

Chapter 15

ALONG THE TRAMMELED ROAD TO WILDERNESS POLICY ON FEDERAL LANDS

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§ 15.01 Why Wilderness Issues Matter*

The benefits of wilderness have been recognized for over 100 years and extolled by American writers, thinkers, and conservationists. In the words of the Wilderness Act of 1964 (Wilderness Act or Act), wilderness provides opportunities for solitude and primitive recreation. Romantic writers in the nineteenth century recognized the importance of wilderness as a setting for individual reflection and restoration. Adventurers and conservationists in the early twentieth century saw wilderness as a place to escape from the increasing intensity of modern life, as well as to challenge oneself against the natural world. Even for those who never visit, wilderness may provide a psychological benefit simply through the knowledge that pristine wild places continue to exist. Wilderness is also valuable for non-anthropocentric purposes such as preserving biodiversity and protecting ecosystems.

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Wilderness is generally acknowledged as the most restrictive management designation for federal lands. Wilderness designation imposes constraints on planning, permitting, resource management, and construction or maintenance of facilities for land management agencies, as well as constraining the activities of other public land users and permittees. In recent years, litigation has challenged agency authority to designate and manage wilderness-quality lands. Questions have been raised about agency obligations to inventory and evaluate impacts on wilderness characteristics when undertaking resource planning and project permitting activities. This chapter surveys recent litigation that highlights some of these open questions about agency obligations, suggests strategies for project proponents seeking authorization in the face of uncertainty, and discusses possible trends in future policy debates.

§ 15.02 The Wilderness Act of 1964

[1] Defining Wilderness

The Wilderness Act¹ identifies the conservation of lands with wilderness characteristics as a national priority. The Act establishes the National Wilderness Preservation System (NWPS) in order to secure “the benefits of an enduring resource of wilderness” for present and future generations of Americans.² Under the Act those lands are to be administered “in such a manner as will leave them unimpaired for future use and enjoyment as wilderness. . . .”³ The Act defines the role of the executive branch in recommending and managing wilderness. It reserves the power to designate wilderness exclusively to Congress, stating that the president’s recommendation for designation of an area as wilderness “shall become effective only if so provided by an Act of Congress”^{3.1} and that “no Federal lands shall be designated as ‘wilderness areas’ except as provided for in this chapter or by a subsequent Act.”⁴

The language of the Wilderness Act reflects the idealism and passion of the generation of wilderness advocates who secured its passage.⁵ It is remarkable for its florid description of wilderness. The statute defines

¹16 U.S.C. §§ 1131–1136 (elec. 2010).

²*Id.* § 1131(a).

³*Id.*

^{3.1}*Id.* § 1132(b).

⁴*Id.* § 1131(a).

⁵For a discussion of the history of the Act and perspectives on wilderness throughout American history, see Roderick Frazier Nash, *Wilderness & the American Mind* (4th ed. 2001).

wilderness as “an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain,” and where the land “retain[s] its primeval character and influence, without permanent improvements or human habitation. . . .”⁶ The statute further defines wilderness as an area of undeveloped federal land that:

(1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.⁷

Thus, the very language of the Act evokes images of an individual’s yearning for nature and solitude and hints at the depth of passions that can surround wilderness issues for today’s advocates who see themselves as heirs of this storied legacy.

[2] Management of Designated Wilderness Areas

Although wilderness is characterized by a lack of evidence of human presence, by definition wilderness “is *protected* and *managed* so as to preserve its natural conditions.”⁸ The federal agencies primarily responsible for managing wilderness areas are the Forest Service within the Department of Agriculture; and the Bureau of Land Management (BLM), Fish and Wildlife Service, and National Park Service within the Department of the Interior. Once included in the NWPS, lands continue to be managed by the agency having jurisdiction immediately prior to the area’s designation as wilderness.⁹

In general, the agency administering any designated wilderness area must preserve the wilderness character of the area and administer the area for such other purposes for which it may have been established.¹⁰ Except as otherwise provided in the Act, “wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use.”¹¹ With certain enumerated exceptions, there shall be no commercial enterprise and no permanent roads within any wilder-

⁶ 16 U.S.C. § 1131(c) (elec. 2010).

⁷ *Id.*

⁸ *Id.* (emphasis added).

⁹ *Id.* § 1131(b).

¹⁰ *Id.* § 1133(b).

¹¹ *Id.*

ness area.¹² Temporary roads, motor vehicles, motorized equipment, aircraft, other forms of mechanical transport, and structures or installations are only allowed to the extent necessary to meet minimum requirements for the administration of a wilderness area, including when required in an emergency involving the health and safety of persons in the area.¹³

Section 4(d) of the Wilderness Act contains a number of “special provisions,” commonly referred to as “non-conforming uses.”^{13.1} In order to be permitted in designated wilderness areas these uses are subject to regulation by the Secretary of Agriculture or the Secretary of the Interior and some must pre-date the passage of the Act.¹⁴ Special provisions enumerated in the Act include: use of aircraft or motorboats;¹⁵ control of fire, insects, and diseases;¹⁶ livestock grazing;¹⁷ and commercial services necessary for realizing the recreational or other wilderness purposes of the areas.¹⁸

Prospecting, mining, and mineral leasing activity was allowed through December 31, 1983, subject to reasonable regulations governing ingress and egress; provided that any patents issued reserved surface title to the United States; and provided that mineral leases, permits, or licenses contained reasonable stipulations for protection of the wilderness character of the land. Effective January 1, 1984, and subject to valid rights then existing, the Act withdrew from appropriation and disposition under mining and mineral leasing laws all minerals in designated wilderness areas.¹⁹

¹²*Id.* § 1133(c).

¹³*Id.*

^{13.1}*Id.* § 1133(d).

¹⁴The Wilderness Act expressly mentions the Secretary of Agriculture because upon enactment the Act designated as wilderness areas only national forest lands, which are under the Department of Agriculture’s jurisdiction. Federal Land Policy and Management Act § 603(c), 43 U.S.C. § 1782(c) (elec. 2010), governs the Secretary of the Interior’s management of Wilderness Study Areas and wilderness on BLM lands, and provides that the provisions of the Wilderness Act applicable to wilderness in national forests also govern BLM lands designated as wilderness. Subsequent laws designating wilderness and permitting non-conforming uses specify the Secretary of the Interior or of Agriculture, depending on which agency has jurisdiction over the federal lands in question. *See, e.g.,* Ojito Wilderness Act, Pub. L. No. 109-94, § 2(3), 119 Stat. 2106 (2005).

¹⁵16 U.S.C. § 1133(d)(1) (elec. 2010).

¹⁶*Id.*

¹⁷*Id.* § 1133(d)(4)(2).

¹⁸*Id.* § 1133(d)(5).

¹⁹*Id.* § 1133(d)(2)-(3).

The president may authorize prospecting for water resources and the establishment and maintenance of reservoirs, water-conservation works, power projects, transmission lines, and other facilities needed in the public interest (including roads) in wilderness areas.²⁰

In addition to the general exemptions established in the Wilderness Act itself, it is also possible for subsequent laws designating particular units in the NWPS to include provisions that allow specific non-conforming uses or activities.²¹ Often these provisions allow for access to or maintenance of preexisting facilities or facilitate management activities. In addition to the types of non-conforming uses described in the Act, subsequent statutes allow a broad range of scientific, historic, cultural, military, and law enforcement activities.²²

[3] Growth of the National Wilderness Preservation System (NWPS)

Upon its enactment, the Wilderness Act designated as wilderness 9.1 million acres^{22.1} of existing “ ‘wilderness,’ ‘wild,’ and ‘canoe’ ” areas within the national forests.²³ The Act directed the Secretary of Agriculture, within 10 years, to evaluate “primitive” areas within the national forests for suitability for preservation as wilderness and to make recommendations to the president who, in turn, would make recommendations to Congress for ultimate designation (or not) as wilderness.²⁴ The Wilderness Act also directed the Secretary of the Interior to conduct a 10-year review and make recommendations with respect to roadless areas within the National Park System, national monuments, national wildlife refuges, and game ranges.²⁵

²⁰*Id.* § 1133(d)(4)(1).

²¹An extensive listing of these provisions is contained in U.S. Congressional Research Service. Ross W. Gorte, “Wilderness Laws: Permitted and Prohibited Uses” (RL33827 Jan. 13, 2008), available at <http://ncseonline.org> (search publication number).

²²See, e.g., Arizona Wilderness Act of 1984, Pub. L. No. 98-406, § 101(13), 98 Stat. 1485 (1984) (installation and maintenance of hydrological, meteorological and climatological equipment); Illinois Wilderness Act of 1990, Pub. L. No. 101-633, § 9, 104 Stat. 4578 (1990) (access to and maintenance of cemetery); California Desert Protection Act of 1994, Pub. L. No. 103-433, §§ 103(g), 705(a), 108 Stat. 4471 (1994) (motorized law enforcement activities; Native American access for cultural and religious purposes); and Lincoln County Conservation, Recreation, and Development Act of 2004, Pub. L. No. 108-424, § 206, 118 Stat. 2403 (2004) (low-level overflights by military aircraft).

^{22.1}<http://wilderness.org/content/wilderness-act-1964>.

²³16 U.S.C. § 1132(a) (elec. 2010).

²⁴*Id.* § 1132(b).

²⁵*Id.* § 1132(c).

