



# Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service (FS): Issues for the 111<sup>th</sup> Congress

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## Summary

The 111<sup>th</sup> Congress, the Administration, and the courts are considering many issues related to the Bureau of Land Management (BLM) public lands and the Forest Service (FS) national forests. Key issues include the following.

**Energy Resources.** The Energy Policy Act of 2005 has led to new regulations on leasing programs and application of environmental laws to certain actions. H.R. 6 was enacted as P.L. 110-140 on December 19, 2007, without many of the federal lands provisions considered earlier.

**Hardrock Mining.** The General Mining Law of 1872 allows prospecting for minerals in open public domain lands, and staking a claim, developing the minerals, and applying for a patent to obtain title to the land and minerals. The House passed H.R. 2262 in the 110<sup>th</sup> Congress, to reform aspects of the General Mining Law, and a similar bill, H.R. 699, has been introduced in the 111<sup>th</sup> Congress.

**Wildfire Protection.** Various initiatives seek to protect communities from wildfires by expanding fuel reduction, and bills have been offered to restore forest health. Concerns over high and rising suppression costs have led to bills for separate wildfire suppression funding accounts. The economic stimulus legislation, P.L. 111-5, includes additional funding for fuel reduction.

**Wild Horses and Burros.** To reduce the number of wild horses and burros on the range and/or program costs, the BLM is considering three controversial options: euthanizing healthy animals, selling them without limitations, or ceasing to removing them from the range. H.R. 1018 has been introduced to amend the Wild Horses and Burros Act to limit euthanasia and sales.

**National Landscape Conservation System.** The BLM created the National Landscape Conservation System in 2000 to enhance the focus on specially protected conservation areas. The 111<sup>th</sup> Congress is considering measures to establish the 27 million acre system legislatively, including in Title Q of S. 22, which passed the Senate on January 16, 2009, and may debate the adequacy of funds for the system.

**Wilderness.** Many agency recommendations for wilderness areas are pending. Questions persist about wilderness review and managing wilderness study areas (WSAs). Nearly fifty wilderness area bills were introduced in the 110<sup>th</sup> Congress, and one was enacted into law. Bills have been introduced in the 111<sup>th</sup> Congress, and one, S. 22, passed the Senate on January 16, 2009.

**National Forest System Roadless Areas.** Debates about managing roadless areas—for wilderness values or development—persist, with differing regulations from the Clinton and Bush Administrations, and litigation challenging both sets of regulations.

**FS NEPA Application.** The FS has proposed altering its process for activity review under the National Environmental Policy Act of 1969 (NEPA), and has added activities that can be categorically excluded from such environmental and public reviews. Many of these changes and proposals have been challenged in court.

Other issues discussed briefly include national forest planning, national forest county payments, BLM land sales, and grazing management.

## Contents

Background .....	1
History of the Bureau of Land Management.....	1
History of the Forest Service.....	2
Scope of Report.....	2
Issue Discussion and Analysis.....	3
Onshore Energy Resources .....	3
Background.....	3
Administrative Actions .....	4
Legislative Activity.....	5
Hardrock Minerals .....	5
Background.....	5
Administrative Actions .....	6
Legislative Activity.....	6
Wildfire Protection.....	7
Background.....	7
Administrative Actions .....	7
Legislative Activity.....	8
Wild Horses and Burros .....	8
Background.....	8
Administrative Actions .....	9
Legislative Activity.....	10
National Landscape Conservation System.....	11
Background.....	11
Administrative Actions .....	11
Legislative Activity.....	11
Wilderness.....	13
Background.....	13
Legislative Activity.....	14
Roadless Areas in the National Forest System.....	15
Background.....	15
Administrative Action.....	15
Legislative Action .....	15
Judicial Action .....	15
FS NEPA Application and Categorical Exclusions .....	16
Background.....	16
Administrative Action.....	16
Legislative Activity.....	17
Judicial Action .....	17
Other Issues.....	18
National Forest Planning.....	18
National Forest County Payments .....	19
BLM Land Sales .....	20
Grazing Management.....	21
Additional Reading: Current and Historical.....	22

**Tables**

Table 1. Wilderness Legislation in the 111<sup>th</sup> Congress ..... 14

**Contacts**

Author Contact Information ..... 23

The 111<sup>th</sup> Congress may consider actions that could affect the various uses and management of federal lands administered by the Bureau of Land Management and the Forest Service. These actions include legislation, administrative or regulatory proposals, and litigation and judicial decisions. Issue areas include onshore energy resources, administration of hardrock mining, wildfire protection, management of wild horses and burros, designation of the National Landscape Conservation System, wilderness designation, management of national forest roadless areas, Forest Service implementation of the National Environmental Policy Act (NEPA), and other issues. Many of these issues have been of interest to Congress and the nation for decades.

## Background

The Bureau of Land Management (BLM) in the Department of the Interior (DOI) and the Forest Service (FS) in the U.S. Department of Agriculture (USDA) manage 449 million acres of land, more than two-thirds of the land owned by the federal government and one-fifth of the total U.S. land area. The BLM manages 255.8 million acres of land, predominantly in the West. The FS administers 192.8 million acres of federal land, also concentrated in the West.

The BLM and FS have similar management responsibilities for their lands, and many key issues affect both agencies' lands. Thus, merging the two agencies often is proposed.<sup>1</sup> By law, BLM and FS lands are to be administered for multiple uses, although slightly different uses are specified for each agency. In practice, land uses considered by the agencies include recreation, range, timber, minerals, watershed, wildlife and fish, and conservation. BLM and FS lands also are required to be managed for sustained yield—a high level of resource outputs in perpetuity—without impairing the productivity of the lands. However, each agency also has unique emphasis and functions. For instance, most rangelands are managed by the BLM, and the BLM administers mineral development on all federal lands. Most federal forests are managed by the FS, and the FS has a cooperative program to assist nonfederal forest landowners. Moreover, development of the two agencies has differed, and historically they have focused on different issues. Nonetheless, there are many parallels.

## History of the Bureau of Land Management

For the BLM, many of the issues traditionally center on the agency's responsibilities for land disposal, range management (particularly grazing), and minerals development. The BLM assumed these three key functions when it was created in 1946 by the merger of the General Land Office (created in 1812) and the U.S. Grazing Service (created in 1934). The General Land Office had helped convey land to settlers, issued leases, and administered mining claims on the public lands, among other functions. The U.S. Grazing Service had been established to manage the public lands best suited for livestock grazing under the Taylor Grazing Act of 1934 (43 U.S.C. §§315, et seq.).

Congress frequently has debated how to manage federal lands, and whether to retain or dispose of the remaining public lands or to expand federal land ownership. Congress enacted the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. §§1701, et seq.), sometimes

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<sup>1</sup> See CRS Report RL34772, *Proposals to Merge the Forest Service and the Bureau of Land Management: Issues and Approaches*, by Ross W. Gorte.

called BLM's Organic Act because it consolidated and articulated the agency's responsibilities. Among other provisions, the law established a general national policy that BLM-managed public lands be retained in federal ownership, established management of the public lands based on the principles of multiple use and sustained yield, and generally required that the federal government receive fair market value for the use of public lands and resources. BLM public land management encompasses diverse uses, resources, and values, such as energy and mineral development, timber harvesting, livestock grazing, recreation, wild horses and burros, fish and wildlife habitat, and preservation of natural and cultural resources.

## **History of the Forest Service**

The FS was created in 1905, when forest lands reserved by the President (beginning in 1891) were transferred from DOI into the existing USDA Bureau of Forestry (initially an agency for private forestry assistance and forestry research). Management direction for the national forests, first enacted in 1897 and expanded in 1960, identifies the purposes for which the lands are to be managed—including timber, grazing, recreation, wildlife and fish, and water—and directs “harmonious and coordinated management” to provide for multiple uses and sustained yields of the many resources found in the national forests.

Many issues concerning national forest management and use have focused on the appropriate level and location of timber harvesting. In part to address these issues, Congress enacted the National Forest Management Act of 1976 (NFMA; 16 U.S.C. §§1600-1614, et al.) to revise timber sale authorities and to elaborate on considerations and requirements in land and resource management plans.

Wilderness protection also is a continuing issue for the FS. The Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. §528-531) authorizes wilderness as a use of national forest lands, and possible national forest wilderness areas have been reviewed under the 1964 Wilderness Act (16 U.S.C. §§1131-1136) as well as in the national forest planning process. Pressures persist to protect the wilderness character of areas in pending wilderness recommendations and other roadless areas.

