1> (last visited Sept. 24, 2006) (“[T]he philosophy of former Interior secretary Gale Norton and her top politicals ran . . . to an extreme libertarianism. In certain spheres, national parks were considered federal deadweights, best cut loose and absorbed by a laissez-faire market, or at least funded by the private sector. Don Barry, assistant Interior Secretary of fish, wildlife and parks in the Clinton Administration, now executive vice president of the Wilderness Society, describes what he calls a ‘starve the beast’ mentality. ‘The ever smaller budgets work to starve the parks system and national wilderness areas deliberately,’ Barry suggests. ‘Then what happens? The parks are so desperate, they have to bring in local economic partners—to outsource vital services.’”). *Id.*

³⁰⁷ DEP'T OF THE INTERIOR, *Fiscal Year 2008 Interior Budget in Brief, National Park Service*, BH-70, available at <http://www.doi.gov/budget/2008/08Hilites/BH069.pdf> (last visited Feb. 8, 2007) (hereinafter, DOI, *FY 2008 Budget in Brief, NPS*).

³⁰⁸ DEP'T OF THE INTERIOR, NATIONAL PARK SERVICE, *National Park Centennial Initiative*, available at <http://www.doi.gov/initiatives/npscentennial.html> (last visited Mar. 12, 2007); *See also* COALITION OF NATIONAL PARK SERVICE RETIREES, *CNSPR Talking Points on 2008 Proposed Budget for NPS*, available at <http://www.npsretirees.org/node/126> (last visited Feb. 26, 2007) (hereinafter, CNSPR, *Talking Points on 2008 Proposed Budget*).

³⁰⁹ Sheryl Gay Stolberg and Felicity Barringer, *The President Shows His Environmentalist Colors*, N.Y. TIMES, Feb. 8, 2007 (noting approval expressed by Bill Wade, Chair of the Executive Council of CNPSR and “persistent critic of the Administration’s parks policies” and Gene Sykes, chairman of the board of the NPCA); *See also, e.g.*, National Parks Conservation Association Press Release, *Administration's*

Budget Makes Unprecedented Step Toward Restoring National Parks for Centennial, available at http://www.npca.org/media_center/press_releases/2007/page.jsp?itemID=29410057 (last visited Feb. 8, 2007).

³¹⁰ CNSPR, *Talking Points on 2008 Proposed Budget*, *supra* note 308.

³¹¹ *Id.*

³¹² DOI, *FY 2008 Budget in Brief*, NPS, *supra* note 307, at BH-70.

³¹³ Letter from J. W. “Bill” Wade, Chair, Executive Council, Coalition for National Park Service Retirees, to The Hon. Norm Dicks, Chairman, Subcommittee on Interior, Environment and Related Agencies Committee on Appropriations (Feb. 16, 2007), available at <http://www.npsretirees.org/node/125> (last visited Feb. 26, 2007).

³¹⁴ *Id.*

³¹⁵ Editorial, *Private Pull on Public Parks*, BALTIMORE SUN, Feb. 12, 2007, available at <http://www.baltimoresun.com/news/opinion/bal-ed.parks12feb12,0,6678983.story?coll=bal-opinion-headlines> (last visited Mar. 12, 2007).

³¹⁶ Photograph by Michael Melford, and included in Lynne Warren, *A Report Card*, NATIONAL GEOGRAPHIC (Oct. 2006), 76-77, also available at <http://www7.nationalgeographic.com/ngm/0610/feature2/gallery6.html> (noting that “off-road vehicles have gouged 23,000 miles of tracks across Big Cypress National Preserve in South Florida.”).

³¹⁷ *Id.*

³¹⁸ Julie Cart, *Controversy Over Plans for Changes in US Parks*, L.A. TIMES, Aug. 26, 2005, A1, available at <http://www.theminingnews.org/news.cfm?newsID=1261> (last visited Sept. 29, 2006); Shnayerson, *supra* note 306.

³¹⁹ *Id.*

³²⁰ Cart, *supra* note 318.

³²¹ DEP’T OF THE INTERIOR, *News Release: Secretary Norton Appoints Paul Hoffman as Deputy Assistant Secretary for Fish and Wildlife and Parks*, Jan. 4, 2002, available at <http://www.doi.gov/news/01072002.html> (last visited Nov. 13, 2006).

