

January 2003

A View From the Front Lines: The Fate of Utah's Redrock Wilderness Under the George W. Bush Administration

Stephen H.M. Bloch

Heidi J. McIntosh

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Environmental Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Stephen H.M. Bloch and Heidi J. McIntosh, *A View From the Front Lines: The Fate of Utah's Redrock Wilderness Under the George W. Bush Administration*, 33 Golden Gate U. L. Rev. (2003).
<http://digitalcommons.law.ggu.edu/ggulrev/vol33/iss3/6>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

ARTICLE

A VIEW FROM THE FRONT LINES:
THE FATE OF UTAH'S REDROCK
WILDERNESS UNDER THE GEORGE W.
BUSH ADMINISTRATION

STEPHEN H.M. BLOCH* & HEIDI J. MCINTOSH**

“The dispute over how much [Bureau of Land Management] land shall be set aside as wilderness in the state of Utah is one more round in the long disagreement between those who view the earth as made for man’s domination, and wild lands as a resource warehouse to be freely looted, and those who see wild nature as precious in itself — beautiful, quiet, spiritually refreshing, priceless as a genetic bank and laboratory, priceless either as relief or even as pure idea to those who suffer from the ugliness, noise, crowding, stress, and self-destructive greed of industrial life.”¹

I. INTRODUCTION

The public lands of southern Utah’s redrock country appear to many as a harsh and unforgiving landscape. It is the kind of place where all but the most dedicated backpackers follow marked trails and use guidebooks and where hard-bitten ranchers and oilmen eke out a living. It is also, however, a place of spectacular beauty, with countless redrock

* Stephen H.M. Bloch is a Staff Attorney for Southern Utah Wilderness Alliance. Mr. Bloch received his B.A. from Miami University in 1993 and received his J.D. from the University of Utah College of Law in 1997.

** Heidi J. McIntosh is the Conservation Director and Senior Attorney for Southern Utah Wilderness Alliance. Ms. McIntosh received her B.A. from University of Arizona in 1982. Ms. McIntosh received her J.D. from Georgetown University Law Center in 1986 and received her L.L.M. from the University of Utah College of Law in 1994.

¹ Wallace Stegner, *Introduction*, Utah Wilderness Coalition, *Wilderness at the Edge*, 3 (1990).

474 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

cliffs, steep walled redrock canyons, forested mesa tops, and desert streams. Indeed, the public lands at the heart of southern Utah make up one of the largest tracts of wilderness quality lands in the lower forty-eight states.

After weathering the twelve year Reagan/Bush “sagebrush rebellion” era, with its extraction bent Secretary of the Interior James Watt and his like-minded successors, southern Utah was the recipient of a mixed preservation and extraction agenda over the eight year Clinton Administration. Though hailed by many conservationists and likewise reviled by many pro-development forces, President Clinton’s two-term Secretary of the Interior, Bruce Babbitt, left many critical southern Utah public lands issues unresolved. These include oil and gas leasing and development on public lands, Revised Statute 2477 (“R.S. 2477”) rights-of-ways, and the larger issue of the fate of Utah’s magnificent wilderness quality public lands.

This article focuses on the question of whether, having survived the past three Republican and Democratic Administrations without the wilderness protections these lands deserve, southern Utah can once again weather the storm of the second coming of the sagebrush rebellion in the form of the George W. Bush Administration (“Administration” or “Bush Administration”). In particular, we focus on two of the most pressing issues facing southern Utah’s public lands — oil and gas development and R.S. 2477 rights-of-ways, both of which have serious implications for future Congressional wilderness designations.² With former oilmen at the nation’s helm (President George W. Bush) and rudder (Vice-President Richard Cheney) oil and gas development has unquestionably become a focus of the Administration. This reorganization in national priorities has led to the appointment and installation of several high-ranking Interior Department officials from the inter-mountain west, including Utah’s own Kathleen Clarke as Director of the Bureau of Land Management (“BLM”).³ As a result, the approval of oil and gas leasing, exploration, and development has reached a frenzied pace.⁴