## **Scope of Report**

The missions of the BLM and FS are similar, and many issues, programs, and policies affect both agencies. For these reasons, BLM and FS lands often are discussed together, as in this report. This report focuses on several issues affecting the agencies' lands that appear likely to be of interest to the 111<sup>th</sup> Congress, including access to energy resources, administration of hardrock mining, wildfire protection, wild horses and burros management, the National Landscape Conservation System, wilderness designation, protection and use of national forest roadless areas and FS implementation of NEPA. It does not comprehensively cover general issues affecting management of these and other federal lands. For background on federal land management generally, see CRS Report R40225, *Federal Land Management Agencies: Background on Land and Resources Management*, coordinated by Ross W. Gorte. For other information on the BLM, FS, and natural resources issues and agencies generally, see the CRS website at <http://www.crs.gov/> and the CRS reports on related issues listed at the end of this report.

## Issue Discussion and Analysis

### Onshore Energy Resources<sup>2</sup>

(by Marc Humphries)

#### Background

Access to federal lands for energy and mineral development has been a controversial issue. Phase III of a BLM-coordinated study (issued May 2008) found that 62% of the estimated oil and 41% of the estimated natural gas on the 279 million acres of federal land inventoried are classified as “inaccessible” or unavailable for drilling and development.<sup>3</sup> The oil and gas industry contends that entry into currently unavailable areas is necessary to ensure future domestic oil and gas supplies. Opponents maintain that the restricted lands are unique or environmentally sensitive and that the United States could realize equivalent energy gains through conservation and increased exploration on current leases or elsewhere.<sup>4</sup>

Development of oil, gas, and coal on BLM and FS lands (and other federal lands) is governed primarily by the Mineral Leasing Act of 1920 (30 U.S.C. §181). Leasing on BLM lands goes through a multi-step approval process. If the minerals are located on FS lands, the FS must perform a leasing analysis and approve leasing decisions for specific lands before the BLM may lease the land for mineral development. The Energy Policy Act of 2005 (EPAct05, P.L. 109-58) made significant changes to the laws governing federal energy resources, including the management of energy development on BLM and FS lands. Implementation of these changes is discussed below.

Geothermal leasing on federal lands is conducted under the authority of the Geothermal Steam Act of 1970, as amended (30 U.S.C. §§1001-1028). Much of the nation’s geothermal energy potential is located on federal lands. Increasing geothermal production on federal lands while mitigating environmental impacts from increased production are at issue. The George W. Bush Administration asserted that improving the efficiency of the federal geothermal leasing process could increase geothermal energy production. The BLM administers more than 400 geothermal leases, with 29 operating geothermal power plants generating an estimated 1,250 mega-watts of energy annually (equivalent to a single large nuclear power plant).<sup>5</sup>

Development of renewable energy such as solar and wind are governed by right-of-way authorities under Title V of the Federal Land Policy and Management Act of 1976 (FLPMA; 43 U.S.C. §§1761-1771). Large tracts of land would be needed for new solar and wind energy

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<sup>2</sup> This report does not cover offshore energy resources, such as oil and gas development in the Outer Continental Shelf, or the Arctic National Wildlife Refuge (ANWR).

<sup>3</sup> U.S. Depts. of the Interior, of Agriculture, and of Energy, *Inventory of Onshore Federal Oil and Natural Gas Resources and Restrictions to their Development (Phase III)*, May 2008, available on the BLM website at [http://www.blm.gov/wo/st/en/prog/energy/oil\\_and\\_gas/EPCA\\_III.html](http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/EPCA_III.html).

<sup>4</sup> See CRS Report RS22928, *Oil Development on Federal Lands and the Outer Continental Shelf*, by Marc Humphries, and CRS Report RL33014, *Leasing and Permitting for Oil and Gas Development on Federal Public Domain Lands*, by Aaron M. Flynn and Ryan J. Watson.

<sup>5</sup> U.S. Dept. of the Interior, *Kempthorne Launches Initiative to Spur Geothermal Energy and Power Generation on Federal Lands*, News Release, October 22, 2008, [http://www.doi.gov/news/08\\_News\\_Releases/102208b.html](http://www.doi.gov/news/08_News_Releases/102208b.html).

projects as well. Some of the environmental impacts of renewable energy production have been controversial, such as impacts on wildlife and locating projects in environmentally sensitive areas.

## **Administrative Actions**

The Bush Administration responded to provisions of EPOA05.<sup>6</sup> Under §369, the BLM had completed environmental assessments and issued leases for five oil shale research, development, and demonstration (RD&D) projects on federal lands in Colorado and one in Utah; a BLM report highlights the progress of the pilot project.<sup>7</sup>

For commercial oil shale development, the BLM completed a draft programmatic environmental impact statement (PEIS) on December 20, 2007. The BLM completed its final PEIS on September 4, 2008, and published its final rule for a commercial oil shale and tar sands leasing program on November 17, 2008. The new rule, in effect, has been criticized by a number of interest groups and is under review by the Obama Administration.

For developing geothermal energy on federal lands, the BLM issued its final rule, effective June 1, 2007.<sup>8</sup> EPOA05, §§221-236, amended the Geothermal Steam Act to change the leasing procedures to offer more competitive leasing and establish a new royalty and rental rate framework. Provisions in EPOA05 addressed competitive lease sale requirements, royalty incentives, improved leasing and permitting processes. Based on BLM's final PEIS, the Interior Department published a Record of Decision on December 18, 2008, to amend several resource management plans for increased development of geothermal resources on federal land.

For wind energy facilities on BLM lands, the BLM completed a final PEIS in January 2006.<sup>9</sup> This document supports land management plan amendments providing for wind energy development in the western states. The review, undertaken in compliance with Executive Order 13212,<sup>10</sup> seeks to comply with provisions in EPOA05 directing renewable energy development on public lands. On December 19, 2008, BLM issued its updated wind energy development policy.

An updated solar energy development policy was published by the BLM on April 4, 2007. The agency continues to collaborate with DOE to prepare a PEIS to evaluate solar energy development on public lands, among other things. A PEIS scoping report was completed in October 2008. A final PEIS is expected to be available for public comment in June 2009.

A recent BLM quarterly oil and gas lease sale in Utah came under scrutiny by the National Park Service (NPS) and several environmental organizations claiming that the lease sales offered were too close to several national parks and environmentally sensitive areas without adequate analysis of the impact on air quality. Initially, the BLM recommended a lease sale of 241 parcels on about 360,000 acres in Utah, near Arches National Park, Dinosaur National Monument, Canyonlands

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<sup>6</sup> For additional information on BLM implementation of the EPOA, see the agency's website at [http://www.blm.gov/wo/st/en/prog/energy/epca\\_chart.html](http://www.blm.gov/wo/st/en/prog/energy/epca_chart.html).

<sup>7</sup> U.S. Dept. of the Interior, Bureau of Land Management, *Year Two Report: Section 365 of the Energy Policy Act of 2005—Pilot Project to Improve Federal Permit Coordination* (Feb. 2008).

<sup>8</sup> 72 *Fed. Reg.* 24358 (May 2, 2007).

<sup>9</sup> 71 *Fed. Reg.* 1768 (Jan. 11, 2006).

<sup>10</sup> "Actions to Expedite Energy-Related Projects," 66 *Fed. Reg.* 28357 (May 22, 2001).



National Park, and areas having wilderness characteristics. The NPS recommended that 93 “parcels of concern” be removed from the sale. The BLM agreed to defer 33 of the 93 parcels. After a number of additional parcels were deferred, the BLM announced on December 12, 2008, its decision to lease 132 parcels on 164,000 acres. The lease sale (116 parcels) was held on December 19, 2008. However, prior to the lease sale, several environmental organizations filed a lawsuit against the BLM in U.S. district court to prevent the sale. While the sale took place as scheduled, the BLM and several environmental groups agreed to allow the district court judge to review and rule on the suit before the lease sale would be finalized (30 days after the sale).

In January 2009, the U.S. District Court for the District of Columbia issued a temporary restraining order halting BLM from finalizing the sale of 77 parcels (on about 110,000 acres) based on a finding of inadequate environmental review of oil and gas development in the area.<sup>11</sup> Under the Bush Administration, the BLM argued that the Resource Management Plans, the basis for the lease sale, were worked out over several years and do adequately address environmental issues. In addition, the BLM stated that many of the leases contain a number of restrictions and stipulations. Even so, others counter, the restrictions and stipulations could be waived by the BLM at the request of industry. On February 4, 2009, Secretary of the Interior Ken Salazar announced that the BLM will not accept the bids on the 77 parcels under the restraining order and will withdraw the leases because of what the Administration considers to have been a rushed sale without adequate environmental review.

## **Legislative Activity**

The use of public lands for increased domestic energy production is likely to remain contentious in the 111<sup>th</sup> Congress as it has in previous Congresses. To date, no legislation on access to or use of federal lands for energy production has been introduced in the 111<sup>th</sup> Congress.