The Federal Land Policy and Management Act of 1976 (FLPMA) required the Secretary of the Interior to complete a similar process for roadless areas of 5,000 acres or more on public lands managed by BLM within 15 years of its enactment.²⁶

Today, many proposed wilderness areas await congressional action and BLM manages 12.7 million acres of wilderness study areas as part of its National Landscape Conservation System.²⁷ Nonetheless, the amount of designated wilderness has also grown significantly in the nearly half-century since the passage of the Wilderness Act. Today there are almost 109.5 million acres of wilderness (776 wilderness areas) in 44 states and Puerto Rico.^{27.1} The system has tended to grow in fits and starts, with no new wilderness designated some years and large additions in others. For example, 56 million acres were added through the Alaska National Interest Lands Conservation Act (ANILCA) in 1980,^{27.2} more than half of the acreage in today's entire system.²⁸ The year with the next greatest acreage additions (and the year that saw the largest number of wilderness areas added to the system) was 1984, largely in response to disagreements between the Reagan Administration and Congress about the Forest Service's RARE II process for reviewing roadless areas.²⁹

§ 15.03 The Federal Land Policy and Management Act (FLPMA)

The Wilderness Act did not directly address BLM's duties with respect to designation or management of lands with wilderness characteristics. FLPMA³⁰ remedied that deficiency by laying out a two-step inventory and management process applicable to all public lands managed by BLM. FLPMA also contains specific directions regarding designation and management of lands with wilderness characteristics.

Under section 201 of FLPMA, the Secretary of the Interior is required to "prepare and maintain on a continuing basis an inventory of all public

²⁶ 43 U.S.C. § 1782(a), (b) (elec. 2010).

²⁷ U.S. Dep't of the Interior, Bureau of Land Mgmt., "Wilderness Study Areas," *available at* http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/wilderness_study_areas.html.

^{27.1} <http://wilderness.net> (choose Maps, Data and Images, Summary Reports).

^{27.2} <http://wilderness.org> (search ANILCA for "Timeline of Wilderness Conservation").

²⁸ Wilderness in Alaska is subject to special management provisions under ANILCA, and therefore largely outside the scope of this chapter.

²⁹ Ross W. Gorte, "Wilderness: Overview and Statistics" CRS-4 (RL31447, Mar. 18, 2005, updated Mar. 10, 2008), *available at* <http://ncseonline.org> (choose CRS Reports from the Science Policy menu).

³⁰ 43 U.S.C. §§ 1701–83 (elec. 2010).

lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern.”³¹ FLPMA further requires that the inventory be kept current “so as to reflect changes in conditions and to identify new and emerging resource and other values.”³² Notably, “[t]he preparation and maintenance of such inventory shall not of itself, change or prevent change of the management or use of public lands.”³³ Section 202 directs the Secretary, with public involvement, to develop, maintain, and revise land use plans for public lands.³⁴ In developing and revising land use plans, the Secretary is required, *inter alia*, to “use and observe the principles of multiple use and sustained yield.”³⁵

Section 603 of FLPMA contains BLM’s wilderness study obligation. Section 603(c) requires that these “Wilderness Study Areas” (WSAs) be managed so as “not to impair the suitability of such areas for preservation as wilderness” until such time as Congress may act on the proposals.³⁶ BLM manages WSAs under its 1995 Interim Management Policy (IMP).³⁷ The IMP provides detailed direction on management of activities within WSAs with the goal of prohibiting actions or impacts that will interfere with Congress’s prerogatives in either designating the areas as wilderness or releasing them for other non-wilderness uses.³⁸ However, WSA management is not as restrictive as management of designated wilderness. Mining, grazing, and mineral leasing that were conducted prior to FLPMA’s enactment, and certain activities with only temporary impacts, may continue in WSAs, provided that BLM prevents unnecessary or undue degradation of the lands.³⁹

³¹ *Id.* § 1711(a).

³² *Id.*

³³ *Id.*

³⁴ *Id.* § 1712(a).

³⁵ *Id.* § 1712(c)(1).

³⁶ *Id.* § 1782(c).

³⁷ Bureau of Land Mgmt., U.S. Dep’t of the Interior, Interim Management Policy for Lands Under Wilderness Review, H-8550-1 (1995) (hereinafter IMP), *available at* <http://www.blm.gov> (search “BLM Manual H-8550-1”).

³⁸ IMP, *supra* note 37, at ¶¶ .01 & .02.

³⁹ 43 U.S.C. § 1782(c) (elec. 2010); IMP, *supra* note 37, at ¶ .06.

§ 15.04 Litigation

[1] Wilderness Study Areas

Several pending cases seek to establish whether BLM has an ongoing duty under FLPMA to continue to consider and create WSAs. Wilderness advocates argue that section 603^{39.1} is not the only applicable provision and that its 15-year sunset does not preclude BLM from identifying additional lands for designation as WSAs. These advocates look, for instance, to section 202, which directs BLM to plan land uses, and section 302(b), which requires the Secretary to avoid managing public lands so as to cause unnecessary or undue degradation of those lands.⁴⁰ Advocates combine these sections to suggest that any time lands with wilderness characteristics are inventoried, they should be managed essentially to the WSA non-impairment standard found in section 603.

In April 2003, in litigation brought by the State of Utah, the Secretary of the Interior entered into a settlement agreement (Utah Settlement) in which BLM agreed to an interpretation of section 603 that limited BLM to a one-time 15-year review of areas with wilderness characteristics for the purpose of making recommendations for preservation.⁴¹ Utah had challenged BLM's policy of establishing WSAs under its section 202 management authority and applying the same "non-impairment" standard governing WSAs created under section 603.⁴² In the settlement, BLM agreed to cease recommending lands for permanent preservation as wilderness and to defer to Congress to establish wilderness.⁴³ The Utah Settlement was challenged, and the district court held that the case should be dismissed for lack of ripeness, among other jurisdictional grounds.^{43.1}

Nevertheless, the district court analyzed the merits and found that the settlement was consistent with both FLPMA and the National Environ-

^{39.1} 43 U.S.C. § 1782 (elec. 2010).

⁴⁰ *Id.* §§ 1712, 1732(b).

⁴¹ See *Utah v. Norton*, No. 2:96-CV-0870, 2006 WL 2711798, at *4 (D. Utah Sept. 20, 2006) (unreported). The Interior Board of Land Appeals (IBLA) has also upheld this 15-year limit on BLM's authority to "designate new WSAs or to establish, manage or otherwise treat public lands not Congressionally designated as wilderness as a WSA or as wilderness. . . ." *Colorado Env't'l Coal.*, 162 IBLA 293, 298-99, GFS(O&G) 11(2004); see also *Colorado Env't'l Coal.*, 165 IBLA 221, 223 n.3, GFS(O&G) 15(2005).

⁴² *Utah v. Norton*, 2006 WL 2711798, at *3-*4.

⁴³ *Id.* at *4.

^{43.1} *Id.* at *29.

mental Policy Act of 1969 (NEPA).⁴⁴ The district court rejected arguments that the settlement precluded BLM from conducting wilderness inventories under section 201 and that it improperly limited BLM's discretion in managing lands with wilderness characteristics under section 202. Plaintiffs also argued that because the settlement would prevent BLM from establishing new "Section 202 WSAs" as part of ongoing Resource Management Plan (RMP) amendments, it contravened NEPA's requirement that an agency not take actions that limit its choice of reasonable alternatives during the NEPA process.⁴⁵ The court disagreed on the ground that "[c]learly an illegal or unauthorized alternative cannot be considered reasonable."⁴⁶ Since the court agreed that BLM did not have authority to establish WSAs outside of section 603, declining to do so in the future could not be a limit on reasonable alternatives.⁴⁷

On appeal, the Tenth Circuit agreed that the district court lacked jurisdiction on ripeness grounds, emphasizing that the court "would benefit from further factual development of the issues advanced."⁴⁸ The court observed, "At some point, the BLM either will, or will not, apply the settlement to specific land management decisions in a manner that conflicts with federal statutes or court orders. On the record before us, this point has not yet come."⁴⁹ Thus, the court concluded the appellant's challenge would not be ripe until BLM relied on the settlement in the development of specific land use plans.

Recent cases raise "as applied" challenges to the Utah Settlement.

- (1) *Southern Utah Wilderness Alliance v. Allred*.^{49.1} Plaintiffs challenge approval of three RMPs covering nearly seven million acres in central and eastern Utah. They allege that the Utah Settlement misinterprets FLPMA and therefore reliance on it in refusing to consider or apply the non-impairment standard under FLPMA section 202 is arbitrary and capricious; that BLM violated NEPA's requirement to consider reasonable alternatives by failing to consider manage-

⁴⁴*Id.* at *17-*25.

⁴⁵*Id.* at *25.

⁴⁶*Id.*

⁴⁷*Id.* at *24-*25.

⁴⁸*Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1192 (10th Cir. 2008).

⁴⁹*Id.*

^{49.1}No. 08 CV 02187, 2009 WL 1612794 (D.D.C. Mar. 19, 2009), Second Amended Complaint filed March 19, 2009 (TRO entered on other grounds, currently stayed for possible settlement).

ment of areas with wilderness characteristics under the IMP or its functional equivalent; and that BLM violated FLPMA by failing to consider impacts to wilderness character from off-highway vehicle route designations.

- (2) *Wilderness Society v. Bureau of Land Management*.^{49.2} Plaintiffs challenge RMPs for the Grand Canyon-Parashant and Vermilion Cliffs National Monuments, alleging that BLM relied on the Utah Settlement to unlawfully disavow its statutory duty to protect wilderness-quality lands in the monuments.
- (3) *Natural Resources Defense Council v. Bureau of Land Management*.^{49.3} Plaintiffs challenge BLM's decision to authorize oil and gas development on three million acres in Wyoming pursuant to the Rawlins RMP, specifically, the agency's refusal to withdraw 223,000 acres of citizen-proposed wilderness from oil and gas drilling and its approval of five permits for wells located within the citizen-proposed wilderness. They allege that BLM violated NEPA by (1) failing to consider an alternative that would withdraw citizen-proposed wilderness areas from oil and gas leasing; (2) failing to take a hard look at impacts, including cumulative impacts, of the RMPs on wilderness characteristics; and (3) relying on the Utah Settlement for its position that it could not expand WSAs or create new ones as part of the RMP process.