³²² See Editorial, *Destroying the National Parks*, N.Y. TIMES, Aug. 29, 2005. Former Park Service Director Fran Mainella wrote to the *Times* to object to the characterization of the Hoffman draft as a “secret draft,” saying that “[a] group of 16 career park service employees, representing all regions and disciplines, recently met – at the request of the offices of the assistant secretary for fish, wildlife and parks and the director of the National Park Service – to review and provide recommendations on the working document.” Fran P. Mainella, Letter to the Editor, *Who Will Care for the National Parks?*, N.Y. TIMES, Sept. 5, 2005 (emphasis added). Noticeably absent from her defense of the process, however,

was any contention that the Park Service had been involved in the actual drafting of the policies. *Id.*

³²³ For a detailed analysis of the proposed changes and their potential impacts, see COALITION OF NATIONAL PARK SERVICE RETIREES, *Analysis of Draft NPS Policy Changes*, available at <http://www.npsretirees.org/node/74> (last visited Nov. 13, 2006).

³²⁴ See Shnayerson, *supra* note 306 (emphasis added).

³²⁵ *Id.* (emphasis added).

³²⁶ Cart, *supra* note 318.

³²⁷ *Id.*

³²⁸ Shnayerson, *supra* note 306.

³²⁹ *Id.*

³³⁰ Cart, *supra* note 318 (“Officials at the Park Service’s Washington headquarters downplayed the significance of the proposed revisions, saying they were less a reflection of policy than an attempt to start a dialogue.”).

³³¹ Shnayerson, *supra* note 306.

³³² Doug Kendall, *Gale Norton Is No James Watt; She’s Even Worse*, L.A. TIMES, Jan. 9, 2001, available at <http://www.commondreams.org/views01/0109-07.htm> (last visited Nov. 10, 2006).

³³³ DEP’T OF THE INTERIOR, *Biography of Paul Hoffman, Deputy Assistant Secretary, Performance, Accountability and Human Resources*, at <http://www.doi.gov/perfmgt/about.html> (last visited Nov. 9, 2006) (hereinafter, DOI, *Hoffman Biography*).

³³⁴ Shnayerson, *supra* note 306; See also BIRCH, HORTON, BITTNER AND CHEROT, *ATTORNEY PROFILE: WILLIAM P. HORN*, available at <http://www.birchhorton.com/horn.html> (last visited Nov. 9, 2006). Horn was also appointed by Gale Norton in 2002 as Chairman of the National Wildlife Refuge Centennial Commission. *Id.*

³³⁵ Shnayerson, *supra* note 306; BIRCH, HORTON, BITTNER AND CHEROT, *ATTORNEY PROFILE: WILLIAM P. HORN*, available at <http://www.birchhorton.com/horn.html> (last visited Nov. 9, 2006).

³³⁶ Shnayerson, *supra* note 306.

³³⁷ John G. Mitchell, *Threatened Sanctuaries*, NATIONAL GEOGRAPHIC (Oct. 2006), 94 (noting that “[a]fter a storm of protest within the Park Service and an outcry in the press, [then Park Service Director Fran] Mainella’s office last fall issued for public comment a muted version of the Hoffman policy rewrite,” called “Hoffman Lite” by some); See also DEP’T OF THE INTERIOR, NATIONAL PARK SERVICE, *Notice of Availability of Draft National Park Service Management Policies*, 70 Fed. Reg. 60852 (Oct. 19, 2005). See *National Parks Subcommittee Hearing*, 109th Cong. (Nov. 1, 2005) (statement of William P. Horn) available at http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1514&Witness_ID=1463 (last visited Nov. 9, 2006) (hereinafter, Horn Testimony).

³³⁸ Mitchell, *supra* note 337, at 95; *See also* Horn Testimony, *supra* note 337. Horn, individually and through his law firm's PAC had contributed nearly \$3000 to two of the members on the Senate Committee on Energy and Natural Resources, which includes the Subcommittee on National Parks, before which he testified. *See* FEDERAL ELECTION COMMISSION, TRANSACTION QUERY BY INDIVIDUAL CONTRIBUTOR, available at <http://www.fec.gov/finance/disclosure/norindsea.shtml> (last visited Nov. 9, 2006) (search for "Horn, William" reveals William Horn of Birch, Horton, Bittner and Cherot donated \$515 to Sen. Lisa Murkowski (R-AK) in 2003 and \$250 to Sen. George Allen (R-VA) in 2000); FEDERAL ELECTION COMMISSION, BIRCH, HORTON, BITTNER AND CHEROT PC PAC, COMMITTEES AND CANDIDATES SUPPORTED/OPPOSED, available at http://query.nictusa.com/cgi-bin/com_supopp/C00383588/ (last visited Nov. 9, 2006) (showing 2003-04 contributions totaling \$1999 to Sen. Lisa Murkowski (R-AK)); FEDERAL ELECTION COMMISSION, BIRCH, HORTON, BITTNER AND CHEROT PC PAC, INDIVIDUALS WHO GAVE TO THIS COMMITTEE, available at http://query.nictusa.com/cgi-bin/com_ind/C00383588/ (last visited Nov. 9, 2006) (showing total contributions to PAC of \$3350 between March 2003 – October 2005).