## **Hardrock Minerals**

(by Marc Humphries)

### **Background**

The General Mining Law of 1872 is one of the major statutes directing federal land management policy. The law grants free access to individuals and corporations to prospect for minerals in open public domain lands, and allows them, upon making a discovery, to stake (or *locate*) a claim on the deposit. A claim gives the holder the right to develop the minerals and apply for a *patent* to obtain full title of the land and minerals. A continuing issue is whether this 136-year-old law should be reformed, and if so, how to balance mineral development with competing land uses.<sup>12</sup>

The right to enter federal lands and freely prospect for and develop minerals is the feature of the claim-patent system that draws the most vigorous support from the mining industry. Critics consider the claim-patent system a giveaway of publicly owned resources because royalty payments are not required and because of the small amounts paid to maintain a claim and to

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<sup>11</sup> *Southern Utah Wilderness Alliance v. Allred*, No. 08-2187 (RMU)(D. D.C. January 17, 2009).

<sup>12</sup> For more information on the General Mining Law and recent reform efforts, see CRS Report RL33908, *Mining on Federal Lands: Hardrock Minerals*, by Marc Humphries.

obtain a patent. Congress has imposed a moratorium on mining claim patents through the annual Interior appropriations laws since FY1995, but has not restricted the right to stake claims or extract minerals. A BLM study in 2000 estimated that about 165 million acres of lands with federally owned mineral rights<sup>13</sup> (about 24% of all federal mineral acreage) have been withdrawn from mineral entry, leasing, and sale, subject to valid existing rights. Mineral development on another 182 million acres (26% of all federal mineral acreage) is subject to the approval of the surface management agency<sup>14</sup> and must not be in conflict with land designations and plans.

The lack of direct statutory authority for environmental protection under the Mining Law of 1872 is another major issue that has spurred reform proposals. Many Mining Law supporters contend that other current laws provide adequate environmental protection. Critics, however, assert that these general environmental requirements are not adequate to assure reclamation of mined areas and that the only effective approach to protecting lands from the adverse impacts of mining under the current system is to withdraw them from development under the Mining Law. Further, critics charge that federal land managers lack regulatory authority over patented mining claims and that clear legal authority to assure adequate reclamation of mining sites is needed.

### **Administrative Actions**

Since the late 1990s, administrative efforts have focused on new surface management regulations, with attention centering on mine reclamation efforts. New mining claim location and annual claim maintenance fees were increased in 2005 to \$30 and \$125 per claim, respectively (from \$25 and \$100). It is unclear what course of action, if any, the Obama Administration will pursue regarding the General Mining Law of 1872.

### **Legislative Activity**

Broad-based legislation to reform the General Mining Law of 1872 (H.R. 699) was introduced on January 27, 2009. The bill is quite similar to H.R. 2262 of the 110<sup>th</sup> Congress. It would, among other provisions, establish an 8% “net smelter return” (NSR) royalty (also known as “gross income” royalty defined in §613(c)(1) of the Internal Revenue Code of 1986) on hardrock mineral production (e.g., gold, copper, silver) from new mines and mine expansions on public domain lands, and a 4% NSR royalty on existing mines. H.R. 699 would create a Locatable Minerals Fund (administered by the Secretary of the Treasury), which would contain two accounts: the Hardrock Reclamation Account and the Community Impact Assistance Account. Both accounts, administered by the Secretary of the Interior, would be used for reclamation and restoration of land and water from past mining activities, and to facilitate public services to those communities impacted by mining conducted under the mining law. All revenues from royalties and fees specified in H.R. 699 would be credited to the Locatable Minerals Fund. H.R. 699 would also require a reclamation plan by mineral producers and impose new environmental standards.

In the 110<sup>th</sup> Congress, hearings were held on a Mining Law reform bill, H.R. 2262, by the House Natural Resources Subcommittee on Energy and Mineral Resources. The committee reported the

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<sup>13</sup> There are approximately 700 million acres of federal mineral rights, including FS and BLM lands as well as lands administered by the National Park Service, Fish and Wildlife Service, and Department of Defense and federal mineral rights underlying private lands.

<sup>14</sup> The BLM administers mineral resources under all federal lands, regardless of which agency has responsibility for administering the surface.

bill on October 29, 2007 (H.Rept. 110-412), and the House passed the bill on November 1, 2007. In the Senate, two oversight hearings on mining law reform were held by the Senate Energy and Natural Resources Committee—one on hardrock mining on federal land (September 27, 2007) and a second on reform of the General Mining Law of 1872 (January 24, 2008). The committee held a third hearing to address abandoned hardrock mine lands and uranium mining (March 12, 2008). No further action occurred in the 110<sup>th</sup> Congress.

## **Wildfire Protection**

(by Ross W. Gorte)

### **Background**

Recent fire seasons seem to have been getting more severe, with more acres burned and presumably more damage to property and resources than in previous years. Despite early concerns about, and evacuations from, wildfires in California, the 2008 fire season was relatively mild—42% fewer acres burned than on average in the previous four years. In contrast, in 2005, 2006, and 2007, more area burned than in any other years since record-keeping began in 1960. Many assert that the threat of severe wildfires and the cost of suppressing fires have grown, because many forests have unnaturally high fuel loads (e.g., dense undergrowth and dead trees) and increasing numbers of structures are in and near the forests (the *wildland-urban interface*).<sup>15</sup>

### **Administrative Actions**

In August 2002, President George W. Bush proposed the Healthy Forests Initiative to improve wildfire protection by expediting projects to reduce hazardous fuels on federal lands. The Healthy Forests Restoration Act of 2003 (HFRA; 16 U.S.C. §§6501 et al.) included many of these proposals as well as other provisions. Title I authorized a new, alternative process for reducing fuels on FS or BLM lands in many areas; five other titles indirectly relate to fire protection.<sup>16</sup> In addition, the Bush Administration made several regulatory changes reportedly to facilitate fire protection activities. First, additional categories of actions—including fuel reduction and post-fire rehabilitation activities<sup>17</sup>—could be excluded from analysis and documentation under the National Environmental Policy Act (NEPA; 42 U.S.C. §§4321-4347). (See “FS NEPA Application and Categorical Exclusions,” below.) Second, the administrative review processes were revised to clarify that some emergency actions may be implemented immediately, and others may be implemented after complying with public notice requirements. Other changes to the administrative review process expanded “emergencies” to include those “that would result in substantial loss of economic value to the Government if implementation of the proposed action were delayed.”<sup>18</sup>

Other regulatory changes, such as new NEPA categorical exclusions for small timber harvesting projects and new regulations for FS planning, could affect fuel reduction, public involvement, and

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<sup>15</sup> See CRS Report RS21880, *Wildfire Protection in the Wildland-Urban Interface*, by Ross W. Gorte.

<sup>16</sup> See CRS Report RS22024, *Wildfire Protection in the 108<sup>th</sup> Congress*, by Ross W. Gorte.

<sup>17</sup> 68 *Fed. Reg.* 33814, June 5, 2003.

<sup>18</sup> FS at 68 *Fed. Reg.* 33582, June 4, 2003; BLM at 68 *Fed. Reg.* 33794, June 5, 2003.

environmental impacts. The total impact of the regulatory changes seems likely to be greater discretion for FS action.

## **Legislative Activity**

The 110<sup>th</sup> Congress held hearings on aspects of wildfire protection, particularly on wildfire preparedness, cost containment, and the effects of global climate change on wildfires. Several bills on forest health restoration to reduce wildfire threats were introduced. In the 111<sup>th</sup> Congress, the Forest Landscape Restoration Act has been included in Title IV of the Omnibus Public Land Management Act of 2009 (S. 22). It would provide a collaborative (diverse, multi-party) process for geographically dispersed, long-term (10-year), large-scale (at least 50,000-acre) strategies to restore forests, reduce wildfire threats, and utilize the available biomass. The act would require multi-party monitoring of and reporting on activities. The authorization for the fund is \$40 million annually for ten years. S. 22 was introduced on January 7, 2009, and passed the Senate on January 15.

Because wildfire funding now constitutes nearly half the FS budget, and the FS and BLM may use other unobligated funds after wildfire appropriations are exhausted, some are concerned that wildfire control efforts are delaying or preventing other agency activities, including land management and cooperative assistance.<sup>19</sup> Legislation was introduced in the 110<sup>th</sup> Congress to establish separate funds for wildfire suppression efforts, and one—the FLAME Act (H.R. 5541)—passed the House, but none was enacted. To date, no comparable bills have been introduced in the 111<sup>th</sup> Congress. In addition, the economic stimulus, P.L. 111-5 (the American Recovery and Reinvestment Act of 2009), includes \$515.0 million for wildfire management—\$15.0 million for the BLM for fuel reduction, and \$500.0 million for the FS, half for fuel reduction, forest health protection and rehabilitation, and hazard mitigation in the national forests and half for fuel reduction and forest health and ecosystem improvements on state and private lands, with up to \$50.0 million for wood energy grants.