In response to a November 2009 congressional request for greater protection of wilderness areas proposed in pending legislation,⁵⁰ Interior Secretary Salazar stated that BLM is reviewing its policy regarding inventory and identification of lands with wilderness characteristics (LWCs) under FLPMA § 201, and use of wilderness inventory information in the RMP process under section 202.⁵¹ Secretary Salazar was also asked about the Utah Settlement during a March 2010 House Appropriations Subcommittee hearing and stated that he did not “think [the Utah Settlement] was an

^{49.2}No. 09-cv-8010, 2009 WL 3059339 (D. Ariz. May 1, 2009), First Amended Complaint.

^{49.3}No. 10-cv-00734, 2010 WL 1975943 (D.D.C. May 6, 2010), Complaint for Declaratory and Injunctive Relief.

⁵⁰Letter from Representative Maurice Hinchey (D-NY) (and 88 other members of Congress) to the Hon. Ken Salazar, Secretary of the Interior (Nov. 10, 2009), available at <http://www.suwa.org/site/DocServer/11.10.09SalazarLetteronUtahWilderness.pdf?docID=9021>.

⁵¹Letter from the Hon. Ken Salazar, Secretary of the Interior, to Representative Maurice Hinchey and all other signatories (Jan. 27, 2010), available at http://www.suwa.org/site/DocServer/DOI_response_to_signers_1-19-10.pdf?docID=10121.

appropriate way for management to cede authority.”⁵² He told the Subcommittee on Interior and Environment that the Department of the Interior is considering options for an alternative policy to protect LWCs, including the possibility of repealing the Utah Settlement. A decision could be forthcoming “in the coming months.”⁵³

[2] Forest Service Roadless Rule Litigation

FLPMA § 202 WSAs are unique to BLM-managed lands. However, there are parallels between the Utah litigation and ongoing challenges to Forest Service rules governing roadless areas.⁵⁴ Both disputes highlight the tension between on-the-ground knowledge and management initiatives of land management agencies and Congress’s exclusive prerogative to designate wilderness. Ironically, sometimes these issues arise out of agency efforts to protect wilderness characteristics and preserve Congress’s discretion to act.

As stated above, the Wilderness Act directed the Secretary of Agriculture to inventory primitive areas in the national forests for possible designation as wilderness. That study was completed within the specified 10-year time frame, and presidential recommendations were made to Congress, which in turn designated as wilderness more than 5 million acres of the primitive area recommendations.⁵⁵ In 1967 the Forest Service initiated a broader study, known as the Roadless Area Review and Evaluation (RARE I), to evaluate additional roadless areas greater than 5,000 acres within the

⁵²Jen Beasley, “Salazar pans ‘No More Wilderness’ Settlement at House Appropriations Hearing,” Redrock Headlines, Mar. 19, 2010, available at <http://suwa.typepad.com> (search Utah Wilderness News, March 19, 2010).

⁵³*Id.*

⁵⁴The Roadless Rule was challenged by a group of plaintiffs including the Kootenai Tribe of Idaho, Boise Cascade Corporation, motorized recreation groups, livestock companies, and two Idaho counties in *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001). The district court enjoined the Roadless Rule finding that plaintiffs were likely to succeed on the merits of their NEPA claims alleging that the Forest Service had failed to provide adequate opportunity for public comment and to consider an adequate range of alternatives, and that the Forest Service’s environmental impact statement (EIS) contained an insufficient discussion of the cumulative impacts of the Roadless Rule. *Id.* at 1244, 1246 & 1247; *Kootenai Tribe of Idaho v. Veneman*, No. CV01-10-N-EJL, 2001 WL 1141275 (D. Idaho May 10, 2001) (granting injunctive relief). After taking office, the Bush Administration declined to appeal the injunction. However, environmental intervenors appealed to the Ninth Circuit, which held that the district court abused its discretion in granting the preliminary injunction against the implementation of the Roadless Rule. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1104 (9th Cir. 2002). Because this line of cases addressed the adequacy of the Forest Service’s NEPA process, rather than wilderness issues, it is not discussed in detail here.

⁵⁵The Wilderness Society, *Wilderness Act Handbook: 40th Anniversary Edition* 27 (5th ed. 2004).

national forests and some smaller roadless areas adjacent to wilderness or primitive areas, lands not specifically required by the Act.⁵⁶ In 1977, the Carter Administration replaced RARE I with a new RARE II inventory. The programmatic environmental impact statement (PEIS) for the RARE II process was held to violate NEPA, largely due to the failure to analyze impacts to lands that would be released from wilderness study or designation.⁵⁷ In lieu of a proposed RARE III process, Congress adopted a number of bills designating wilderness from RARE II lands. Other wilderness studies were to be conducted under National Forest Management Act procedures.^{57.1}

By the mid-1990s, wilderness advocates were seeking a more systematic way to protect roadless forests (i.e., potential wilderness areas) while the time-consuming process of wilderness designation was pursued.⁵⁸ On January 12, 2001, the Forest Service adopted the Roadless Area Conservation Final Rule (2001 Roadless Rule).⁵⁹ The 2001 Roadless Rule prohibited road construction, road reconstruction, and timber harvesting in inventoried roadless areas nationwide, but did not prohibit mining, grazing, or off-road vehicle use.⁶⁰

In July 2003, the federal district court in Wyoming concluded that the 2001 Roadless Rule violated NEPA and the Wilderness Act and permanently enjoined the rule.⁶¹ That decision was vacated as moot by the Tenth Circuit in light of an intervening State Petitions Rule⁶² adopted by the Forest Service, which allowed state governors to petition for state-by-state management of roadless areas.⁶³ The State Petitions Rule was in turn challenged in the Northern District of California.⁶⁴ The court held

⁵⁶H. Michael Anderson & Aliko Moncreif, "America's Unprotected Wilderness" 76 *Den. U. L. Rev.* 413, 419 (1999).

⁵⁷*California v. Block*, 690 F.2d 753 (9th Cir. 1982).

^{57.1}U.S. Congressional Research Service, Ross W. Gorte, "Roadless Areas: The Administration's Moratorium" (RS20150 Apr. 8, 1999) (choose CRS Reports from the Science Policy menu)

⁵⁸Ray Ring, "Roadless-less: The Campaign to Protect Unroaded Forests Gets Torn Apart by a Wyoming Judge," *High Country News*, Nov. 9, 2009.

⁵⁹66 Fed. Reg. 3244 (Jan. 12, 2001) (final rule and record of decision).

⁶⁰*Id.* at 3250.

⁶¹*Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197, 1239 (D. Wyo. 2003).

⁶²70 Fed. Reg. 25,654 (May 13, 2005) (final rule and decision memo).

⁶³*Wyoming v. U.S. Dep't of Agric.*, 414 F.3d 1207, 1213 (10th Cir. 2005).

⁶⁴*California ex rel. Lockyer v. U.S. Dep't of Agric.*, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

that the promulgation of the State Petitions Rule violated NEPA and the Endangered Species Act (ESA), and it reinstated the 2001 Roadless Rule. The Ninth Circuit affirmed.⁶⁵

In the meantime, the State of Wyoming once again challenged the 2001 Roadless Rule in federal district court. The district court again invalidated the 2001 Roadless Rule, finding, among other statutory violations, that it constituted an impermissible de facto wilderness designation in violation of the Wilderness Act.⁶⁶ In reaching its conclusion, the court relied on three factors. First, the court reasoned that it was “reasonable and supportable to equate roadless areas with the concept of wilderness”⁶⁷ and concluded that a roadless forest is synonymous with the Wilderness Act’s definition of “wilderness.”^{67.1} Second, the court compared permissible uses in wilderness areas to those allowed in inventoried roadless areas and concluded that the roadless area uses were at least as restrictive as those permitted in wilderness.⁶⁸ Finally, the court noted that most of the roadless areas were based on the RARE II inventories, which were specifically designed to recommend wilderness areas to Congress.⁶⁹ The court rejected arguments that the 2001 Roadless Rule did not create de facto wilderness because it permitted certain motorized uses, grazing, and mineral development, reasoning that such activities could not be meaningfully undertaken in light of the Rule’s prohibition on construction of new roads.⁷⁰ The decision is currently on appeal to the Tenth Circuit, setting the stage for a circuit split if it is upheld.⁷¹

If the Ninth and Tenth Circuits rule inconsistently on the legality of the 2001 Roadless Rule, it is possible that parties to the litigation could seek resolution before the U.S. Supreme Court. Another possibility is for the dispute to be resolved legislatively. Bills have been introduced in both the House and the Senate that would reinstate the 2001 Roadless Rule (with

⁶⁵California *ex rel.* Lockyer v. U.S. Dep’t of Agric., 575 F.3d 999 (9th Cir. 2009).

⁶⁶Wyoming v. U.S. Dep’t of Agric., 570 F. Supp. 2d 1309, 1350 (D. Wyo. 2008) (injunction upheld, Wyoming v. U.S. Dep’t of Agric., No. 07-CV-017B (D. Wyo. filed June 15, 2009)).

⁶⁷Wyoming v. USDA, 570 F. Supp. 2d at 1348 (citation omitted).

^{67.1}*Id.* at 1349.

⁶⁸*Id.* at 1349-50.

⁶⁹*Id.* at 1350.