³³⁹ Horn Testimony, *supra* note 337.

³⁴⁰ *See National Parks Subcommittee Hearing*, 109th Cong. (Nov. 1, 2005) (statement of Denis Galvin, Deputy Director, National Park Service (Retired)) available at http://energy.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=1514&Witness_ID=1442 (last visited Nov. 9, 2006) ("By all accounts, including NPS-commissioned visitor surveys, the hundreds of millions of people who visit the parks annually enjoy these parks. But, due to NPS management, certain uses that certain people might also enjoy in the parks are prohibited.").

³⁴¹ Shnayerson, *supra* note 306.

³⁴² Julie Cart, *Snowmobile-Friendly Plan for National Parks Rejected*, L.A. TIMES, June 20, 2006, A7.

³⁴³ THE WILDERNESS SOC'Y, *News Release: Final National Park Management Policies Preserve Parks' Mission*, Aug. 31, 2006, available at <http://www.wilderness.org/NewsRoom/Release/20060831.cfm> (last visited Sept. 26, 2006).

³⁴⁴ Karen Tumulty & Mike Allen, *It's Lonely at the Top*, TIME, Oct. 29, 2006, available at <http://www.time.com/time/magazine/printout/0,8816,1552033,00.html> (last visited Nov. 10, 2006).

³⁴⁵ In addition to Gale Norton's departure, NPS Chief Fran Mainella resigned in July 2006. L.A. TIMES, *Beleaguered Director to Leave Park Service*, July 27, 2006, A24. According to a *New York Times* editorial, her replacement, Mary Bomar, has not thus far indicated a sufficient willingness to repudiate the political involvement in the national park system that the Hoffman draft so clearly epitomized. Editorial, *A Bad Start*

in the Parks, N.Y. Times, Oct. 6, 2006. In March 2006, then-Secretary Norton appointed Paul Hoffman to the position of Deputy Assistant Secretary for Performance, Accountability and Human Resources, which he describes as a move up from his post as Deputy Assistant Secretary of Fish, Wildlife and Parks. DOI, *Hoffman Biography*, *supra* note 333.

³⁴⁶ Robert L. Fischman, *The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy*, 21 J. LAND USE & ENVTL. L. 1, 2 (2005).

³⁴⁷ U.S. FISH & WILDLIFE SERV., *America's National Wildlife Refuges* (Jul. 2002), available at <http://www.fws.gov/refuges/generalInterest/factSheets/FactSheetAmNationalWild.pdf> (last visited Apr. 26, 2007) (hereinafter, FWS, *Wildlife Refuges Fact Sheet*).

³⁴⁸ GAO: INCOMPATIBLE USES ON WILDLIFE REFUGES, *supra* note 4, at 8. Other early additions to the nascent wildlife refuge system included additional islands as well as parcels of land and water set aside by President Roosevelt and succeeding presidents. *See id.* The focus of these early sanctuaries was to protect colony-nesting birds that were killed for their plumes and feathers and other rapidly-disappearing game animals. *Id.*

³⁴⁹ Fischman, *supra* note 346, at 3.

³⁵⁰ Fischman, *supra* note 346, at 3-4.

³⁵¹ FWS, *Wildlife Refuges Fact Sheet*, *supra* note 347.

³⁵² The National Parks also have particular, individual purposes separate from the organic mission of the system. *See* Robert L. Fischman, *From Words to Action: The Impact and Legal Status of the 2006 National Wildlife Refuge System Management Policies*, 26 STAN. ENVTL. L.J. 77, 89 (2007). However, individual purposes for the parks are set forth in the statute that establishes each National Park, whereas the refuge units are created by a much more diverse array of instruments. *Id.*; *see infra*. Also, the Parks have had a unifying system-wide mission since Congress enacted the Park System's organic law in 1916, "which has focused subsequent park establishment on a narrower, somewhat more coherent, range of purposes." *Id.* (citing Act to Establish a National Park Service, ch. 408, 39 Stat 535 (1916) (codified at 16 U.S.C. § 1)).