² The country’s major newspapers have framed oil and gas development and R.S. 2477 rights-of-ways in Utah as two flashpoints of the Bush Administration’s anti-environmental crusade. See *Can the Courts Save Wilderness?* THE N. Y. TIMES, Jan. 4, 2003, at A11; see also *Landscapes Under Siege*, THE N. Y. TIMES, March 7, 2002, at A13; *More Than Lines On a Map*, WASH. POST, July 25, 2002, at A20. The popular media also picked up on the Bush Administration’s penchant for promoting extractive industries over resource protection. See Erika Casriel, *Bush v. The Environment*, ROLLING STONE, Feb. 22, 2002, at 31-32.

³ See *infra* note 23 and accompanying text.

⁴ See Eric Pianin, *Report Find Few Curbs on West’s Oil and Gas*, WASH. POST, Jan. 17, 2003, at A10. See also Dan Morgan and Ellen Nakashima, *Search for Oil Targets Rockies, Administration Takes Steps to Loosen Drilling Curbs*, WASH. POST, April 18, 2002, at A1; Brent Israelsen, *Oil, Gas Drilling Put on Fast Track*, SALT LAKE TRIB., April 18, 2002, at B1.

In addition, and perhaps as “payback” for their loyal support, the Bush Administration has backed the State of Utah and its rural counties’ desire to lay claim to alleged rights-of-ways across perhaps as many as 10,000 long-forgotten “roads” throughout the state.⁵ Thus, in December 2002, the Department of the Interior released a new rule that would facilitate the give-away of these public lands and throughout 2001-02 the Department conducted numerous closed-door meetings with State of Utah and county officials regarding their R.S. 2477 claims.⁶ Indeed, more so than almost any other legal battles raging throughout the intermountain west, the fate of southern Utah’s redrock wilderness lands has captured the nation’s attention.

What this article is not. This article is not a treatise on the more than twenty-five year Utah wilderness debate, though that issue is discussed where pertinent.⁷ This article also does not provide a detailed legal background on the laws and regulations governing oil and gas activities on BLM-managed lands, nor does it repeat the thorough analysis already contained in many recent articles on the legal ins-and-outs of R.S. 2477.⁸

What this article is. This article is an overview, an executive summary of the heady and fast-paced times that we work in as the conservation community reacts, responds, and attacks the current Administration’s concerted efforts to promote its extractive-based agenda.

⁵ There is little question that one of the State of Utah’s primary goals in establishing ownership over these R.S. 2477 rights-of-ways is the frustration of federal wilderness designations. See Judy Fahys, *Activists, Feds at Odds on Road Claims*, SALT LAKE TRIB., March 7, 2002, at D3; see also Tom Kenworthy, *Proposal Would Ease Way for Roads in Wilds*, USA TODAY, March 6, 2002, at A4.

⁶ See 68 Fed. Reg. 494 (Jan. 6, 2003) (amending 43 C.F.R. Part 1860).

⁷ Utah’s wilderness debate has provided fodder for several articles and books that discuss, in-depth, the intricacies of this ongoing public lands issue. See, e.g., Kevin Hayes, *History and Future of the Conflict Over Wilderness Designation of BLM Lands in Utah*, 16 J. ENVTL. L. & LITIG. 203 (2001) [hereinafter Hayes]. See generally GOODMAN AND MCCOOL, *CONTESTED LANDSCAPE: THE POLITICS OF WILDERNESS IN UTAH AND THE WEST* (1999).

⁸ See, e.g., Michael Wolter, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism or Exercise for the Ghost of Land Use Past*, 5 DICK. J. ENVTL. L. & POL’Y. 315, 331 (1996).