⁷⁰*Id.*

⁷¹Wyoming v. U.S. Dep’t of Agric., No. 09-8075 (10th Cir. Notice of Appeal filed Aug. 14, 2009) (consolidated with No. 08-8061).

the force of law).⁷² Additionally, in May 2009 the Secretary of Agriculture issued a directive requiring approval at the national level for all proposed projects in roadless areas, and stated that the Forest Service will issue a new rule if the federal courts do not resolve the issues surrounding the 2001 Roadless Rule.⁷³ Over the past year, the Secretary approved 21 projects in roadless areas. A dozen of those projects included road construction related to mining activities, consistent with the reasonable right of access granted under the 1872 General Mining Law.⁷⁴ In May 2010, the directive was extended for an additional year.⁷⁵

In addition to the question of whether the Roadless Rule creates de facto wilderness in inventoried roadless areas, debate has arisen as to whether certain Forest Service management policies create de facto wilderness in Recommended Wilderness Areas (RWAs), and whether such policies are permissible under the Wilderness Act. The Forest Service does not have a specific national policy on permitted uses in RWAs. Rather, RWAs are closed to “any use or activity that may reduce the wilderness potential of an area.”⁷⁶ Currently permitted activities that do not compromise wilderness values of the area may continue.⁷⁷ At least one Forest Service region, Region 1, which encompasses 25 million acres in northeastern Washington, northern Idaho, Montana, North Dakota, and northwestern South Dakota, has adopted a narrow interpretation of allowing only those uses that are permitted in designated wilderness to continue in RWAs.⁷⁸ This interpretation has angered many outdoor recreation groups that promote snowmobile and off-highway vehicle access.

In January 2010, Representative Raul Grijalva (D-AZ), chairman of the Natural Resources Subcommittee on National Parks, Forests and Public

⁷²National Forest Roadless Area Conservation Act, H.R. 111-3692 (2009); Roadless Area Conservation Act of 2009, S. 111-1738 (2009).

⁷³U.S. Dep’t of Agric., Secretary’s Memorandum 1042-154: Authority to Approve Road Construction and Timber Harvesting in Certain Lands Administered by the Forest Service (May 28, 2009).

⁷⁴U.S. Dep’t of Agric., News Release No. 0293.10: “Agriculture Secretary Vilsack Renews Interim Directive Covering Roadless Areas In National Forests” (May 28, 2010).

⁷⁵U.S. Dep’t of Agric., Secretary’s Memorandum 1042-155, Authority to Approve Road Construction and Timber Harvesting in Certain Lands Administered by the Forest Service (May 28, 2010).

⁷⁶U.S. Dep’t of Agric., *Forest Service Manual* (FSM) 1923.03.

⁷⁷*Id.*

⁷⁸*See* Blueribbon Coalition, “National Recreation Advocacy Group Applauds Lawmakers’ Stance Against USFS De-Facto Wilderness Policy” (Apr. 21, 2010), *available at* <http://www.sharetrails.org> (go to press room, “Media Release Archives”).

Lands, wrote to Forest Service Chief Tom Tidwell expressing concern that “continued authorization of activities that are disallowed in wilderness areas, including the use of motorized vehicles” could adversely affect the wilderness character of lands and make wilderness designation more difficult.⁷⁹ The letter urged Chief Tidwell to issue national guidance prohibiting “activities, such as use of motorized vehicles, that adversely affect the wilderness qualities of the recommended areas to a significant degree.”⁸⁰

In response to Representative Grijalva’s letter, Representatives Doc Hastings (R-WA) and Rob Bishop (R-UT) authored a letter suggesting that such a policy would “usurp Congressional authority” to designate wilderness.⁸¹ The letter asserted, “[i]t is a baseless, twisted reading of the law to suggest that Congress intended to allow an agency to administratively declare an area as recommended for wilderness designation and then to manage that area exactly as if Congress had taken action to make such a designation.”⁸² No nationwide Forest Service policy has been issued to date. In the meantime, the debate continues locally as individual forest plans are adopted.

§ 15.05 Current Issues—Wilderness Characteristics

Regardless of which way the question of BLM’s continuing authority to designate WSAs is resolved, it is clear that BLM has an ongoing duty to inventory wilderness characteristics under FLPMA § 201. This inventory requirement can raise questions of NEPA adequacy in the context of both land use planning activities and project-specific NEPA analyses. In *Oregon Natural Desert Ass’n v. Bureau of Land Management (ONDA v. BLM)*,⁸³ the court reviewed BLM’s duties under FLPMA and NEPA and concluded that the agency must evaluate impacts to wilderness values not only for

⁷⁹Letter from Rep. Raul Grijalva to Forest Service Chief Tom Tidwell (Jan. 2010), available at <http://www.imba.com> (see news, action alert).

⁸⁰*Id.* While this language has been interpreted as requesting a policy equivalent to the Region 1 policy, there is some ambiguity over whether mountain biking would be excluded in RWAs. After lobbying by a major bike advocacy group, the letter was revised to remove language expressly prohibiting bikes in RWAs, and the International Mountain Bicycling Association subsequently requested that its members support the request. See Press Release, “IMBA Meets with Congressional Leaders and Federal Agencies on Public Lands Issues” (Feb. 12, 2010), available at <http://www.imba.com> (search news release archives).

⁸¹Letter from Reps. Doc Hastings and Rob Bishop to U.S. Forest Service Chief Tom Tidwell (Apr. 19, 2010), available at http://www.sharetrails.org/uploads/Bishop_Letter_to_Tidwell_re_RWA_issue.pdf.

⁸²*Id.*

⁸³531 F.3d 1114 (9th Cir. 2008).

activities affecting congressionally designated wilderness areas, but also for activities affecting administratively created WSAs and other LWCs.^{83.1}

[1] Lands With Wilderness Characteristics (LWCs)

[a] Concept of Wilderness

Cases addressing LWCs frequently fail to define such characteristics by reference to the Wilderness Act itself. According to a BLM Instruction Memorandum,⁸⁴ wilderness characteristics are: “Features of the land associated with the concept of wilderness that may be considered in land use planning when BLM determines that those characteristics are reasonably present, of sufficient value (condition, uniqueness, relevance, importance) and need (trend, risk), and are practical to manage.”^{84.1}

The “concept of wilderness” is taken from the Wilderness Act and incorporated into FLPMA.⁸⁵ Generally, BLM considers lands to be LWCs when the area possesses sufficient size and naturalness, and either outstanding opportunities for solitude or for primitive and unconfined recreation. Supplemental values such as ecological, geological, or other features are considered a bonus but are not among the minimum criteria for the determination of an LWC. Other environmental criteria, such as visual resources, are deemed irrelevant.^{85.1}

[b] Roads and Roadlessness

When evaluating whether wilderness characteristics are present, roads continue to garner a disproportionate amount of analysis and attention because they can affect all criteria. Additionally, the other criteria are highly subjective, while the existence of a road is more readily ascertainable.

BLM defines a “road” using FLPMA’s legislative history. No definition is otherwise found in the statute. A committee report from the House of

^{83.1}BLM has adopted this phrase for lands which are neither designated wilderness nor WSAs, but which contain all of the wilderness characteristics identified in the Wilderness Act.

⁸⁴U.S. Dep’t of the Interior, Bureau of Land Mgmt., Instruction Memorandum No. 2003-275 app. 1 (Sept. 29, 2003) (IM 2003-275). BLM currently is updating its wilderness inventory handbook and it is not yet available to field offices or the public. It was last updated in 2001 and rescinded in 2003 as part of the Utah Settlement, leaving in place the 1978 edition. Some field offices are using more current draft handbooks to fill the void in order to provide policy, direction, procedures and guidance for BLM employees for maintaining wilderness inventories.

^{84.1}IM 2003-275, at app. 1.

⁸⁵43 U.S.C. § 1702(i) (elec. 2010) (citing 16 U.S.C. 1131(c) (elec. 2010)).

^{85.1}Bureau of Land Management, U.S. Dep’t of the Interior, *Wilderness Inventory Handbook* 14 (1978 ed.).

Representatives stated, “The word ‘roadless’ refers to the absence of roads which have been improved and maintained by mechanical means to ensure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.”⁸⁶ The BLM subsequently adopted a sub-definition of certain key phrases in the committee report.⁸⁷ The phrase “Improved and Maintained” refers to “[a]ctions taken physically by people to keep the road open to vehicle traffic. ‘Improved’ does not necessarily mean formal construction. ‘Maintained’ does not necessarily mean annual maintenance.” “Mechanical means” includes the “[u]se of hand or power machinery or tools.” “Relatively regular and continuous use” means “[v]ehicular use that has occurred and will continue to occur on a relatively regular basis.”^{87.1}

The Interior Board of Land Appeals (IBLA) discussed the definition of a road in a 1982 decision,⁸⁸ and that definition is still used by BLM for guidance:

Clearly, a route which was created and maintained solely by the passage of vehicles could not qualify as a road. Similarly, a route which was opened and/or constructed by a mechanical means, but which requires additional maintenance in order to keep it open to regular and continuous use cannot qualify as a road if such additional maintenance is not performed. But, on the other hand, if the route was initially opened by the passage of vehicles, or even by herds of bison or cattle, but is thereafter mechanically maintained to insure regular and continuous use by vehicles, that would qualify as a road. Likewise, a route, or a segment of a route which was mechanically improved to permit the passage of vehicles, but which to date has not needed any further mechanical improvement or maintenance to facilitate the regular and continuous passage of vehicles, is also a road.⁸⁹

Notably, the determination regarding existence of a road is not a decision for all time.⁹⁰ Roads that qualify under the FLPMA legislative history and BLM definitions can lose their status through nonuse and natural reclamation so that an area that might have once failed to qualify as an LWC due to the presence of a road could, over time, regain primitive and size characteristics and qualify as an LWC.