³⁵³ GAO: INCOMPATIBLE USES ON WILDLIFE REFUGES, *supra* note 4, at 11.

³⁵⁴ *Id.* at 10.

³⁵⁵ *See id.* The mission as then described in the U.S. Fish and Wildlife Service's Refuge Manual was to "provide, preserve, restore and manage a national network of lands and waters sufficient in size, diversity and location to meet society's needs for areas where the widest possible spectrum of benefits associated with wildlife is enhanced and made available." *See id.*

³⁵⁶ Fischman, *supra* note 346, at 5.

³⁵⁷ Although a comprehensive analysis of legislation affecting the National Wildlife Refuges is beyond the scope of this section, statutes include: the Migratory Bird Hunting and Conservation Stamp Act (passed in 1934 and known as the Duck Stamp Act, 16 U.S.C. § 718 *et seq.*); the Land and Water Conservation Fund Act (16 U.S.C. § 460L-5 *et seq.*); the 1962 Refuge Recreation Act (16 U.S.C. § 460k *et seq.*); the 1966 National Wildlife Refuge System Administration Act (Pub. L. No.89-699, § 1(a), 80 Stat. 926 (1966), codified at 16 U.S.C. § 668dd(d)(1)(a), subsequently amended by the National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252)) (discussed further, *infra*); the Endangered Species Act of 1973 (16 U.S.C. § 1531 *et seq.*); and the Alaska National Interest Lands Conservation Act (16 U.S.C. § 3120). For more information concerning these laws, see GAO: INCOMPATIBLE USES ON WILDLIFE REFUGES, *supra* note 4, at 8-10; See also Fischman, *supra* note 346, at 11-13; Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L. Q. 457, 464-500 (2002).

³⁵⁸ National Wildlife Refuge System Improvement Act of 1997, Pub. L. No. 105-57, 111 Stat. 1252 (codified as amended at 16 U.S.C. § 668dd, 668ee).

³⁵⁹ Fischman, *supra* note 346, at 15.

³⁶⁰ GAO: INCOMPATIBLE USES ON WILDLIFE REFUGES, *supra* note 4, at 2. See also Fischman, *supra* note 346, at 15.

³⁶¹ GAO: INCOMPATIBLE USES ON WILDLIFE REFUGES, *supra* note 4, at 16, 18.

³⁶² The compatibility standard was first employed by the 1962 Refuge Recreation Act, a standard which was expanded under the 1966 Refuge Administration Act. See Fischman, *supra* note 357, at 477-90.

³⁶³ The compatibility standard “finally grew sharp teeth in the 1997 Act and the subsequent Service compatibility policy.” Fischman, *supra* note 352, at 98.

³⁶⁴ See Fischman, *supra* note 357, at 479 (citing Refuge Recreation Act, § 1); see also, e.g., GAO: INCOMPATIBLE USES ON WILDLIFE REFUGES, *supra* note 4, at 11.

³⁶⁵ *Id.* at 18, 20.

³⁶⁶ *Id.* at 24.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ See Fischman, *supra* note 357, at 498. Concern over secondary uses impeding the ability of refuges to meet their primary purpose were expressed as early as 1962, when Congress enacted the Recreation Act. See *id.* at 493. Adding to the momentum for reform of refuge management were a lawsuit and several follow-up studies that confirmed the extent of the problems with incompatible uses. Fischman, *supra* note 346, at 15.

³⁷⁰ Fischman, *supra* note 357, at 498. Executive Order 12,966, issued in 1996 to reform administration of the refuge system, foreshadowed the statutory reforms to come; for example, it set out a broad ecological mission “to preserve a national network of lands and waters for the conservation and management of fish, wildlife, and plant resources.” *Id.* at 499, citing 61 FED. REG. at 13,647 (Mar. 25, 1996). In fact, “the approach taken and terms defined in the Executive Order powerfully influenced the content of the subsequent legislation.” *Id.* at 500. For more on the Executive Order, see *id.* at 499-500.

³⁷¹ Fischman, *supra* note 352, at 79.

³⁷² *Id.*

³⁷³ National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd(a)(2).

³⁷⁴ Ecological concerns are paramount, as evidenced by the emphasis on fish, wildlife, and plant resources and their habitats. Professor Fischman notes that this clear statutory goal, defined in ecological terms, “is a very different conception of conservation from the progressive-era, multiple-use, sustained yield missions that sought to conserve a steady stream of commodities to be extracted from the public lands.” Fischman, *supra* note 346, at 16.