476 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

II. BACKGROUND

A. AMERICA'S REDROCK WILDERNESS ACT⁹

First introduced in 1989 by then-Congressman Wayne Owens (D-UT), America's Redrock Wilderness Act ("ARWA") is a citizen-led response to the BLM's unsatisfactory efforts in the late 1970's and early 1980's to identify wilderness quality Utah BLM lands and to designate them as wilderness study areas ("WSAs").¹⁰ ARWA is supported by over 230 national, regional, and local conservation groups, including: The Wilderness Society, the Sierra Club, Natural Resources Defense Council, the Appalachian Mountain Club, Southern Utah Wilderness Alliance, and Wasatch Mountain Club.¹¹ Together, these groups comprise an umbrella organization, the Utah Wilderness Coalition that coordinates efforts to support ARWA.¹² In its most current form, ARWA was sponsored in the 107th Congress in the U.S. House of Representatives by Maurice Hinchey (D-NY) and in the U.S. Senate by Richard Durbin (D-IL), and enjoyed considerable support in both houses with 164 co-sponsors in the House and 17 in the Senate.¹³ If passed, ARWA

⁹ This article deals exclusively with Utah's 23 million acres of BLM-managed lands, which make up approximately forty-four percent of Utah's total land mass. See Utah Bureau of Land Management, Facts and Figures 2000, available at www.ut.blm.gov/Facts&Figures/ff15.html (last visited Feb. 7, 2003). In drafting the Federal Land Policy Management Act ("FLPMA"), Congress charged the BLM to manage its lands pursuant to a "multiple use" mandate. See FLPMA of 1976 Title I § 102, 43 U.S.C. § 1701 (1998). Included in the BLM's multiple use mandate is the seemingly conflicting directive to identify and preserve for Congressional designation lands with wilderness qualities, as well as to promote sustainable development and use of the lands many resources. See *id.* § 1701(7)(8).

¹⁰ See Hayes, *supra* note 7, at 232-235. See also Utah Wilderness Coalition, *Wilderness at the Edge*, 34-40 (1990). See, e.g., *Southern Utah Wilderness Alliance*, 150 U.S. Deptmt of the Interior Board of Land Appeals ("IBLA") 263, 266-67 (1999) (reviewing Utah BLM's WSA designation process). As originally drafted, ARWA contained approximately 5.7 million acres of Utah BLM lands. Hayes, *supra* note 9, at 219. In 1999, the Utah Wilderness Coalition updated and revised the proposed Act, which now includes slightly more than 9.3 million acres of Utah BLM lands (on file with authors).

¹¹ See generally e.g., The Utah Wilderness Coalition website, available at www.uwcoalition.org (last visited March 3, 2003); The Southern Utah Wilderness Alliance website — America's Redrock Wildernss Act: A Call to Action, available at www.suwa.org (last visited March 3, 2003).

¹² *Id.*

¹³ As originally drafted, America's Redrock Wilderness Act, contained approximately 5.7 million acres of Utah BLM lands. Hayes, *supra* note 7, at 219. In 1999, the Utah Wilderness Coalition updated and revised the proposed Act, which now includes slightly more than 9.3 million acres of Utah BLM lands (on file with authors).

would designate just over nine million acres of Utah BLM as wilderness.¹⁴

Today, there are four different classes of wilderness quality lands in Utah.¹⁵ First, Utah BLM manages approximately 3.4 million acres of its public lands as wilderness study areas ("WSAs"), which are managed pursuant to FLPMA's "non-impairment" mandate.¹⁶ Second, pursuant to Section 202 of FLPMA, the BLM reviewed an additional 3 million acres of Utah BLM land outside of the already designated WSAs and determined that just over 2.7 million acres of these lands have wilderness characteristics.¹⁷ The third class is made up of roughly an additional million acres of BLM lands that the agency between 2001 and 2003 acknowledged may have wilderness character and should be further inventoried and reviewed.¹⁸ Finally, the fourth class is the remaining ap-

¹⁴ See Hayes, *supra* note 11. See also Southern Utah Wilderness Alliance, ARWA, available at www.suwa.org/page.php?page_name=arwa_home#history (describing ARWA) (last visited Feb. 7, 2003). The public lands that would be designated as wilderness include not only lands commonly referred to as southern Utah's "redrock county," but also hundreds of thousands of acres of public lands in Utah's Basin and Range, Book Cliffs, and San Rafael Swell. *Id.*

¹⁵ See U.S. Department of Interior Bureau of Land Management Instruction Memorandum No. UT 2001-092, *Documentation for Actions Involving Lands with Wilderness Concerns* (Aug. 20, 2001) (on file with authors) [hereinafter UT 2001-092].