⁸⁶ See H.R. Rep. No. 94-1163 at 17 (1976).

⁸⁷ Internal Draft Guidance: H-6300-1-Wilderness Inventory Maintenance in BLM Oregon/Washington (Apr. 18, 2008) (Internal Draft Guidance).

^{87.1} *Id.* at 11.

⁸⁸ Sierra Club, 62 IBLA 367, GFS(MISC) 72(1982).

⁸⁹ *Id.* at 369-70.

⁹⁰ See *ONDA v. BLM*, 531 F.3d 1114, 1128 (9th Cir. 2008) (citing *Colorado Env'tl Coal.*, 161 IBLA 386, 391, GFS(O&G) 6(2004)). See also Bureau of Land Mgmt., U.S. Dep't of the Interior, *Wilderness Inventory Handbook* 5 (1978 ed.).

[2] Considering Wilderness Characteristics in the Resource Management Plan (RMP) Process

The Ninth Circuit's decision in *ONDA v. BLM*⁹¹ forms the backdrop for analysis of impacts to wilderness characteristics as part of the RMP process. ONDA and other environmental plaintiffs alleged that BLM violated NEPA by failing to properly analyze the effects of RMPs on lands possessing wilderness characteristics in southeastern Oregon. BLM explicitly disclaimed any obligation to analyze impacts on wilderness values, noting that "a global reinventory to address wilderness values within the planning area is outside the scope of [an RMP]."⁹² The court disagreed, and further concluded that the Utah Settlement did not preclude inventory or management to protect wilderness values, assuming there was no automatic application of the non-impairment standard.⁹³

The Ninth Circuit's reasoning in *ONDA v. BLM* highlights the interrelation of FLPMA and NEPA obligations relating to analysis of planning impacts on wilderness characteristics. The court concluded that BLM has authority to inventory wilderness characteristics under FLPMA § 201, separate and apart from the process for recommending wilderness areas under section 603.⁹⁴ "FLPMA makes clear that wilderness characteristics are among the values which the BLM can address in its land use plans, and hence, needs to address in the NEPA analysis for a land use plan govern-

⁹¹ 531 F.3d 1114 (9th Cir. 2008).

⁹² *Id.* at 1123.

⁹³ *Id.* at 1135-36. The Ninth Circuit vacated the Record of Decision (ROD) approving the EIS and the challenged Southeastern Oregon RMP, and remanded the case to the district court with instructions to remand to BLM. BLM filed a petition for panel rehearing that was limited to the scope of the remand to the agency and did not seek rehearing on the merits. On June 10, 2010, the parties filed a Joint Motion Requesting Amendment of Opinion and Remand in order to effectuate a settlement agreement resolving the *ONDA v. BLM* litigation, as well as claims raised in a second case, *Oregon Natural Desert Ass'n v. Gammon*, No. 07-35728 (9th Cir., filed Sept. 4, 2007). Joint Motion Requesting Amendment of Opinion and Remand, *ONDA v. BLM*, No. 05-35931 (9th Cir., June 10, 2010).

The parties request that the Ninth Circuit amend its decision so as not to set aside the ROD for the Southeastern Oregon RMP, and to remand to the district court, which would dismiss the case but retain jurisdiction for the purpose of enforcing the settlement agreement. Pursuant to the terms of the settlement agreement, BLM would continue to manage lands under the Southeastern Oregon RMP and the Lakeview RMP challenged in *Gammon*, but would undertake "as quickly as practicable" RMP amendments addressing wilderness character, off-road vehicle use, and grazing management. Joint Motion, att. A at ¶¶ 13-16. Among other commitments to protect LWCs, the settlement agreement requires BLM to analyze effects on wilderness character in project-specific NEPA analyses for projects proposed or scheduled for implementation in areas found to possess wilderness character, pending the completion of the RMP amendments. *Id.* at ¶19.

⁹⁴ *ONDA v. BLM*, 531 F.3d 1114, 1119 (9th Cir. 2008).

ing areas which may have wilderness values.”⁹⁵ The environmental impact statement (EIS) for an RMP must consider the presence of wilderness characteristics and, if they exist, how the RMP should treat those lands.⁹⁶

Another case currently pending before the Ninth Circuit also makes clear that NEPA adequacy is implicated by consideration of wilderness characteristics. In *ONDA v. Shuford*,⁹⁷ the district court reviewed wilderness characteristics issues in the context of the RMP for Steen’s Mountain in southeastern Oregon. The court held that there was no explicit NEPA duty to inventory for wilderness characteristics for each proposed action but there is an implicit duty to do so in NEPA’s hard look requirement.⁹⁸ The court in *Shuford* also determined that NEPA does not specify the quantum of information required for making a decision related to wilderness characteristics, and BLM does not need a new inventory each time an RMP is developed if BLM already has an adequate environmental baseline of resource information in its existing NEPA analysis.⁹⁹ The *Shuford* court found that BLM had adequately considered wilderness characteristics suggested by plaintiffs and through its own review and had determined that the lands did not contain those characteristics. Therefore, no further analysis was necessary in the EIS. In other words, BLM had taken a hard look at the effects of the RMP amendment on wilderness resources.¹⁰⁰

[3] FLPMA Requirements with Respect to LWCs

[a] The Continuing Duty to Inventory

FLPMA § 201 requires the Secretary to prepare and maintain “on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values). . . .”¹⁰¹ The courts have uniformly found that this continuing duty to inventory public land resources includes wilderness resources.¹⁰² In

⁹⁵ *Id.* at 1133.

⁹⁶ *Id.* at 1143.

⁹⁷ No. 06-242-AA, 2007 WL 1695162 (D. Or. June 8, 2007) (unreported). Cross appeals have been taken from the *Shuford* decision in the Ninth Circuit. See First Brief on Cross-Appeal of Plaintiff-Appellant-Cross-Appellee, *ONDA v. McDaniel*, No. 08-35942 (9th Cir. Dec. 1, 2009) (consolidated with *ONDA v. Shuford*, No. 08-36041). Oral Argument is set for July 12, 2010.

⁹⁸ *ONDA v. Shuford*, 2007 WL 1695162, at *4.

⁹⁹ *Id.* at *6.

¹⁰⁰ *Id.* at *7.

¹⁰¹ 43 U.S.C. § 1711(a) (elec. 2010).

¹⁰² See, e.g., *ONDA v. BLM*, 531 F.3d 1114, 1119 (9th Cir. 2008).

other words, wilderness characteristics are a FLPMA resource and the duty to inventory them extends beyond identification for purposes of recommending designated wilderness under section 603.¹⁰³

Normally BLM field offices maintain the inventory in the context of land use planning. However, nongovernmental organizations (NGOs) may also initiate their own inventories of lands that they deem to possess wilderness characteristics and provide that information to BLM for consideration in addition to whatever independent analysis BLM has undertaken. As will be seen below, the submission of NGO wilderness inventories is a focal point for litigation.

The duty to inventory does not, however, equate to a duty to manage the inventoried lands to the non-impairment standard. Having identified wilderness values, BLM can manage such lands to protect them from extractive or destructive uses without requiring complete, permanent, non-impairment of wilderness values.¹⁰⁴ Assuming consistency with or amendment to the existing RMP, BLM could also change its mind, reconsider the restrictions on the land use, and abandon protection.¹⁰⁵ Indeed, the *ONDA v. BLM* court emphasized that permanence is a key attribute of section 603 and used that feature to distinguish permissible management to protect wilderness values from impermissible de facto WSA designation.¹⁰⁶

In *Southern Utah Wilderness Alliance*,¹⁰⁷ SUWA challenged six oil and gas lease sales in Utah that were located in an area identified by congressional legislation as worthy of wilderness protection. The legislation did not become law. IBLA found that none of the parcels was determined to have wilderness characteristics in BLM's initial inventory between 1978 and 1985 or in BLM's reinventory of the lands in 1999. IBLA stressed that the timing and manner of BLM's compliance with FLPMA's continuing duty to inventory resource values is up to BLM.¹⁰⁸ Additionally, the inventory conducted pursuant to FLPMA § 201(a) is not a land use plan and does not make any decisions concerning the management or use of public lands. The statute specifically states, "The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or

¹⁰³ *Id.* at 1134.

¹⁰⁴ *Id.* at 1135.

¹⁰⁵ *Id.* at 1136.

¹⁰⁶ *Id.*

¹⁰⁷ 163 IBLA 14, GFS(O&G) 13(2004).

¹⁰⁸ *Id.* at 27.

prevent change of the management or use of public lands.”¹⁰⁹ IBLA found that the fact that the lands had been contained in a congressionally-proposed wilderness area that was not enacted into law made no difference.

It is worth noting that when wilderness inventory claims are brought under the Administrative Procedure Act (APA), they fall under section 706(2)(A) as challenges to agency action that is arbitrary, capricious, or not in accordance with law. It is well established that approval of an RMP is a final agency action that may be challenged under the APA.¹¹⁰ However, the Supreme Court has held that a claim under APA § 706(1) to compel agency action unlawfully withheld or unreasonably delayed “can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take.”¹¹¹ FLPMA imposes no such discrete, mandatory duty on BLM to update its wilderness inventory.¹¹² Furthermore, when a statute compels an agency to act within a certain time period but leaves open the manner of compliance, a court may “compel the agency to act, but has no power to specify what the action must be.”¹¹³ In *Shuford*, BLM argued that FLPMA grants it “wide discretion to determine when and how to maintain resource inventories.”¹¹⁴ The court stated that it would defer to BLM’s expertise in conducting wilderness analysis “absent a showing that BLM failed to analyze the RMP’s impact on an obviously-present resource value.”¹¹⁵

**[b] Wilderness Characteristics and FLPMA’s Prohibition
Against Unnecessary or Undue Degradation of the
Public Lands**

FLPMA states “[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands.”¹¹⁶ Cases address whether BLM must protect LWCs from unnecessary or undue degradation and in so doing give those lands quasi-wilderness stature.

