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Secretary Salazar Promotes Wilderness Management of BLM Lands

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On December 23, 2010, Secretary of the Interior Ken Salazar announced new wilderness management policies for Bureau of Land Management ("BLM") lands. Thus began the latest chapter in a saga of federal wilderness management that commenced with President Johnson's signature on the Wilderness Act of 1964. The BLM manages 245 million acres of federal lands, 21.5 million acres (9 percent) of which are already managed as wilderness. The new policy affects the remaining 91 percent of BLM lands.

Secretary Salazar touted the new "Wild Lands" policy as a restoration of balance to BLM's multiple-use approach to land management. Some will agree with this portrayal; others will see it as a thumb on the scale in favor of a particular use. The two camps are likely to be fairly predictable with environmental groups hailing the decision and commodity groups bemoaning it. Recreationists are likely to split between those who use mechanized and motorized equipment (e.g., mountain bikes, all-terrain vehicles, snow machines) that will be barred from Wild Lands and those who don't.

The foundation for the announcement was the Secretary's issuance of Order No. 3310¹ directing the BLM to:

- Maintain a current inventory of all BLM land with wilderness characteristics ("LWCs").
- Protect LWCs through land use planning where they will be denominated "Wild Lands" and protected as wilderness until the land use plan is revised or amended.
- Protect LWCs in project-level decisions unless BLM decides that the LWCs should be impaired by the project consistent with other legal requirements and resource management considerations.

The new policy was not created from whole cloth. It built on existing formal and informal BLM policy and court decisions and then applied them to all BLM lands while adding new elements and emphasis. The 9th Circuit Court of Appeals and various district courts within the 9th Circuit had already interpreted the Wilderness Act, the Federal Land Policy and Management Act ("FLPMA"), and the National Environmental Policy Act ("NEPA") to require an ongoing inventory of BLM lands for wilderness characteristics. The courts had also required BLM to consider those inventoried values in its land use planning process and, to an increasing

degree, in project-level decisions such as issuance of grazing permits, rights-of-way, oil and gas drilling authorizations, and other approvals.

Importantly, FLPMA, the courts, and this new policy do not require the BLM to manage LWCs to the so-called "non-impairment" standard applicable to congressionally designated wilderness areas and administratively designated wilderness study areas. BLM will be able to allow uses of LWCs and Wild Lands that may impair or impact the areas' wilderness characteristics through general or project-specific land use plan amendments. This flexibility is restrained, however, by the necessity of accompanying NEPA analysis that would have to identify the environmental effects of such impairment or impact and provide a reasonably complete discussion of possible mitigation.

In the meantime, the new policy presumes that LWCs will be managed to protect the wilderness characteristics until and unless BLM finds that there are reasons not to do so. This is perhaps the most crucial aspect of the new policy -- a rebuttable presumption that lands with wilderness characteristics will be managed to protect those characteristics.

The characteristics themselves are taken directly from the Wilderness Act. They are (1) at least 5000 contiguous acres in size unless a smaller area can be practicably preserved and used in an unimpaired condition; (2) an appearance of naturalness; and (3) either outstanding opportunities for solitude or primitive and unconfined recreation. LWCs may also have optional values such as scenery or scientific interest. 16 U.S.C. § 1131(c). Secretarial Order No. 3310 retains BLM's existing policy of requiring all three of the required characteristics before an area of BLM land can be denominated an LWC.

As with all federal land issues, the details may drive the practical implications of this new policy. For example, BLM also shared with the public a new draft chapter of the BLM Manual instructing BLM staff on how to inventory LWCs. It addresses the mandatory size requirement for LWCs. This requirement has generated enormous debate over roads that define and limit the size of the parcel under consideration. As noted above, the Wilderness Act provides that wilderness can be less than 5000 acres in certain circumstances. The draft manual chapter says the BLM parcel can be any size that constitutes a "roadless island of the public lands." Draft BLM Manual 6300-1.13.B.1.b(3). Read literally, this standard could eliminate the size criterion entirely because the smallest of BLM parcels can be an island bounded by roads. This result would leave only naturalness and solitude or primitive recreation as the defining criteria for an LWC.

A number of other questions flow from Secretary Salazar's announcement, some of which were addressed in an accompanying Q and A paper,² some of which were not. For instance, does this new guidance constitute a rulemaking that first requires public notice and comment in compliance with the Administrative Procedure Act? Does the policy merit a programmatic environmental impact statement under NEPA as was done for other land values managed by the BLM such as wind and geothermal resources? How do other statutory mandates such as the Energy Policy

Act and the Multiple Use and Sustained Yield Act affect the presumption of wilderness on LWCs and Wild Lands? If the draft BLM Manual is correct that certain manmade structures such as bridges and fencing do not impair LWCs, can such structures be built in Wilderness Study Areas or Wilderness Areas without violating the "non-impairment" standard? Will BLM's inventory decisions, LWC designations, and eventual Wild Lands designations be appealable to the Interior Board of Land Appeals or in federal court? Wilderness policy has always attracted litigation and this latest pronouncement is likely to do so as well.

Readers interested in or working on projects on BLM lands may contact Bill Myers for more information (wmyers@hollandhart.com or 208-342-5000). Click [here](#) to read Secretary Salazar's announcement.

For more information on federal wilderness policy, click [here](#) to read "Along the Trammeld Road to Wilderness Policy on Federal Lands," 56 *Rocky Mt. Min. L. Inst.* 15-1 (2010) by William Myers and Jennifer Hill.

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http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf

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http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.24135.File.dat/wilderness_Q_and_A.pdf

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