## **Wild Horses and Burros**

(by Carol Hardy Vincent)

### **Background**

The Wild Free-Roaming Horses and Burros Act of 1971 (16 U.S.C. §§1331, et seq.) seeks to protect wild horses and burros on federal land and places them under the jurisdiction of the BLM and FS. For years, management of wild horses and burros has generated controversy and lawsuits. Controversial issues include the method of determining the *appropriate management levels* (AMLs) for herd sizes, as the statute requires; whether and how to remove animals from the range to achieve AMLs; methods—other than adoption—for reducing animals on the range, particularly fertility control and holding animals in long-term facilities; whether appropriations for managing wild horses and burros are adequate; and the slaughter, or potential for slaughter, of horses.<sup>20</sup>

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<sup>19</sup> See CRS Report RL33990, *Wildfire Funding*, by Ross W. Gorte.

<sup>20</sup> For more information, see CRS Report RL34690, *Wild Horse and Burro Issues*, by Carol Hardy Vincent.

*Adoption* has been the primary method of disposal of healthy animals, with 225,420 adopted from FY1972 to FY2008. The 108<sup>th</sup> Congress enacted controversial changes to wild horse and burro management on federal lands (P.L. 108-447, §142) to provide for the *sale* of wild horses and burros. Specifically, the first change directed the agencies to sell, “without limitation,” excess animals (or their remains) that essentially are deemed too old (more than 10 years old) or otherwise unable to be adopted (offered unsuccessfully at least three times). Proceeds are to be used for the adoption program. A second change removed the ban on the sale of wild horses and burros or their remains for processing into commercial products. A third change removed criminal penalties for processing into commercial products the remains of a wild horse or burro, if sold under the new authority. These changes have been supported as providing a cost-effective way to help the agencies achieve AMLs, to improve the health of the animals, to protect range resources, and to restore a natural ecological balance on federal lands. They have been opposed as potentially leading to the slaughter of healthy animals. As of December 3, 2008, the BLM had sold more than 2,900 animals.

As of February 29, 2008, there were an estimated 33,000 wild horses and burros on BLM lands. The national maximum AML is 27,219 for all herds, which some critics assert is set low in favor of livestock. There were another 3,180 wild horses and burros on FS lands as of September 30, 2006 (most recent year available). Further, another 30,489 wild horses and burros that were removed from the range were being held in short- and long-term facilities as of October 2008. The BLM continues to be responsible for these animals.

### **Administrative Actions**

The BLM has been pursuing a multi-year effort to achieve AMLs and in FY2007 had been closer to AMLs than at any time since the early 1970s. To achieve AMLs and reduce program costs, the BLM has been focusing on three specific options. These options have been contentious. First, to reduce program costs, the BLM is evaluating whether it is feasible to stop removing animals from the range. The agency has expressed that stopping removals would be destructive to the range, and this option likely would be opposed by ranchers who use the lands for forage for livestock.

Second, the BLM is considering whether to sell animals “without limitation,” as provided in the 108<sup>th</sup> Congress amendments to the 1971 Act. Thus far the agency has focused on buyers who intend to provide long-term care. This option has been opposed on the grounds that these animals could end up being sold for slaughter.

Third, the BLM is reviewing whether to euthanize healthy wild horses and burros under current authorities. Authority to destroy excess animals is provided for under the 1971 Act. Specifically, the Secretary of the Interior, for BLM lands, and the Secretary of Agriculture, for FS lands, are to remove animals exceeding the range’s carrying capacity to restore a natural ecological balance and protect the range from deterioration associated with an overpopulation of wild horses and burros. The agencies have not used this authority since January 1982.

In reaction to the possibility of slaughter, a private animal activist has expressed interest in purchasing more than 30,000 excess wild horses and burros from the BLM.<sup>21</sup> The agency is also evaluating other recommendations for managing wild horses and burros, developed at the

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<sup>21</sup> For background as well as news stories related to the proposal, see the website of its proponent at <http://www.madeleinepickens.com>.

November 17, 2008, meeting of the Wild Horse and Burro Advisory Board. The recommendations relate to enhancing the adoption and sale of animals, euthanizing animals, slowing population growth, securing sufficient funding, and providing care through livestock permits, among other matters.<sup>22</sup>

The level of funding that would be sufficient to care for wild horses and burros, achieve AML, and reduce long-term budgetary needs has been a matter of debate. A particular concern has been the cost of holding animals in facilities, partially in light of declining rates of adoption over the past several years. The BLM estimates that the cost of holding animals in all facilities in FY2008 was nearly three-quarters of its appropriation for wild horse and burro management. The BLM currently needs additional space in long-term holding facilities and has been soliciting bids for contracts for new pasture facilities.

For FY2008, the BLM requested \$32.1 million for management of wild horses and burros, a 12% decrease from the FY2006 and FY2007 level of \$36.4 million. The BLM expected that the funding reduction would be achieved by reducing efforts to gather and remove animals from the range, at the time anticipating the removal of 830 animals in FY2008. Congress did not support the requested decrease, instead appropriating \$36.2 million for FY2008. Ultimately, an estimated 5,275 wild horses and burros were removed in FY2008. For FY2009, the Administration requested \$37.0 million. Funding for wild horse and burro management has not been determined for FY2009; the BLM is operating under a continuing appropriations resolution through March 6, 2009 (Division A, P.L. 110-329).

## **Legislative Activity**

Legislation to amend the 1971 Act has been introduced in the 111<sup>th</sup> Congress. H.R. 1018 seeks to prohibit the slaughter<sup>23</sup> of wild horses and burros, unless the animal is terminally ill, and to remove the authority of the agencies to sell excess wild horses and burros. Further, the bill would limit the removal of wild horses and burros from the range except where (1) the animals are terminally ill, (2) the immediate health or safety of the animals is threatened, or (3) the Secretary “has exhausted all practicable options” of maintaining the animals on the range, has determined that there is an “adoption demand” for the animals, and can “ensure humane treatment and care” through specified requirements. Other provisions of the bill seek to facilitate the establishment of wild horse and burro sanctuaries on public lands; identify new rangelands for wild horses and burros, including on private lands; improve the methods for estimating animals on the range and determining AMLs; enhance implementation of fertility control; and promote wild horse and burro adoptions. The bill would require annual reports to the House and Senate authorizing committees<sup>24</sup> with information on animal populations, AMLs, acres of BLM land for wild horses and burros, sanctuaries (or exclusive use areas), and fertility control, among other topics.

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<sup>22</sup> The recommendations are on the BLM website at [http://www.blm.gov/wo/st/en/info/newsroom/2008/november/NR\\_11\\_19\\_2008.html](http://www.blm.gov/wo/st/en/info/newsroom/2008/november/NR_11_19_2008.html).

<sup>23</sup> For information on horse slaughter legislation generally, see CRS Report RS21842, *Horse Slaughter Prevention Bills and Issues*, by Geoffrey S. Becker.

<sup>24</sup> The committees are the House Committee on Natural Resources and the Senate Committee on Energy and Natural Resources.

In October 2008, the Government Accountability Office (GAO) released a report on BLM management of wild horses and burros.<sup>25</sup> GAO examined a number of issues including the BLM's progress towards setting and meeting AML; use of adoptions, sales, and holding facilities for managing wild horses and burros off the range; controls to ensure humane treatment of animals; and challenges in program management. Among other findings, GAO determined that if the costs of holding animals in facilities are not controlled, they will overwhelm the program. GAO also concluded that the BLM's options for dealing with unadoptable animals are limited, and that because the BLM is not destroying animals or selling them without limitation, it is not in compliance with 1971 Act. Among its recommendations for executive action, GAO recommended that the Secretary of the Interior direct the BLM to discuss with Congress and other interests how best to comply with the 1971 Act or to amend it so that the BLM would be able to comply.

## **National Landscape Conservation System**

(by Carol Hardy Vincent)

### **Background**

The BLM created the National Landscape Conservation System (NLCS) in 2000 to focus management and public attention on its specially protected conservation areas. According to the BLM, the mission of the system is to conserve, protect, and restore for present and future generations the nationally significant landscapes that have been recognized for their outstanding archaeological, geological, cultural, ecological, wilderness, recreation, and scientific values.<sup>26</sup> The system consists today of about 27 million acres of land, with more than 850 federally recognized units. These units include national monuments, national conservation areas, wilderness areas, and wilderness study areas as well as thousands of miles of national historic and national scenic trails and wild and scenic rivers. Current issues for Congress include whether to establish the system legislatively, and the adequacy of funds for the system.

### **Administrative Actions**

Over the past several years, the BLM has given priority to developing new or updated land management plans for areas within the NLCS. Currently, most of these plans are completed. The George W. Bush Administration testified in favor of establishing the NLCS legislatively and sought reduced funds for the system for FY2009.