¹⁰⁹43 U.S.C. § 1711(a) (elec. 2010).

¹¹⁰See, e.g., *Shuford*, 2007 WL 1695162, at *9.

¹¹¹*Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

¹¹²*Shuford*, 2007 WL 1695162, at *9.

¹¹³*Norton*, 542 U.S. at 65.

¹¹⁴*Shuford*, 2007 WL 1695162, at *9.

¹¹⁵*Id.* at *11.

¹¹⁶43 U.S.C. § 1732(b) (elec. 2010).

In *Shuford*, plaintiff ONDA argued that BLM's wilderness inventory was inaccurate, leaving BLM with no basis to determine whether the proposed use would cause unnecessary or undue degradation. The court found that BLM had maintained a wilderness inventory and that BLM had broad discretion to manage public lands. BLM had no mandatory duty under FLPMA to further update its wilderness inventory. The court also found that the claim was barred because the maintenance of the inventory was not a final agency action under the Administrative Procedure Act.¹¹⁷ Had BLM's inventory been badly outdated or inaccurate, a FLPMA claim may have existed.¹¹⁸

In *Oregon Natural Desert Ass'n*,¹¹⁹ IBLA determined that BLM did not violate FLPMA's multiple use mandate or its mandate to prevent unnecessary or undue degradation when authorizing vegetative treatments in areas identified in a citizen inventory as containing wilderness characteristics. IBLA reasoned that because BLM found the lands in question did not meet the criteria necessary to establish wilderness character, no duty to prevent unnecessary or undue degradation was triggered under section 302.¹²⁰ A possible corollary to that finding is that the existence of wilderness characteristics *would* require protection under the unnecessary or undue degradation standard, but such a reading seems contrary to the Ninth Circuit's holding in *ONDA v. BLM* that LWCs may be impaired consistent with an underlying land use plan.¹²¹

[4] Considering Wilderness Characteristics at the Project Level

In *ONDA v. Rasmussen*,¹²² the district court held that BLM must do more than simply critique a wilderness inventory submitted by an NGO when considering the impacts of a specific project upon wilderness char-

¹¹⁷*Shuford*, 2007 WL 1695162, at *9 (discussing *Norton v. SUWA*, 542 U.S. 55 (2004)).

¹¹⁸*Id.* at *11.

¹¹⁹173 IBLA 348, GFS(MISC) 8(2008).

¹²⁰*Id.* at 356.

¹²¹Numerous IBLA decisions have also held that while BLM has NEPA obligations to supplement its environmental analysis when it has significant new information regarding wilderness or other resource values, *Colorado Envt'l Coal.*, 173 IBLA 362, 372, GFS(O&G) 5(2008), mere submission of a citizen inventory or presence of citizen-proposed wilderness does not require that BLM manage such lands to preserve wilderness values. Biodiversity Conservation Alliance, 171 IBLA 218, 234, GFS(O&G) 4(2007); Biodiversity Conservation Alliance, 171 IBLA 313, 318-19, GFS(O&G) 6(2007); Oregon Natural Desert Ass'n, 176 IBLA 371, 391, GFS(MISC) 8(2009).

¹²²451 F. Supp. 2d 1202 (D. Or. 2006).

acteristics. BLM was obligated under NEPA to “consider whether there were changes in or additions to the wilderness values within the [grazing allotment], and whether the proposed action in that area might negatively impact those wilderness values, if they exist.”¹²³ The court reasoned by analogy to a case from the Northern District of California and concluded that although an agency need not compile perfect information on resources on public lands before it can act, it cannot simply disregard information that conflicts with its conclusions. The California court observed,

[T]he problem here is not that BLM did not update the inventory data so that it was exhaustive and current; to the contrary, the problem lies with the fact that, despite extensive evidence in the record indicating the existence of numerous other species . . . , the BLM nevertheless approved [a Recreation Area Management Plan] which does not take these species into consideration. . . .¹²⁴

In response to BLM’s criticism that the citizen-conducted inventory was incomplete, the court emphatically stated that “ONDA did not have a responsibility to provide accurate information regarding any changes to the wilderness characteristics in the [affected area] before the [Environmental Assessment] was issued. BLM did.”¹²⁵

In *ONDA v. Freeborn*,¹²⁶ ONDA challenged site-specific decisions in southeastern Oregon for alleged failure to maintain a current inventory of wilderness characteristics and to consider the impact of range improvements for grazing projects on wilderness characteristics in a grazing environmental assessment (EA). Eight days prior to the filing of the complaint, the Oregon district court had ruled in the *Rasmussen* case.^{126.1} Based on that decision, BLM stayed its grazing decisions, updated its wilderness characteristics inventory, issued an addendum to its EA, and then reissued the proposed grazing decisions.^{126.2} Those reissued grazing decisions were subsequently protested. The parties stipulated to a stay of the *Freeborn* litigation pending resolution of the administrative appeals process.¹²⁷ In March 2010, BLM issued a decision authorizing new 10-year grazing permits accompanied by a new Finding of No Significant Impact (FONSI)

¹²³*Id.* at 1213.

¹²⁴*Id.* at 1212 (quoting *Center for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1167 (N.D.Cal. 2006)).

¹²⁵*Id.* at 1212-13.

¹²⁶Complaint, No. 06-CV-1311 (D. Or. Sept. 14, 2006).

^{126.1}451 F. Supp. 2d 1202 (D. Or. 2006).

^{126.2}*ONDA v. Freeborn*, First Amended Complaint, No. 06-CV-1311, ¶¶ 63, 71-74 (D. Or. June 7, 2010).

¹²⁷*ONDA v. Freeborn*, Joint Status Report, No. 06-CV-1311 (D. Or. Jan. 8, 2010).

under NEPA, relying on its 2005 EA and 2008 Addendum.^{127.1} Plaintiffs recently filed an amended complaint challenging the adequacy of BLM's NEPA process, noting in particular project impacts to citizen-inventoried LWCs and sage-grouse habitat.¹²⁸

Another case involving site-specific projects and wilderness characteristics is *Southern Utah Wilderness Alliance (SUWA) v. Norton*.¹²⁹ SUWA alleged NEPA violations for failure to consider significant new information about the wilderness characteristics of parcels affected by the sale and issuance of oil and gas leases. BLM argued that its Determination of NEPA Adequacy (DNA) had sufficiently determined that the SUWA information did not rise to the level of significant new information requiring a new EA or new EIS. The district court held that NEPA had been violated by BLM's arbitrary determination not to supplement the existing NEPA analysis in light of BLM's own wilderness characteristics information and the subsequent new information provided by SUWA.¹³⁰ The court ruled that NEPA does not require supplementation every time new information comes to light unless "new information is sufficient to show [the proposed action] will affect the quality of the human environment in a significant manner or to a significant extent not already considered."¹³¹

Questions regarding wilderness characteristics at site-specific projects also arise in IBLA administrative decisions. In *Oregon Natural Desert Ass'n*,¹³² IBLA held that BLM had taken a hard look at the wilderness resource prior to authorizing vegetative treatments including juniper removal, invasive species treatment, brush mowing, and seeding. BLM had considered the NGO's wilderness characteristics inventory and found that no lands in the project area contained all of the characteristics. Once that conclusion had been reached, there were no wilderness characteristics to analyze in the EA. IBLA stated that NEPA does not require a discussion of impacts to nonexistent resources.¹³³

^{127.1} *ONDA v. Freeborn*, First Amended Complaint, No. 06-CV-1311, ¶ 87 (D. Or. June 7, 2010).

¹²⁸ *Id.*

¹²⁹ 457 F. Supp. 2d 1253 (D. Utah 2006).

¹³⁰ *Id.* at 1262.

¹³¹ *Id.* at 1268 (quoting *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 373-74 (1989)).

¹³² 173 IBLA 348, GFS(MISC) 8(2008).

¹³³ See also *Oregon Natural Desert Ass'n*, 174 IBLA 341, GFS(MISC) 21(2008).

More recently, ONDA and others challenged BLM's decision to offer 11 parcels of BLM land in Oregon for geothermal leasing.¹³⁴ ONDA argued that significant new information on wilderness resources required supplementation of the 1989 and 1992 EISs supporting the RMPs. IBLA denied the appeal, finding that BLM had considered ONDA's inventory of wilderness characteristics and other information and had found no lands with those characteristics. ONDA's information was not significant and BLM appropriately used the DNA process to determine that a supplemental EIS (SEIS) was not necessary.¹³⁵ However, BLM was required to consider the likely impacts of lease activity on roadlessness and other characteristics under *ONDA v. BLM*. IBLA found that BLM had done so and again had found a lack of LWCs due to the lack of opportunity for solitude or primitive, unconfined recreation in the site-specific area.¹³⁶

[5] Considering Wilderness Characteristics in Areas Proposed by Citizen and Nongovernmental Organizations (NGOs)

Citizen-proposed wilderness areas are an especially likely flashpoint for conflicts over LWC management. By definition, they are areas with characteristics that environmental NGOs or other members of the public deem worthy of protection. At the same time, they are not currently being managed to protect those values, at least not exclusively or to the non-impairment standard. Thus, competing ideas about appropriate uses are likely to arise.