³⁷⁵ *Id.*

³⁷⁶ Professor Fischman examines the development of U.S. conservation policy as reflected in the National Wildlife refuges in his article examining *The Significance of National Wildlife Refuges in the Development of U.S. Conservation Policy*, *supra* note 346. He notes that “Pelican Island reflects the early refuge function as an isolated sanctuary where habitat could be maintained for hunted animals. Over time, however, conservation approaches recognized the inadequacies of a zoo-like collection of rich habitats.” *Id.* at 20.

³⁷⁷ *Id.* at 16.

³⁷⁸ The RIA instructs that in the case of a conflict between an individual purpose and the system mission, the “conflict shall be resolved in a manner that first protects the purposes of the refuge, and, to the extent practicable, that also achieves the mission of the system.” National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd(a)(4)(D).

³⁷⁹ Fischman, *supra* note 346, at 16.

³⁸⁰ Fischman, *supra* note 352, at 98; U.S. FISH & WILDLIFE SERV., *Final Compatibility Regulations Pursuant to the National Wildlife Refuge System Improvement Act of 1997*, 65 Fed. Reg. 62,458 (Oct 18, 2000).

³⁸¹ Fischman, *supra* note 346, at 16-17 (citing 50 C.F.R. § 29.1 (2006) (providing that “[w]e may only authorize public or private economic use of the natural resources of any wildlife refuge . . . where we determine that the use contributes to

the achievement of the national wildlife refuge purposes or the National Wildlife Refuge System mission.”)).

³⁸² *Id.* at 8.

³⁸³ See *supra* note 363.

³⁸⁴ The RIA mandated that the rules implementing the compatibility criterion be formally promulgated; the only such mandate in the 1997 Act. 16 U.S.C. § 668dd(d)(3)(B). Other policies implementing the statute are collected in a comprehensive FWS manual. U.S. FISH & WILDLIFE SERV., THE FISH AND WILDLIFE SERV. MANUAL (updated continually), available at <http://www.fws.gov/policy/manuals/> (last visited May 29, 2007) (hereinafter, FWS MANUAL). The other policies issued by the Clinton Administration were: the Refuge Planning Policy (aimed at meeting the deadline Congress established for the preparation of individual refuge plans); and the Integrity-Diversity-Health Policy (implementing the statutory mandate to ensure the maintenance of the biological integrity, diversity and environmental health of the refuge system). For more on the Clinton-era policies, see Fischman, *supra* note 352, at 81-86.

³⁸⁵ *Id.*, at 85, n. 30.

³⁸⁶ For an in-depth analysis of these policies, see Fischman, *supra* note 352.

³⁸⁷ “Both the five year gestation period and the Bush Administration rejection of most other Clinton-era public land management policy premises suggested that the final policies might make an abrupt departure from the 2001 proposals.” *Id.* at 86.

³⁸⁸ *Id.*

³⁸⁹ *Id.* at 116.

³⁹⁰ Significantly, since the Duck Stamp Act of 1934, funds paid by waterfowl hunters for migratory bird hunting stamps (which are required for state hunting licenses) have been a steady source of funding for refuge system expansion. Fischman, *supra* note 346, at 11.

³⁹¹ Fischman, *supra* note 352, at 87.

³⁹² *Id.* at 88; FWS MANUAL, *supra* note 384, at pt. 601 § 1.8.

³⁹³ Fischman, *supra* note 352, at 94-95.

³⁹⁴ *Id.* (citing U.S. FISH & WILDLIFE SERV., *Policy on National Wildlife Refuge System Mission and Goals and Refuge Purposes*, 71 Fed. Reg. at 36,404-05, 36,406 (June 26, 2006) (Responses to Issues 1 and 11)).

³⁹⁵ *Id.* at 95. Professor Fischman points out that consultation with state fish and wildlife agencies was also a rationalization for the five-year delay by the Bush Administration in issuing the final policies. *Id.*

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ GAO: INCOMPATIBLE USES ON WILDLIFE REFUGES, *supra* note 4, at 16, 18, 24.

³⁹⁹ Fischman, *supra* note 352, at 95.

⁴⁰⁰ The categories of activities that, under the 2006 Appropriate Uses Policy, need not pass through appropriate use analysis are: 1) reserved or mandated uses; 2) refuge management activities; 3) wildlife-dependent recreation; and 4) “take” under state law. For an examination of each category, see *id.* at 97-101.