### **Legislative Activity**

Legislation has been introduced (H.R. 404, S. 22) to establish the NLCS legislatively. The measures seek to "conserve, protect, and restore nationally significant landscapes" that have outstanding values for the benefit of current and future generations. H.R. 404 is a free-standing

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<sup>25</sup> U.S. Government Accountability Office, *Bureau of Land Management: Effective Long-Term Options Needed to Manage Unadoptable Wild Horses*, GAO-09-77, October 2008, at <http://www.gao.gov/new.items/d0977.pdf>.

<sup>26</sup> U.S. Dept. of the Interior, Bureau of Land Management, *Budget Justifications and Performance Information, Fiscal Year 2009*, p. I-78.

bill that has been introduced and referred to committee. S. 22 is an omnibus public lands bill that passed the Senate and has been sent to the House.

At hearings in the 110<sup>th</sup> Congress on similar NLCS bills, the Bush Administration (and other witnesses) testified in favor of establishing the system legislatively. For instance, at a hearing on S. 1139 (110<sup>th</sup> Congress), the then Acting Director of the BLM testified that DOI supported the bill as a way to provide legislative support and direction to the BLM and to formalize and strengthen its conservation system within the context of the agency's multiple-use mission.<sup>27</sup> Other witnesses expressed opposition to such legislation, for instance, on the assertion that it could have the effect of establishing new, standardized requirements for disparate areas in the system.<sup>28</sup>

There continues to be some concern over whether measures to establish the NLCS legislatively would affect how the areas in the system are managed. The intent appears to be not to alter the way the areas are currently managed. For instance, when introducing S. 1139 in the 110<sup>th</sup> Congress, Senator Bingaman expressed that "[t]he bill does not create any new management authority and does not change the authorities for any of the previously designated areas within the system."<sup>29</sup> Provisions of the pending measures (H.R. 404 and S. 22) state they do not enhance, diminish, or modify any law, proclamation, or related regulations under which components of the system were established or are managed. Concerns have centered on whether lands in the system will be given a higher emphasis on conservation with resulting restrictions on land uses, such as energy development; livestock grazing; or hunting, fishing, and trapping.

Pending bills also would make federal land designations (e.g., wilderness, national monument, and national conservation area) and add the BLM areas to the NLCS. Such measures were considered in the 110<sup>th</sup> Congress. For instance, P.L. 110-229 (S. 2739) established two Outstanding Natural Areas and provided for their management as part of the NLCS. Specifically, the law established the Piedras Blancas Historic Light Station Outstanding Natural Area (CA) and the Jupiter Inlet Lighthouse Outstanding Natural Area (FL).

Questions about the adequacy of funds for the NLCS have been recurring. Some questions have centered on whether recent funding for management and law enforcement have been sufficient to address vandalism and other damage to cultural resources in the system. These questions are likely to continue in light of a proposed reduction in funding for the NLCS in FY2009. Specifically, the Bush Administration requested \$49.9 million for the NLCS in FY2009, a \$4.4 million decrease from the FY2008 enacted level of \$54.2 million. Funding for the NLCS has not been determined for FY2009; Interior agencies are operating under a continuing appropriations resolution through March 6, 2009 (Division A, P.L. 110-329).

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<sup>27</sup> Mr. Jim Hughes, Acting Director, Bureau of Land Management, *Hearing to Receive Testimony on Current Legislation*, U.S. Senate Energy and Natural Resources Subcommittee on Public Lands and Forests (May 3, 2007).

<sup>28</sup> Mr. Orie Williams, Chief Executive Officer, Doyon Limited, *Legislative Hearing on H.R. 2016*, U.S. House Natural Resources Subcommittee on National Parks, Forests, and Public Lands (June 7, 2007).

<sup>29</sup> Senator Jeff Bingaman, Remarks in the Senate on S. 1139, April 18, 2007, *Congressional Record*, p. S. 4679.



## Wilderness

(by Ross W. Gorte)

### Background

The 1964 Wilderness Act established the National Wilderness Preservation System and directed that only Congress can designate federal lands as part of the national system. Designations often are controversial because commercial activities, motorized access, and roads, structures, and facilities generally are restricted in wilderness areas.<sup>30</sup> Similarly, agency wilderness studies can be controversial, first because uses are restricted while the study is conducted and while Congress considers possible designations, and second because the study recommendations and Congress's decision may permanently determine the future management of the areas.

Some observers believe that a Clinton rule protecting national forest roadless areas (see below) was prompted by a belief that Congress had lagged in designating areas as wilderness.<sup>31</sup> Others assert that the Bush Administration—in promulgating new guidance to preclude additional, formal BLM wilderness study areas and in eliminating the nationwide national forest roadless area protections of the Clinton Administration—was attempting to open areas with wilderness attributes to roads, energy and mineral exploration, and development, thereby making them ineligible to be added to the wilderness system.

One significant issue is when (and whether) the agencies must review the wilderness potential of their lands. The Wilderness Act directed the review of administratively designated national forest primitive areas and of National Park System and National Wildlife Refuge System lands. *Release language*, in statutes designating national forest wilderness areas, and FS planning regulations (36 C.F.R. §219.7(a)(5)(ii)) provide for periodic review of potential national forest wilderness areas in the FS planning process. For BLM lands, §603 of FLPMA requires the agency to review potential wilderness, to present recommendations to the President, and to not impair the wilderness character of wilderness study areas (WSAs) “until Congress has determined otherwise.”

In 1996, then-DOI Secretary Bruce Babbitt used the general BLM authority to inventory lands and resources (FLPMA §201; 43 U.S.C. §1711) to identify an additional 2.6 million acres in Utah as having wilderness qualities. The State of Utah challenged the inventory as violating the review required by § 603, and in September 2003, DOI settled the case and issued new wilderness guidance (IM Nos. 2003-274 and 2003-275) prohibiting further reviews and limiting the *non-impairment* standard (i.e., protecting wilderness characteristics of the areas) to previously designated §603 WSAs.<sup>32</sup>

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<sup>30</sup> See CRS Report RL33827, *Wilderness Laws: Permitted and Prohibited Uses*, by Ross W. Gorte.

<sup>31</sup> The federal District Court for Wyoming found that the Clinton roadless rule violated the Wilderness Act's mandate that only Congress had the authority to designate wilderness areas. *Wyoming v. U.S. Dept. of Agriculture*, 570 F.Supp. 2d 1309 (D. Wyo. 2008).

<sup>32</sup> See CRS Report RS21917, *Bureau of Land Management (BLM) Wilderness Review Issues*, by Ross W. Gorte and Pamela Baldwin.

## Legislative Activity

In the 110<sup>th</sup> Congress, dozens of bills to designate new wilderness areas or expand existing ones were introduced; only one, the Consolidated Natural Resources Act of 2008, was enacted into law (P.L. 110-229). Only one introduced bill would have amended the Wilderness Act, but no hearings were held on the bill. Near the end of the 110<sup>th</sup> Congress, a proposed amendment titled the Omnibus Public Lands Management Act of 2008 (S.Amdt. 5662) was submitted to the *Congressional Record* but was not enacted.

In the 111<sup>th</sup> Congress, the Omnibus Public Lands Management Act of 2009 (S. 22), which included many wilderness designations, was introduced on January 7, 2009, and passed the Senate on January 15. As passed, the bill would enact 2.0 million acres of wilderness in eight states. Other bills to designate wilderness areas have also been introduced (and some of these have been included in S. 22).

**Table I. Wilderness Legislation in the 111<sup>th</sup> Congress**

Bill Title	Acreage <sup>a</sup>	State	Bill No.	Most Recent Action
Beaver Basin Wilderness Act	11,740	MI	S. 109	Introduced 1/6/09
California Desert and Mountain Heritage Act of 2009	146,824 <sup>b</sup>	CA	H.R. 369	Introduced 1/9/09
Central Idaho National Forest and Public Land Management Act	318,765	ID	H.R. 192	Introduced 1/6/09
Dominguez-Escalante National Conservation Area and Dominguez Canyon Wilderness Area Act	66,280	NM	H.R. 170/ S. 183	H.R. 170 introduced 1/6/09 S. 183 introduced 1/8/09
Northern Rockies Ecosystem Protection Act	24,034,575 <sup>c</sup>	<sup>d</sup>	H.R. 980	Introduced 2/11/09
Omnibus Public Land Management Act of 2009 <sup>e</sup>	2,029,870 <sup>f</sup>	<sup>g</sup>	S. 22	Passed Senate 1/15/09
Rocky Mountain National Park Wilderness and Indian Peaks Wilderness Expansion Act	253,534	CO	H.R. 419/ S. 190	H.R. 419 introduced 1/9/09 S. 190 introduced 1/8/09
Sabinoso Wilderness Act of 2009	15,995	NM	H.R. 921	Introduced 2/11/09
Udall-Eisenhower Arctic Wilderness Act (H.R. 39); no short title to S. 231	1,559,538	AK <sup>h</sup>	H.R. 39/ S. 231	H.R. 3 introduced 1/6/09 S. 231 introduced 1/14/09

**Source:** CRS calculation from LIS database.

**Notes:**

- a. Acreage as introduced; acreage may change as bills are reported or passed.
- b. Also designated potential wilderness of 43,300 acres, to be added when current non-conforming uses have ceased and sufficient inholdings have been acquired to make a manageable unit.
- c. Acreage totaled from pre-publication edition via LIS.
- d. Contains acreage in several states: ID, MT, OR, WA, and WY.
- e. Also identified as Craig Thomas Snake Headwaters Legacy Act of 2008.
- f. Also designated several potential wilderness areas (46,419 acres total) to be added when non-conforming uses have ceased, land exchanges have been completed, or other conditions have been met.