When an inventory is submitted as part of an RMP or project-specific NEPA analysis, those statutes and their associated regulations provide guidance on how the information should be incorporated into the scoping process or other responses to public comment.¹³⁷ NEPA regulations promulgated by the Council on Environmental Quality further specify when an agency must prepare an SEIS. An SEIS is required if the agency makes "substantial changes in the proposed action that are relevant to environmental concerns"¹³⁸ (e.g., if an RMP changes management direction for an area identified as having wilderness characteristics, or if the location of a right-of-way is altered). An SEIS is also required when there are "significant new circumstances or information relevant to environmental

¹³⁴ Oregon Natural Desert Ass'n, 176 IBLA 371, GFS(MISC) 8(2009).

¹³⁵ *Id.* at 390.

¹³⁶ *Id.*

¹³⁷ See, e.g., 43 U.S.C. § 1712(a) (elec. 2010); 43 C.F.R. §§ 1610.4-1, 1610.2 (elec. 2010); 42 U.S.C. § 4331(a) (elec. 2010); 40 C.F.R. § 1501.7 & pt. 1503 (elec. 2010).

¹³⁸ 40 C.F.R. § 1502.9(c)(i) (elec. 2010).

concerns and bearing on the proposed action or its impacts”¹³⁹ (e.g., if citizens or NGOs have submitted updated inventory information for an area affected by the proposed action).

A draft BLM Handbook on Wilderness Inventory Maintenance recognizes that BLM has discretion regarding implementation of the FLPMA § 201 inventory requirement. “Normally, District Offices will do this [1] in the context of a land use plan, [2] when new information exists, or [3] when conditions change.”¹⁴⁰ This language suggests that citizen-created inventories should trigger review and inventory maintenance, even if submitted outside of a formal FLPMA or NEPA process, as they may document new information or changed conditions.

When it comes to evaluating the wilderness characteristics of a citizen-proposed area, BLM is entitled to rely on its own expertise and need not rubber stamp an NGO proposal.¹⁴¹ At the same time, it must respond to information that raises questions of whether it is relying on an incomplete or outdated inventory. Simply disclaiming a duty to consider wilderness characteristics or rejecting submissions as incomplete will render the agency’s decisions vulnerable to judicial attack. BLM has a duty to inventory and manage lands regardless of whether additional information is submitted by the public.

Beyond the extremes of accepting or rejecting citizen proposals wholesale, the standards governing BLM’s evaluation of citizen proposals are less clear. In contrast to WSAs, the agency is not required to manage citizen-proposed wilderness under the non-impairment standard (or any other level of protection for wilderness characteristics).¹⁴²

Courts have declined to require that BLM perform a new wilderness inventory every time it develops an RMP. The agency has also argued that the very purpose of an RMP is to guide future site-specific decisions, and it need not revisit its wilderness inventory for every subsequent proposal.¹⁴³ In order to fulfill its FLPMA obligations, BLM must rely on adequate information to comply with its multiple use and sustained yield mandates.¹⁴⁴ NEPA further requires that BLM possess sufficient information to estab-

¹³⁹*Id.* § 1502.9(c)(ii).

¹⁴⁰Internal Draft Guidance, *supra* note 87, at 2.

¹⁴¹*Shuford*, 2007 WL 1695162, at *8.

¹⁴²*See* Colorado Env’tl Coal., 171 IBLA 256, GFS(O&G) 5(2007), S. Utah Wilderness Alliance, 163 IBLA 14, GFS(O&G) 13(2004).

¹⁴³*Rasumussen*, 451 F. Supp. 2d at 1212.

¹⁴⁴*Shuford*, 2007 WL 1695162, at *6.

lish an “adequate environmental baseline” and take a “hard look” at the environmental consequences of its action, though it does not specify the “quantum of information” required.¹⁴⁵

[6] What a Finding of One or More Wilderness Values Means for BLM Management

Whether LWCs are identified through agency- or citizen-initiated inventories, it is important to remember several key factors. First, it is BLM policy that all characteristics must be present for lands to qualify as having wilderness characteristics, a position that is subject to possible challenge by NGOs and others. Second, the inventory process itself (in contrast to the section 202 management process) is not open to the public and, at least in the opinion of BLM, is not subject to appeal.

Finally, it is important to remember that neither the FLPMA inventory requirement nor BLM’s LWC analysis requires BLM to manage LWCs for non-impairment. BLM may allow destructive use and impairment of the lands so long as such alternatives are consistent with the underlying RMP. BLM field offices may decide to manage LWCs for non-impairment if an RMP amendment is underway to avoid committing to a course of action during NEPA analysis.

This distinction between management obligations for LWCs and WSAs is illustrated in the case of the lands covered by a pending bill, H.R. 1925, “America’s Red Rock Wilderness Act.” In November 2009, 89 House members wrote to Interior Secretary Ken Salazar requesting that he protect lands recommended for wilderness in that bill.¹⁴⁶ Of the 9.4 million acres covered in the bill, over four million acres are already protected as WSAs. The remaining five million acres are LWCs and subject to greater discretion in BLM’s management. The congressmen requested that the lands be administratively protected until Congress acted to protect them by statute. Specifically, they requested that Secretary Salazar renounce the Utah Settlement, arguing that “[d]esignation of wilderness study areas is a crucial means of interim protection. . . .”¹⁴⁷ They also requested that the agency complete a wilderness inventory of lands proposed for protection; bar oil and gas leasing on lands that would be designated wilderness under the bill; withdraw the lands from mining claim location; and prohibit other

¹⁴⁵ *Id.* at *6.

¹⁴⁶ “House members seek Utah wild land protections,” 34(22) *Public Lands News*, Nov. 13, 2009.

¹⁴⁷ Letter from Maurice Hinchey (D-NY) to the Hon. Ken Salazar, Secretary of the Interior (Nov. 10, 2009), available at <http://www.suwa.org/site/DocServer/11.10.09SalazarLetteronUtahWilderness.pdf?docID=9021>.

uses incompatible with wilderness, such as off-road vehicle use, logging, and road construction.¹⁴⁸

In a letter responding to the request, Secretary Salazar noted that BLM is reviewing its policy regarding inventory and identification of LWCs under FLPMA § 201 and use of wilderness inventory information in the RMP process under section 202, and that BLM would “continue to follow all applicable laws in the management and protection of the public lands” in the meantime.¹⁴⁹ Presumably, “applicable law” still means the interpretation of BLM’s authority articulated in the Utah Settlement, which has been judicially endorsed and not legislatively reversed.

[7] Options for Project Proponents When Wilderness Characteristics May Be Present

NEPA requires BLM to take a “hard look” at the impacts of its proposed action on the human environment.¹⁵⁰ That hard look must occur when BLM is undertaking RMP activities under FLPMA § 202 and when BLM is considering applications for specific projects on BLM land (e.g., FLPMA § 501 rights-of-way). If wilderness characteristics are not found in the affected area, that concludes the level of analysis. If wilderness characteristics are found, then the NEPA documentation must explain the impacts of the proposed action on those resources. To date, the majority of cases alleging failure to adequately consider planning or project impacts on wilderness values have involved lands that have been inventoried by NGOs and recommended for inclusion in the wilderness system. But it would seem prudent for BLM to conduct the LWC inventory and analysis on lands that have not been recommended by any particular individual or NGO. BLM offices vary in their approach to this scenario. When a project proponent is concerned that BLM has not adequately analyzed impacts to LWCs in its NEPA process, it can take several approaches:

- (1) Do nothing and hope for the best.
- (2) Coax the agency to undertake an inventory of characteristics. The floor for an acceptable methodology has not yet been established, and courts are typically deferential to BLM decisions regarding how to undertake the inventory. One possibility is for BLM to update prior inventories. It is also possible that lands previously found not to contain wilderness characteristics could now be found to possess

¹⁴⁸*Id.*

¹⁴⁹Letter from the Hon. Ken Salazar, Secretary of the Interior, to Representative Maurice Hinchey et al. (Jan. 27, 2010), *available at* http://www.suwa.org/site/DocServer/DOI_response_to_signers_1-19-10.pdf?docID=10121.

¹⁵⁰*See* ONDA v. BLM, 531 F.3d 1114, 1120-21 (9th Cir. 2008).

them through natural reclamation. BLM should be reminded that it need only look at federal lands and not state or private lands in determining whether wilderness characteristics exist.

- (3) Investigate if there are legitimate questions as to facts on the ground. For persons or entities wishing to avoid management of lands as LWCs, one option may be to use a road or lose it, since creation of LWCs can result through inaction. An agency may rely on its own expertise and is not obligated to simply agree with another party's assessment of wilderness values. If an NGO has submitted a wilderness inventory, does the agency's review comport with those findings?
- (4) Inventory the characteristics and give the information to the agency. This can be done as a desktop exercise or fieldwork and submitted to the agency. This approach is not without risks, however. If BLM chooses to ignore the information submitted by a project proponent, the information would be contained in the BLM's decision file awaiting discovery or a FOIA request. Such an analysis could be used as evidence that BLM had failed to meet its statutory duties, even in the eyes of the project proponent.
- (5) Weigh early and proactive involvement against risk of litigation at a later date. As a counterpoint to the exposure from a project proponent's data being included in the Administrative Record, there is also a risk of extra-record information being introduced to demonstrate an agency has ignored the wilderness issue. In at least one instance, wilderness inventories conducted by environmental groups after the conclusion of the RMP and NEPA process were admitted under an exception to the usual rule that agency decisions are reviewed on the Administrative Record. It is the agency's duty to act on accurate and complete information, and it may not abdicate that duty merely because it deems a citizen inventory incomplete.

§ 15.06 Trends

[1] Alternative Protective Designations

Wilderness is often viewed as the gold standard of resource protection. However, it is not the only management designation available to agencies. If courts ultimately interpret more narrowly agencies' authority to designate and manage lands to protect wilderness values, it is possible they could turn to other designations to protect those resource values. Environmental NGOs may agree that such alternatives represent an acceptable compromise and one that is less expensive in terms of time and resources than pursuing wilderness designation. Designations that allow a broader range of recreational uses may also facilitate development of broader coalitions.