⁴⁰¹ For detail on the criteria, see *id.* at 98-99.

⁴⁰² *Id.* at 98.

⁴⁰³ *Id.* at 100, 105.

⁴⁰⁴ 16 U.S.C. § 668ee.

⁴⁰⁵ FWS MANUAL, *supra* note 384, *Wildlife-Dependent Recreation (Part 605)*, available at <http://www.fws.gov/policy/manuals/part.cfm?series=600&seriestitle=LAND%20USE%20AND%20MANAGEMENT%20SERIES#605> (last visited May 29, 2007).

⁴⁰⁶ Fischman, *supra* note 352, at 108.

⁴⁰⁷ *Id.*; See U.S. FISH & WILDLIFE SERV., *Final Wildlife-Dependent Recreational Uses Policy Pursuant to the National Wildlife Refuge System Improvement Act of 1997*, 71 Fed. Reg. 35418, 36422 (Response to Comment on Issue 1-3) (June 26, 2006).

⁴⁰⁸ Fischman, *supra* note 352, at 109.

⁴⁰⁹ *Id.*

⁴¹⁰ Tim Reiterman, *Mighty Lean Times for Wildlife Refuges*, L.A. TIMES, Feb. 27, 2007.

⁴¹¹ Fischman, *supra* note 346, at 2, n.5.

⁴¹² PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, *News Release: National Wildlife Refuges Severely Shortchanged*, Apr. 11, 2007, available at http://www.peer.org/news/news_id.php?row_id=844 (last visited May 30, 2007).

⁴¹³ Fischman, *supra* note 352, at 82.

⁴¹⁴ Reiterman, *supra* note 410.

⁴¹⁵ Matthew Daly, *Budget Cuts Mean Job Losses for Wildlife Refuges*, ASSOCIATED PRESS, Mar. 15, 2007. The Cooperative Alliance for Refuge Enhancement (CARE), using FWS databases, calculated the backlog to be closer to \$2.8 billion – the backlog for operations was estimated at \$1.23 billion, while the backlog for maintenance was estimated at \$1.53 billion. COOPERATIVE ALLIANCE FOR REFUGE ENHANCEMENT, *Restoring America’s Wildlife Legacy 2007*, at 6-7 (2007), available at <http://www.refugenet.org/new-pdf-files/RestoringLegacy07Web.pdf> (last visited May 30, 2007). CARE is a “broad coalition of 21 diverse wildlife, sporting, conservation, and scientific organizations.” *Id.* For a complete list of the organizations, visit CARE’s website, <http://www.refugenet.org/CARE/CareHome.html> (last visited May 30, 2007).

⁴¹⁶ Daly, *supra* note 415 (quoting FWS officials as saying the \$2.5 billion backlog in operations and maintenance made the reductions unavoidable); Reiterman, *supra* note 410 (reporting that anticipation by FWS officials that domestic security, hurricane relief, and the wars in Iraq and Afghanistan will remain higher priorities played a role in these decisions).

⁴¹⁷ Daly, *supra* note 415. Agency officials report that most job losses will occur through attrition rather than layoffs. *Id.*

⁴¹⁸ *Id.* (quoting David Eisenhauer, FWS spokesman). See also Reiterman, *supra* note 410 (quoting FWS Director H. Dale Hall as saying “I told them [managers] that we can no longer do more with less if we are going to have quality delivery. We are going to have to do less with less and make . . . intelligent management decisions We are going to come out of this with a strong wildlife system.”).

⁴¹⁹ PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, *News Release: Wildlife Refuge Cuts Crippling Conservation, Say Managers*, Feb. 1, 2007, available at http://www.peer.org/news/print_detail.php?row_id=816 (last visited May 30, 2007).

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, *2007 Refuge Manager Survey*, at 2, no. 24, available at http://www.peer.org/docs/nwr/07_5_2_survey.pdf (last visited May 30, 2007).

⁴²³ U.S. FISH & WILDLIFE SERV., *Antioch Dunes National Wildlife Refuge, Overview*, available at <http://www.fws.gov/refuges/profiles/index.cfm?id=11646> (last visited May 30, 2007).

⁴²⁴ Reiterman, *supra* note 410.

⁴²⁵ *Id.*

⁴²⁶ *Id.*

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ N.Y. TIMES, *National Briefing | Southwest: Arizona: Prison Sentence for Immigrant Smuggler*, Apr. 5, 2003.