- g. Contains acreage from several states: CA, CO, ID, MI, NM, OR, UT, VA, and WV. Includes Beaver Basin Wilderness Act (S. 109), California Desert and Mountain Heritage Act of 2009 (H.R. 369), Rocky Mountain National Park Wilderness and Indian Peaks Wilderness Expansion Act (H.R. 419/S. 190), and Sabinoso Wilderness Act of 2009 (H.R. 321), plus several bills from the 110<sup>th</sup> Congress.
- h. Affects Arctic National Wildlife Refuge (ANWR).

## **Roadless Areas in the National Forest System**

(by Ross W. Gorte and Kristina Alexander)

### **Background**

Potential wilderness areas in the National Forest System were examined in the 1970s and early 1980s; 60 million acres of *roadless areas* were inventoried in the process. Some contend that the remaining roadless areas (that have not been designated as wilderness by Congress) should be protected from development, while others contend that the areas should be available for development-type uses.<sup>33</sup>

### **Administrative Action**

The principal Clinton Administration rule affecting roadless areas, issued in 2001, resulted in a nationwide approach that curtailed most road building and timber cutting in roadless areas.<sup>34</sup> The Bush Administration issued a final rule in 2005 to replace the Clinton rule, allowing governors 18 months to petition the FS for a special rule for roadless areas in all or part of their state.<sup>35</sup> Until such a new regulation was finalized or until each forest plan was amended or revised, the FS was to manage roadless areas in accordance with interim directives that place most decisions with the regional forester or the Chief. Even though the Bush rule was enjoined and the 18-month period has expired, the Bush Administration stated that under the Administrative Procedure Act (5 U.S.C. §§701, et seq.) states could still petition for a special rule. A final rule for Idaho was published on October 16, 2008.<sup>36</sup>

### **Legislative Action**

Bills to provide protection for national forest roadless areas have been introduced in past Congresses, but to date, none have been introduced in the 111<sup>th</sup> Congress.

### **Judicial Action**

Numerous lawsuits have tracked the roadless rules' course. In April 2001, the Clinton roadless rule was enjoined by the U.S. District Court for Idaho,<sup>37</sup> but that decision was overturned by the

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<sup>33</sup> For more detailed information, see CRS Report RL30647, *National Forest System Roadless Area Initiatives*, by Kristina Alexander and Ross W. Gorte.

<sup>34</sup> 66 *Fed. Reg.* 3244, Jan. 12, 2001.

<sup>35</sup> 70 *Fed. Reg.* 25654, May 13, 2005.

<sup>36</sup> 73 *Fed. Reg.* 61456-61496, Oct. 16, 2008.

<sup>37</sup> *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001).

Ninth Circuit.<sup>38</sup> In July 2003, the U.S. District Court for Wyoming stopped application of the Clinton roadless rule—the second injunction, after the first was overturned.<sup>39</sup> In September 2006, the U.S. District Court for Northern California found that the Bush roadless rule violated NEPA and the Endangered Species Act (ESA; 16 U.S.C. §§1531-1540). The court set aside the Bush roadless rule and reinstated the Clinton rule.<sup>40</sup> The FS filed an appeal in the Ninth Circuit, challenging the September 2006 decision. After a new suit was filed, the U.S. District Court for Wyoming found that the Clinton roadless rule had violated NEPA and the Wilderness Act, and enjoined it.<sup>41</sup> The Wyoming court said it had the authority to do this despite the California court’s order because it (the Wyoming court) was the only court to consider the legality of the Clinton roadless rule, and so there was no conflict between the court decisions. Because of these conflicting court rulings, the FS sought clarification from the courts as to which rule governed. The California court limited the application of its injunction to specific states (AK, AZ, CA, ID, HI, NV, NM, OR, and WA).<sup>42</sup> Therefore, the Clinton rule applies in those states, but the Bush rule is in place for the rest of the country.

## **FS NEPA Application and Categorical Exclusions**

(by Ross W. Gorte and Kristina Alexander)

### **Background**

The FS historically has identified certain activities as not having significant environmental impacts, and has exempted them from analysis and associated public participation under NEPA, except in extraordinary circumstances. *Categorical exclusions* (CEs) and other controversial NEPA-related decisions have been based on the belief that FS management and activities have been thwarted by litigation based on the statute. Proponents of CEs see them as a way to expedite actions and reduce agency costs. Opponents charge that some of the excluded actions could have significant impacts, especially if extraordinary circumstances are present, and should be examined and subject to public involvement.

### **Administrative Action**

In 2008, the FS shifted many of its NEPA policies from the *Forest Service Handbook* (FSH) to the *Code of Federal Regulations* (C.F.R.).<sup>43</sup> As part of the rulemaking to make the switch, some regulations were modified. For example, the NEPA process would incorporate “incremental alternative development,” to allow FS decision-making to change while developing alternatives without issuing versions for notice and comment.<sup>44</sup> The rule also allows the FS to consider only one alternative when preparing an environmental assessment (EA), if there are no unresolved conflicts concerning alternative uses of available resources.<sup>45</sup> Further, the rule limits

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<sup>38</sup> *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9<sup>th</sup> Cir. 2002).

<sup>39</sup> *Wyoming v. U.S. Dept. of Agriculture*, 277 F. Supp. 2d 197 (D. Wyo. 2003).

<sup>40</sup> *California v. U.S. Dept. of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

<sup>41</sup> *Wyoming v. U.S. Dept. of Agriculture*, 570 F. Supp. 2d 1309 (D. Wyo. 2008).

<sup>42</sup> *California v. U.S. Dept. of Agriculture*, No. C05-03508 EDL, 208 WL S102864 (N.D. Cal. Dec. 2, 2008).

<sup>43</sup> 73 *Fed. Reg.* 43084, July 24, 2008.

<sup>44</sup> 36 C.F.R. §220.5(e).

<sup>45</sup> 36 C.F.R. §220.7(b)(2).

consideration of cumulative impacts to only those past actions found to be “relevant and useful.”<sup>46</sup>

Since 2003, the FS has expanded the types of activities that can be conducted without environmental review, increasing the number of types from 18 to 27.<sup>47</sup> Some of the nine newer CEs include biomass fuel reduction projects, “small” timber sales, and forest plans.<sup>48</sup> Additionally, the FS has modified its application of extraordinary circumstances.<sup>49</sup> Previously, the rules appeared to preclude automatic use of a CE in the presence of extraordinary circumstances (e.g., roadless areas or endangered species habitat). The new rule gives the responsible official discretion to determine whether extraordinary circumstances warrant NEPA analysis and public involvement in otherwise exempt projects. Finally, the FS issued new regulations (36 C.F.R. Part 215) changing its notice, comment, and appeals procedures for land management planning, particularly including a change that a decision to use a CE could not be administratively appealed.<sup>50</sup>

## **Legislative Activity**

Little legislation has been introduced addressing CEs, and none addressing CEs generally. Two bills (which were not enacted) in the 110<sup>th</sup> Congress would have repealed the authority to use CEs for certain energy leases enacted in the Energy Policy Act of 2005 (P.L. 109-58). Another 110<sup>th</sup> Congress bill would have authorized use of CEs for certain wildfire protection projects.

## **Judicial Action**

The new CE appeals regulation (36 C.F.R. Part 215) was challenged. In 2005, a California federal court ruled that the regulation violated the Forest Service Decision Making and Appeals Reform Act (ARA; P.L. 102-381, §322; 16 U.S.C. §1612, note) by excluding decisions from the public comment and appeals process and for other reasons.<sup>51</sup> On appeal, the Ninth Circuit reversed the lower court, holding that the challenges to the regulations in Part 215 were premature, except for §215.12(f).<sup>52</sup> That section—which provided that CE projects could not be appealed—had been applied by the FS, and therefore was ripe for review. The court held that the rule violated the ARA. The action was brought before the U.S. Supreme Court, which heard arguments on the issue in early October 2008.