Alternatively, environmental NGOs may decide that direct legislative action is a preferred strategy for seeking wilderness protection. Because Congress holds the ultimate authority to designate wilderness, wilderness proponents always have the option of going straight to Congress to seek designation, rather than advocating before agencies.

[a] National Conservation Areas

National Conservation Areas (NCAs) are designated on an ad hoc basis by Congress to “conserve, protect, enhance, and manage public lands for the benefit and enjoyment of present and future generations.”¹⁵¹ NCAs comprise one component of the National Landscape Conservation System (NLCS), along with National Monuments, Wilderness Areas, WSAs, Wild and Scenic Rivers, National Scenic and Historic Trails, and a small number of other congressionally-designated areas. The NLCS was established administratively by Interior Secretary Bruce Babbitt in June 2000 and reflects a philosophy that sites with exceptional natural and heritage values should be preserved by protecting the larger landscape context in which they are situated. Congress established the NLCS legislatively on March 30, 2009.¹⁵² The mission of the NLCS “is to conserve, protect and restore nationally significant landscapes recognized for their cultural, ecological and scientific values for the American public.”¹⁵³

The legislation creating each NCA specifies the particular values or purposes for which it is established and the permitted or prohibited uses within the area. Typically, the statutes also address motorized vehicle use, withdrawal of minerals from entry and appropriation, future land acquisition, and miscellaneous matters such as utility corridors and buffer zones. Management in NCAs is generally not as restrictive as in Wilderness Areas. It is not unusual for a larger NCA to encompass designated wilderness or WSAs.

Beyond these basics, statutory provisions can vary greatly from one NCA to another and often reflect the political realities of each particular NCA’s designation.¹⁵⁴ Indeed, NCAs are sometimes described as “wilder-

¹⁵¹Bureau of Land Mgmt., U.S. Dep’t of the Interior, “National Conservation Areas and Similarly Designated Lands,” *available at* http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/National_Conservation_Areas.html.

¹⁵²Omnibus Public Lands Management Act of 2009, Pub. L. No. 111-11, § 2002, 123 Stat. 991, 993 (2009).

¹⁵³Bureau of Land Mgmt., U.S. Dep’t of the Interior, “NLCS Fact Sheet,” *available at* http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/fact_sheet.html. *See also* Pub L. No. 111-11, § 2002(a), 123 Stat. 991, 1095 (2009).

¹⁵⁴*See* Andy Kerr & Mark Salvo, “Bureau of Land Management National Conservation Areas: Legitimate Conservation or Satan’s Spawn?,” 20 *UCLA J. Envtl. L. & Pol’y* 67

ness lite”—a way to exclude resource extraction and avoid impacts from motorized recreation while still allowing a broader range of recreational uses than would be permitted in wilderness, such as mountain biking. Wilderness advocates, on the other hand, fear that “mere” NCA designation offers less permanent protection and leaves “wilderness-quality land and water exposed to motorized recreation and possibly more intense, industrial activities such as logging, mining and gas drilling.”¹⁵⁵

[b] Areas of Critical Environmental Concern

An Area of Critical Environmental Concern (ACEC) is a land management designation established under FLPMA. Section 202(c)(3) requires that BLM give priority to the designation and protection of ACECs in the development and revision of land use plans.^{155.1} The agency is also required to give priority to ACECs when preparing and maintaining inventories of public lands and their resource and other values.¹⁵⁶

The creation of ACECs is an administrative designation made by BLM in the land use planning process.¹⁵⁷ An ACEC may be nominated by either BLM or the public, usually as part of the scoping process for a resource management plan. In order to be proposed for inclusion as an ACEC in a Resource Management Plan, a nominated area must meet criteria for relevance and importance.

“Relevance” requires that there be “a significant historic, cultural, or scenic value; a fish or wildlife resource or other natural system or process; or natural hazard.”¹⁵⁸ “Importance” means substantial significance and value, and “generally requires qualities of more than local significance and special worth, consequence, meaning, distinctiveness, or cause for concern. A natural hazard can be important if it is a significant threat to human life or property.”¹⁵⁹ An interdisciplinary BLM team evaluates information from a variety of sources, including federal agencies, state and local governments, conservation groups, research institutions, and other expert opinions

(2001/2002).

¹⁵⁵“About Non-Wilderness Designations,” *available at* <http://www.whiteriverwild.org> (under “Why Hidden Gems?”).

^{155.1}43 U.S.C. § 1712(c)(3) (elec. 2010).

¹⁵⁶*Id.* § 1711(a).

¹⁵⁷43 C.F.R. § 1610.7-2(b) (elec. 2010).

¹⁵⁸*Id.* § 1610.7-2(a)(1).

¹⁵⁹*Id.* § 1610.7-2(a)(2).

in order to determine if the relevance and importance requirements are met.¹⁶⁰

BLM prescribes specific management measures to protect the values for which each ACEC is designated, thus, permissible activities may vary dramatically among ACECs. The state director is required to provide public notice and an opportunity for public comment on proposed ACECs and any resource use limitations that would occur in the event of formal ACEC designation.¹⁶¹ The public may also participate in the ACEC process by submitting comments on the relevant RMP and associated EIS addressing the relevance and importance criteria and the environmental impact of establishing an ACEC.

[2] Executive Branch

Conservationists have expressed optimism that President Barack Obama's administration will be more sympathetic to the wilderness cause. Indeed, there are already signs of greater support for wilderness designation than in other recent administrations. The Omnibus Public Land Management Act of 2009¹⁶² signed by President Obama on March 30, 2009, designated 52 new wilderness areas and added acreage to 26 existing areas for a total addition of over two million acres to the NLCS.^{162.1} This represents the greatest annual increase in more than a decade.

In February 2010, an internal draft Department of the Interior document was leaked describing 14 areas under consideration for designation as national monuments under the Antiquities Act.¹⁶³ Despite the preliminary nature of the draft, it sparked an outcry from politicians in several western states and criticism of a perceived heavy-handed presidential approach without local input or adequate consideration of competing uses including mining and energy development.

Although there are many pressing domestic and foreign policy issues competing for attention, President Obama recently asserted, “[e]ven in times of crisis, we’re called to take the long view to preserve our national heritage,” when introducing the America’s Great Outdoors Initiative to

¹⁶⁰BLM Utah, “ACEC, Frequently Asked Questions (How does BLM evaluate an ACEC nomination?),” *available at* <http://www.blm.gov> (search “ACEC Utah”).

¹⁶¹43 C.F.R. § 1610.7-2(b) (elec. 2010).

¹⁶²Pub. L. No. 111-11, 123 Stat. 991 (2009).

^{162.1}<http://www.wilderness.net> (under “About Wilderness,” then “Fast Facts”).

¹⁶³The leaked document is *available at* http://robbishop.house.gov/UploadedFiles/stats_for_designation.pdf.

promote local conservation efforts.¹⁶⁴ The President stated that he intends to “enrich [the] legacy” of presidents like Theodore Roosevelt who championed “a breathtaking legacy of conservation that still enhances our lives.”¹⁶⁵

§ 15.07 Conclusion

Howard Zahniser, an early wilderness advocate and primary author of the first draft of the Wilderness Act, exhorted,

Let’s try to be done with a wilderness preservation program made up of a sequence of overlapping emergencies, threats and defense campaigns! Let’s make a concerted effort for a positive program that will establish an enduring system of areas where we can be at peace and not forever feel that the wilderness is a battleground!¹⁶⁶

Although the Wilderness Act has provided a framework for a positive program of wilderness protection for more than 45 years, wilderness issues remain a battleground in many ways, stirring intense passions and inspiring heated controversies among those who utilize public lands.

Several courts are currently considering “as applied” challenges to the Utah Settlement that may clarify BLM’s authority to designate WSAs and to apply the non-impairment standard (or decline to do so) in its management of lands with wilderness qualities. The Department of the Interior is evaluating its policies, even as those cases are moving through the litigation process, and we may see a change in management approach implemented administratively, as well. The Forest Service’s authority to manage roadless areas and WSAs is also subject to litigation and political debate, raising similar questions of what constitutes *de facto* wilderness and whether such designations usurp congressional authority.

Litigation has established the basic scope of BLM’s obligations to consider management of and impacts to LWCs in its planning and project permitting activities. However, there is still little clarity on the actual scope of BLM’s discretion and what constitutes an adequate inventory on which to balance multiple-use and sustained-yield decisions, consider reasonable alternatives, and evaluate the environmental impact of proposals. Proponents of projects on federal lands that may be LWCs bear the risk of this uncertainty and need to evaluate how best to ensure the adequacy of the agency permitting process when wilderness characteristics may be present.

¹⁶⁴Remarks by the President at America’s Great Outdoors Conference, April 16, 2010, available at <http://www.whitehouse.gov> (search “America’s Great Outdoors Conference”).

¹⁶⁵*Id.*

¹⁶⁶Howard Zahniser, “How Much Wilderness Can We Afford to Lose?” in *Wildlands in Our Civilization* 46, 51 (David Brower ed., 1964).

Wilderness advocates may continue to pursue litigation and seek decisions imposing more robust study and environmental analysis requirements when it comes to LWCs. Alternatively, they may pursue “second best” protective designations if those protections are determined to represent an acceptable compromise in terms of time, resources, and certainty. In addition, one of the attributes of wilderness designation most frequently touted by conservationists is the permanence of its protection. It is therefore reasonable to expect that wilderness advocates will seek to capitalize on the current favorable political climate and make efforts to secure congressional wilderness designations, as well as more favorable administrative policies and legislation.