⁴³¹ *Enhancing National Border Security: Hearing Before the Senate Committee on Commerce, Science and Transportation*, 108th Cong. (2004) (statement of Roger Di Rosa, Refuge Manager, Cabeza Prieta Nat'l Wildlife Refuge, U.S. Fish & Wildlife Serv., Dep't of the Interior), available at <http://www.doi.gov/oc/2004/EnhancingBorderSecurity.htm> (last visited May 31, 2007).

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ Daly, *supra* note 415.

⁴³⁵ COOPERATIVE ALLIANCE FOR REFUGE ENHANCEMENT, *State Fact Sheets*, available at <http://www.fundrefuges.org/CARE/StateFunding.html> (last visited May 31, 2007) (click on state of interest).

⁴³⁶ COOPERATIVE ALLIANCE FOR REFUGE ENHANCEMENT, *Restoring America's Wildlife Legacy 2007*, at 8 (2007), available at <http://www.refugenet.org/new-pdf-files/RestoringLegacy07Web.pdf> (last visited May 30, 2007). The FWS maintains a database that compiles operational needs of refuge managers and field staff throughout the country and prioritizes the needs into two tiers, with Tier-1 projects given the highest priority, including projects critical to fulfilling the mission of both the individual refuge and the entire Refuge System. *Id.* at 6.

⁴³⁷ *Fiscal Year 2008 Appropriations: Hearing Before the Subcomm. on Interior, Environment and Related Agencies of the S. Comm. on Appropriations*, 110th Cong. (2007) (statement of Evan Hirsche, President, National Wildlife Refuge Association), available at <http://www.refugenet.org/new-pdf-files/FY08%20AIA%20testimony.pdf> (last visited May 31, 2007).

⁴³⁸ Daly, *supra* note 415.

⁴³⁹ DEFENDERS OF WILDLIFE, *News Release: House Budget Blueprint Makes Down Payment on Environment*, Mar. 22, 2007, available at <http://www.defenders.org/releases/pr2007/pr032207c.html> (last visited May 31, 2007) (commending House of Representatives for passing budget resolution that would “begin to restore the National Wildlife Refuge System, which has been undergoing a massive restructuring and downsizing in the face of budget shortfalls.”).

⁴⁴⁰ National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd(a)(2).

⁴⁴¹ H.R. Rep. No. 900, 88th Cong., 1st Sess. 7-8 (1963).

⁴⁴² Pub. L. No. 85-470, June 28, 1958, 72 Stat. 238.

⁴⁴³ Outdoor Recreation Resources Review Commission, *Outdoor Recreation for America* (1962), available at http://www.nps.gov/history/history/online_books/anps/anps_5d.htm (last visited June 29, 2007).

⁴⁴⁴ *Id.*

⁴⁴⁵ Robert L. Glicksman and George Cameron Coggins, *Federal Recreational Land Policy: The Rise and Decline of the Land and Water Conservation Fund*, 9 EMORY L.J. 125, 140 (1984).

⁴⁴⁶ P.L. 88-578, Sept. 3, 1964, 78 Stat. 897; 16 U.S.C. §§ 460l-4, *et seq.*

⁴⁴⁷ 16 U.S.C. § 460l-4.

⁴⁴⁸ 16 U.S.C. § 460l-5.

⁴⁴⁹ Glicksman & Coggins, *supra* note 445, at 146 (footnotes omitted) (citing H.R. Rep. No. 900, 88th Cong., 1st Sess. 18,30 (1963), and S. Rep. No. 1364, 88th Cong. 2d Sess. 20 (1964)).

⁴⁵⁰ 16 U.S.C. §§ 460l-5 – 6.

⁴⁵¹ 16 U.S.C. § 460l-5.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ See Carol Hardy Vincent, *Conservation Fund: Overview, Funding History, and Current Issues*, Cong. Research Serv. Report No. RL33531, 4-6 (2006), available at <http://www.nationalaglawcenter.org/assets/crs/RL33531.pdf> (last visited June 25, 2007).

⁴⁵⁵ See Owen Demuth, *Sweetening the Pot: The Conservation and Reinvestment Act Reignites the Property Rights/Land Conservation Debate for the Twenty-First Century*, 50 BUFF. L. REV. 755, 762-64 (2002). Money paid into the Fund that originated as user fees, motorboat fuel taxes, or surplus property sale revenues only stays in the LWCF for two years before it is transferred to the miscellaneous receipts account of the Treasury and then can be used for non-LWCFA purposes. 16 U.S.C. § 460l-6. Money that came from offshore oil and gas leases, however, remains in the LWCFA account until it is used for LWCFA purposes. 16 U.S.C. § 460l-5(c).