Five of the new CE types, including those for fire management activities and limited timber harvesting, were challenged in the U.S. District Court for Alabama.<sup>53</sup> In January 2007, the court upheld the regulations, finding that the FS complied with NEPA in adopting the CEs.<sup>54</sup> The court

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<sup>46</sup> 36 C.F.R. §220.4(f).

<sup>47</sup> FSH 1909.15, ch. 30, §§30.12, 31.2; under the rule, the CEs are found at 36 C.F.R. §220.6.

<sup>48</sup> 68 *Fed. Reg.* 33814, June 5, 2003; 68 *Fed. Reg.* 44598, July 29, 2003; and 70 *Fed. Reg.* 1023, Jan. 5, 2005, respectively.

<sup>49</sup> 67 *Fed. Reg.* 54622, Aug. 23, 2002.

<sup>50</sup> 68 *Fed. Reg.* 33581, June 4, 2003; 36 C.F.R. part 215.

<sup>51</sup> *Earth Island Institute v. Pengilly*, 376 F. Supp. 2d 994 (E.D. Cal. 2005).

<sup>52</sup> *Earth Island Institute v. Ruthenbeck*, 459 F.3d 954 (9<sup>th</sup> Cir. 2007).

<sup>53</sup> The challenged regulations are found at FSH 1909.15, ch. 30, §§ 31.2(10) through (14).

<sup>54</sup> *Wildlaw v. U.S. Forest Service*, 471 F. Supp. 2d 1221, 1242-43 (M.D. Ala. 2007).

also considered the regulations under Part 215. It did not expressly consider § 215.12(f), which had been invalidated in August 2006 by the Ninth Circuit, although it refers to the Ninth Circuit decision. The Alabama court held that the issuance of the Part 215 rule followed NEPA. It refused to consider ARA challenges to the Appeal Rule, finding they were not ripe for review because the rule had not been applied yet.

Despite the Alabama District Court's holding, the hazardous fuels reduction CE is not in effect. In December 2007, the Ninth Circuit Court of Appeals ruled that the CE violated NEPA.<sup>55</sup> The court found that the FS had failed to consider the environmental consequences of such a broad program. Thus, after all the relevant court decisions, the new appeals regulations in Part 215 remain in place, except for § 215.12(f)—that is, invoking a CE is *not* exempt from administrative appeal—and the FS cannot use the hazardous fuels reduction CE.

In two recent NEPA cases, the Ninth Circuit has found in favor of the FS. In one case, the Ninth Circuit acknowledged that the court had overly scrutinized FS actions in some cases.<sup>56</sup> The court refused to act as a panel of scientists, instead deferring to the FS's expertise regarding the disputed timber sale. In the second case, the court found that the FS took the requisite "hard look" at possible impacts on wildlife populations in its EIS and determined that the hazardous fuels reduction project did not endanger the viability of species. In support of the viability conclusions, the court found that the FS appropriately relied on studies conducted by qualified scientists and its own wildlife biologist's evaluation.<sup>57</sup>

## **Other Issues**

Other federal lands topics are of interest to the 111<sup>th</sup> Congress. They include national forest planning, national forest county payments, BLM land sales, and grazing management.

### **National Forest Planning**

(by Ross W. Gorte and Kristina Alexander)

The FS is required to prepare comprehensive, integrated land and resource management plans for the national forests.<sup>58</sup> The plans are to be developed and revised with public involvement (16 U.S.C. §1604(d)), must provide for the multiple use and sustained yield of goods and services (16 U.S.C. §1604(e)), and must be prepared in accordance with NEPA (16 U.S.C. §1604(g)(1)). Regulations for forest planning were adopted in 1979 and substantially revised in 1982.<sup>59</sup>

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<sup>55</sup> *Sierra Club v. Bosworth*, 510 F.3d 1016 (9<sup>th</sup> Cir. 2007).

<sup>56</sup> *Lands Council v. McNair*, 537 F.3d 981, 1001 (9<sup>th</sup> Cir. 2008) ("to the extent our case law suggests that a NEPA violation occurs every time the Forest Service does not affirmatively address an uncertainty in the EIS, we have erred").

<sup>57</sup> *Native Ecosystems Council v. Kimbell*, No. 07-35360, 2008 WL 5272518, at 2 (9<sup>th</sup> Cir. Dec. 19, 2008).

<sup>58</sup> The requirement is in the Forest and Rangelands Renewable Resources Planning Act of 1974, as amended (16 U.S.C. §§1600-1614). Substantial detail on the considerations and analysis to be included in the plans was added in the National Forest Management Act of 1976 (NFMA). Hence, forest planning is also often called NFMA planning.

<sup>59</sup> 47 *Fed. Reg.* 43037 (Sept. 30, 1982).

The Clinton Administration finalized new rules (to be phased in) that emphasized planning for the biological sustainability of the national forests.<sup>60</sup> The Bush Administration delayed implementing the Clinton rules, then replaced them before they went into effect. The final Bush rules were to balance biological and socioeconomic sustainability, to make fewer decisions nationally by reducing regulatory guidelines, and to alter public input in the planning process. The rules also exempted plans from NEPA and ESA, because the Bush Administration viewed plans as guides to decision-making that would not include site-specific decisions.<sup>61</sup>

The Bush planning rules were challenged, with plaintiffs asserting that the rules reduced environmental protection without adequate opportunities for public comment and consideration of the effects on endangered species. On March 30, 2007, the U.S. District Court for Northern California remanded the Bush rules because they violated NEPA, ESA, and APA.<sup>62</sup> The FS reissued the 2005 rule as a proposed rule to meet the court's requirement to provide notice.<sup>63</sup> To comply with the court's other mandates, the FS issued a draft environmental impact statement and consulted with the Fish and Wildlife Service under the ESA. The final planning rules were issued in April 2008.<sup>64</sup> Two lawsuits have been filed challenging the rules, again alleging reduced environmental protection without adequate opportunities for public comment and consideration of the effects on endangered species.

## **National Forest County Payments**

(by Ross W. Gorte)

The Secure Rural Schools and Community Self-Determination Act of 2000 (SRS; 16 U.S.C. §500, note)<sup>65</sup> provided an alternative to two major programs that compensate counties for the tax-exempt status of certain federal lands.<sup>66</sup> Payments under SRS expired at the end of FY2006, but the FY2007 emergency supplemental appropriations act (P.L. 110-28, the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007) extended the payments for one year (\$525 million). Bills to extend the SRS payments were introduced in the 110<sup>th</sup> Congress, but legislation that creates new or extends existing mandatory spending (like SRS payments) generally must be offset by new revenues or other changes in mandatory spending programs. A four-year extension (FY2008-FY2011), with complex modifications to shift more of the payments toward counties with large federal landholdings but low historic revenues from those lands, was enacted in the Emergency Economic Stabilization Act of 2008 (P.L. 110-343, in Title VI of Division C). The enacted provision also provides five years (FY2008-FY2012) of mandatory spending for the Payments in Lieu of Taxes (PILT) program.

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<sup>60</sup> 65 *Fed. Reg.* 67514 (Nov. 9, 2000).

<sup>61</sup> 70 *Fed. Reg.* 1022 (Jan. 5, 2005).

<sup>62</sup> *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007).

<sup>63</sup> 72 *Fed. Reg.* 48513 (Aug. 23, 2007).

<sup>64</sup> 73 *Fed. Reg.* 21467 (Apr. 21, 2008).

<sup>65</sup> See CRS Report RL33822, *The Secure Rural Schools and Community Self-Determination Act of 2000: Forest Service Payments to Counties*, by Ross W. Gorte.

<sup>66</sup> FS and some BLM payments have traditionally been based on revenues—25% of FS gross revenues returned to the states for use on roads and schools in the counties where the FS lands are located; and 50% of BLM revenues from the Oregon & California (O&C) grant lands returned to the counties containing the O&C lands. FS and BLM revenues declined precipitously in the early 1990s due to declining timber sales to protect northern spotted owls, water quality, and other resources.

## **BLM Land Sales**

(by Carol Hardy Vincent)

The Federal Land Transaction Facilitation Act (FLTFA, 43 U.S.C. §2301) provides for the sale or exchange of land identified for disposal under BLM's land use plans. Most of the proceeds are to be used for land acquisitions, as described below. The law's purposes include allowing for the reconfiguration of land ownership patterns to better facilitate resource management, improving administrative efficiency, and increasing the effectiveness of the allocation of fiscal and human resources. This authority to sell or exchange BLM lands is to expire on July 24, 2010—ten years after enactment. An issue for the 111<sup>th</sup> Congress is whether to retain this authority and if so in what form.

FLTFA currently provides for the sale or exchange of public land identified for disposal in BLM's land use plans "as in effect on the date of enactment"—July 25, 2000. All BLM lands (except some lands in Alaska) are covered by a land use plan. In 2001, BLM began a multiyear effort to develop new land use plans and to update existing ones to address changing circumstances, such as increased demand for energy resources. BLM estimates that from the start of that effort through 2009, it will complete approximately 100 new or revised plans. The changing nature of these plans has prompted interest in amending FLTFA to allow the most current land use plans to be used as the basis of land disposals. For instance, the George W. Bush Administration's FY2009 budget request included a proposal to extend FLTFA until January 1, 2018, and to direct using updated land management plans for determining which lands to sell or exchange. The FLTFA sales authority was not tied to future land use plans due to concerns that BLM might revise plans to pursue a broad land disposal program as a way to generate funds. BLM asserts that its authorities to dispose of public lands would preclude this. Under FLPMA, for example, BLM is authorized to sell certain tracts of land only if they meet specified criteria. The agency also has asserted that land use plan revisions since 2000 have not changed significantly the acreage identified for disposal. Further, a 2008 report of the Government Accountability Office (GAO)<sup>67</sup> concluded that while BLM land use plans identify areas for disposal, BLM has not made sale of lands under FLTFA a priority.

Currently, proceeds from the sale or exchange of BLM lands under FLTFA are split between the state in which the lands were disposed of (4%) and a separate Treasury account (96%). The funds in the account are available to both the Secretary of the Interior and the Secretary of Agriculture to acquire inholdings and other nonfederal lands (or interests therein) that are adjacent to federal lands and contain exceptional resources, with no more than 20% for administrative expenses related to the land disposal program. Of the funds for acquisitions, at least 80% are to be used in the state in which the funds were generated, and the remaining funds may be used in any state. Further, not less than 80% of the funds for land purchases within a state are to be used to acquire inholdings.

An area of debate has been whether to retain the current allocation of proceeds. One question is whether to continue to allow the proceeds of land sales to be retained by the agencies, or whether to return them to the general fund of the Treasury as traditionally had been the case. Under one failed proposal, in the FY2009 Bush Administration budget, 70% of the net proceeds would have

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<sup>67</sup> U.S. Government Accountability Office, *Federal Land Management: Federal Land Transaction Facilitation Act Restrictions and Management Weaknesses Limit Future Sales and Acquisitions*, GAO-08-196, February 5, 2008, at <http://www.gao.gov/new.items/d08196.pdf>.



been deposited in the general fund of the Treasury. The change was promoted to reduce the federal deficit, to ensure that the public would benefit from land sales, and to reduce the amount of money not subject to oversight during the appropriations process. However, such a proposal would reduce funds for land acquisition at a time of declining funds from the primary acquisition source—the Land and Water Conservation Fund.<sup>68</sup> A related question is whether some of the funds should be used for other federal lands purposes. For instance, the FY2009 Bush Administration proposal had sought to dedicate “a portion” of the funds to BLM for restoration projects.

Another issue regarding the allocation of proceeds is whether to retain the requirement that most of the funds for land acquisition be used in the state where the funds were generated. The GAO concluded that this requirement has made it difficult to acquire priority lands in states that sell relatively little land. Currently, most of the revenue for land acquisitions is available to Nevada. Specifically, as of September 30, 2008, \$85.6 million was available for land acquisition, with \$17.1 million (20%) for purchases in any state and \$68.5 million (80%) for purchases in the states in which the funds were generated. Of the \$68.5 million, \$54.1 million was available for land acquisitions in Nevada. Nevada has generated the most revenue from land sales due to the large BLM holdings in areas of population growth, the high demand for such land to develop, and the experience of BLM with selling land in Nevada under another land sale program.<sup>69</sup> Most states had land sales of about a million dollars or less.<sup>70</sup>

The GAO report identified other challenges to future land sales and acquisitions which might be examined by the 111<sup>th</sup> Congress. They included that the BLM has insufficient realty staff to work on land sales, has not developed goals or an implementation strategy for land sales, and lacks an effective mechanism for determining which lands to acquire.

## **Grazing Management**

(by Carol Hardy Vincent and Kristina Alexander)

The BLM issued new grazing regulations in 2006, but an injunction has prevented the regulations from taking effect. The BLM had revised its grazing regulations on the grounds that changes were needed to comply with previous court decisions, to increase flexibility for managers and permittees, to improve administrative procedures and business practices, and to promote conservation. While lauded by some, the reform effort had been criticized by others as unnecessary or harmful. Some of the regulatory changes would have (1) allowed title to range improvements to be shared by the BLM and permittees, (2) allowed permittees to acquire water rights for grazing if consistent with state law, (3) changed the definition of *grazing preference* to include an amount of forage, (4) eliminated conservation use grazing permits, (5) extended the time to remedy rangeland health problems, and (6) reduced occasions where the BLM is required to consult with the public. The BLM did not address some controversial issues, such as revising

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<sup>68</sup> For further information, see CRS Report RL33531, *Land and Water Conservation Fund: Overview, Funding History, and Current Issues*, by Carol Hardy Vincent.

<sup>69</sup> Under the Southern Nevada Public Land Management Act, the Secretary of the Interior, through the BLM, is authorized to sell or exchange certain land around Las Vegas. Revenues from these land sales have totaled \$3.29 billion as of September 30, 2008, significantly larger than had been expected.

<sup>70</sup> Revenues currently are allocated to 11 “states.”

the grazing fee. The BLM had expected to return to the consideration of related grazing policy changes once the new regulations were in effect.

The U.S. District Court for Idaho enjoined all the 2006 regulations from taking effect.<sup>71</sup> The court found that the BLM had violated three laws in promulgating the regulations—NEPA, ESA, and FLPMA. In particular, the court criticized the 2006 regulations’ reduction of public input into BLM day-to-day decisions such as allotment boundaries and temporary permits. It also found that the BLM should have consulted with the Fish and Wildlife Service regarding the changes, as it had done for the 1995 changes to grazing regulations. Further, the court criticized the BLM for eliminating comments by DOI scientists from a NEPA document. Before the regulations could be reinstated, the BLM would have to satisfy the court that it had examined the environmental impacts under NEPA, performed a § 7 consultation under ESA, and restored the FLPMA public comments provisions. The BLM currently is operating under its 1995 grazing regulations, which were in effect before the 2006 changes. The court did not require the BLM to use these grazing regulations, leaving that decision to the BLM. However, the provisions on conservation use permits that were enjoined in 1996 are not in effect.<sup>72</sup>

## **Additional Reading: Current and Historical**

CRS Report RL34273, *Federal Land Ownership: Current Acquisition and Disposal Authorities*, by Ross W. Gorte and Carol Hardy Vincent.

CRS Report RL34267, *Federal Land Ownership: Constitutional Authority and the History of Acquisition, Disposal, and Retention*, by Kristina Alexander and Ross W. Gorte.

CRS Report RL30755, *Forest Fire/Wildfire Protection*, by Ross W. Gorte.

CRS Report RL32244, *Grazing Regulations: Changes by the Bureau of Land Management*, by Carol Hardy Vincent.

CRS Report RL34461, *Interior, Environment, and Related Agencies: FY2009 Appropriations*, by Carol Hardy Vincent et al.

CRS Report RS21967, *Land Exchanges: Bureau of Land Management Process and Issues*, by Carol Hardy Vincent.

CRS Report RL33014, *Leasing and Permitting for Oil and Gas Development on Federal Public Domain Lands*, by Aaron M. Flynn and Ryan J. Watson.

CRS Report RL33908, *Mining on Federal Lands: Hardrock Minerals*, by Marc Humphries.

CRS Report RL30647, *National Forest System Roadless Area Initiatives*, by Kristina Alexander and Ross W. Gorte.

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<sup>71</sup> *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008).

<sup>72</sup> See the BLM instruction memorandum on the agency’s website, at [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2007/im\\_2007-137\\_0.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2007/im_2007-137_0.html).

CRS Report RS22928, *Oil Development on Federal Lands and the Outer Continental Shelf*, by Marc Humphries.

CRS Report RL34772, *Proposals to Merge the Forest Service and the Bureau of Land Management: Issues and Approaches*, by Ross W. Gorte.

CRS Report RL33525, *Recreation on Federal Lands*, by Kori Calvert et al.

CRS Report RL33822, *The Secure Rural Schools and Community Self-Determination Act of 2000: Forest Service Payments to Counties*, by Ross W. Gorte.

CRS Report RL34690, *Wild Horse and Burro Issues*, by Carol Hardy Vincent.

CRS Report RL33827, *Wilderness Laws: Permitted and Prohibited Uses*, by Ross W. Gorte.

CRS Report RL31447, *Wilderness: Overview and Statistics*, by Ross W. Gorte.

CRS Report RL34517, *Wildfire Damages to Homes and Resources: Understanding Causes and Reducing Losses*, by Ross W. Gorte.

CRS Report RL33990, *Wildfire Funding*, by Ross W. Gorte.

CRS Report RS21880, *Wildfire Protection in the Wildland-Urban Interface*, by Ross W. Gorte.

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