⁴⁵⁶ Vincent, *supra* note 454, at 1.

⁴⁵⁷ *Id.* at 4.

⁴⁵⁸ H.R. 701 (106th Congress).

⁴⁵⁹ See 16 U.S.C. § 460l-4 (The purpose of the Act is “to strengthen the health and vitality of the citizens of the United States by (1) providing funds for and authorizing Federal assistance to the States in planning, acquisition, and development of needed land and water areas and (2) providing funds for the Federal acquisition and development of certain lands and other areas.”); *but see* 16 U.S.C. 460l-9 (“Moneys appropriated from the fund for Federal purposes shall, unless otherwise allotted in the appropriation Act making them available, be allotted by the President for [the acquisition of land, waters, or interests in lands or waters for the National Park System, National Forest System, or National Wildlife Refuge System.]”). For over thirty years after the statute was first enacted, it was assumed that § 460l-4 precluded federal and state officials from using LWCF money for any purposes other than planning, purchasing, and developing new recreational land. In recent years, Congress has interpreted the clause “unless otherwise allotted in the appropriation Act making them available” in § 460l-9 to mean that LWCF money can be used for other purposes (including park maintenance). See Vincent, *supra* note 454 at 4.

⁴⁶⁰ *Id.* at 9.

⁴⁶¹ *Id.*

⁴⁶² Demuth, *supra* note 455, at 777-78.

⁴⁶³ Vincent, *supra* note 454, at 7.

⁴⁶⁴ *Id.*

⁴⁶⁵ NATIONAL RECREATION AND PARK ASSOCIATION, *President’s 2007 Budget Harmful to Parks and Recreation Interests* (Feb. 8, 2006), available at <http://www.nrpa.org/content/default.aspx?documentId=3586> (last visited June 25, 2007).

⁴⁶⁶ Demuth, *supra* note 455, at 778 (citing Hearing Before the Sen. Environment and Public Works Comm. on S. 25, S. 2123 and S. 2181, 106th Cong. 34 (2000) (statement of Sen. Graham)).

⁴⁶⁷ LWCFA § 6(f)(3); 16 U.S.C. § 460l-8(f)(3).

⁴⁶⁸ 16 U.S.C. 460l-8(f)(3).

⁴⁶⁹ 36 C.F.R. Part 59.

⁴⁷⁰ U.S. DEP’T OF THE INTERIOR, NATIONAL PARK SERVICE, *L&WCF Grants-in-Aid Manual*, Part 675, Chapter 9, Section 3, available at <http://www.nps.gov/nrcr/programs/lwcf/manual/lwcf.pdf> (last visited April 3, 2007) (hereinafter LWCF Grants Manual).

⁴⁷¹ See 36 C.F.R. § 59.3, LWCF Grants Manual, *supra* note 470, at 675.9.3.

⁴⁷² 36 C.F.R. § 59.3(b)(7); LWCF Grants Manual, *supra* note 470, at 675.9.3.B.7.

⁴⁷³ LWCF Grants Manual, *supra* note 470, at 650.2.1.

⁴⁷⁴ *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978) (explaining that NEPA imposes upon agencies duties that are “essentially procedural”).

⁴⁷⁵ *Sierra Club v. Davies*, 955 F.2d 1188, 1193 (8th Cir. 1992).

⁴⁷⁶ *Id.* The park at issue in this case, Crater of Diamonds State Park in Arkansas, allows visitors to search for diamonds and keep any they find. Recently, a pair of eight-year-old Texas twins discovered a 2.5-carat diamond at the park. Associated Press, *8-year-old Texas twins find 2.5-carat diamond at Arkansas Park*, THE DALLAS MORNING NEWS, Mar. 12, 2007, available at <http://www.dallasnews.com/sharedcontent/APStories/stories/D8N9FAL81.html> (last visited June 25, 2007).

⁴⁷⁷ *Friends of the Shawangunks, Inc. v. Clark*, 754 F.2d 446 (2nd Cir. 1985).

⁴⁷⁸ LWCFA § 6(f)(3); 16 U.S.C. § 460l-8(f)(3).

⁴⁷⁹ See *Save Our Parks v. Kempthorne*, 2006 WL 3378703, *9 (S.D.N.Y. 2006).

⁴⁸⁰ *Id.*

⁴⁸¹ *Id.*

⁴⁸² 16 U.S.C. § 460l-8(f)(3).

About the Center for Progressive Reform

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