¹⁶ FLPMA established a fifteen-year review process, beginning in 1976, for the BLM to review and recommend lands for wilderness designation. See FLPMA Title VI § 603(a), 43 U.S.C. § 1782(a) (1998). See *State of Utah v. Babbitt*, 137 F.3d 1193, 1197-99 (10th Cir. 1998) (summarizing background to BLM's Utah wilderness inventories); see also U.S. Department of the Interior, Bureau of Land Management, Utah Wilderness Inventory vii (1999), available at www.ut.blm.gov/wilderness/wrpt/wrptcontents.html (last visited Feb. 7, 2003). In 1984, the BLM identified 3.2 million acres of its lands in Utah as wilderness study areas, and in 1991 President George H. Bush recommended that approximately 1.9 million acres of those lands become designated wilderness. See *generally* *State of Utah*, 137 F.3d at 1198. Congress, however, did not act on the President's recommendation, and thus the 3.2 million acres of WSAs remain under consideration for entry into the National Wilderness Preservation System, and are managed pursuant to Section 603(c) of FLPMA. FLPMA Title VI § 603(c), 43 U.S.C. § 1782(c) (1998). The BLM is strictly prohibited from allowing any activity that impairs the wilderness character of the WSAs under that provision:

During the period of review of such areas [WSAs] and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness.

Id. (emphasis added).

See also *Sierra Club v. Hodel*, 848 F.2d 1068, 1085 (10th Cir. 1988) (with exception of limited grandfathered uses, "FLPMA expressly requires the Secretary to protect WSAs" from "impairment"); *Parker v. U.S.*, 448 F.2d 793, 797 (10th Cir. 1971) (harvesting timber in WSA "would render meaningless the clear intent of Congress . . . that both the President and Congress shall have a meaningful opportunity to add . . . areas predominately of wilderness value" to the wilderness preservation system), cert. denied 405 U.S. 989 (1972).

¹⁷ See FLPMA Title II § 202, 43 U.S.C. § 1712. The BLM currently refers to these FLPMA § 202 units as "wilderness inventory areas" or WIAs. *Id.* The roughly 2.7 million acres of lands reviewed by the BLM in its § 202 process were identified in the original ARWA, but not designated as WSAs. See also *supra* note 7.

¹⁸ In the last days of the Clinton Administration, the BLM released the so-called "Wilderness Inventory Handbook" which contains the BLM's "policy, direction, general procedures, and guid-

478 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

proximately two million acres of public lands that conservationists contend have wilderness qualities, but that BLM either has not reviewed for wilderness characteristics since the late 1970's or agency disagrees that such wilderness qualities exist.¹⁹

B. KEY PLAYERS AT THE DEPARTMENT OF THE INTERIOR

The installation of the Bush Administration's front line staff at the Department of Interior ("DOI" or the "Department") and the BLM has made a striking difference in the nature and pace of oil and gas development, R.S. 2477 policy, and attacks on wilderness protections. Behind the leadership of Secretary of the Interior Gale Norton, herself a former attorney for the conservative wise-use law firm Mountain States Legal Foundation, officials at the Department and BLM have been emboldened to pursue a resource extractive agenda.²⁰ At Secretary Norton's right hand is Assistant Secretary Steven Griles. A former lobbyist for the oil and gas and coal industries, Mr. Griles is certainly no stranger to the extractive industry and has been outspoken in his desire to push for increased leasing and drilling on western public lands.²¹

ance for wilderness inventories under provisions of Sections 201 of the FLPMA of 1976 and the designation of WSAs under provisions of Sections 202 of FLPMA." See BLM Manual, *Final Wilderness Inventory and Study Procedures Handbook*, H-6310-1.01 (2002). A Solicitor's Opinion issued at the end of the Clinton Administration discussed the process of establishing additional WSAs:

Section 603(c) of FLPMA prohibits the BLM from eliminating or reducing existing WSAs that were identified under section 603(a). Such WSAs must be managed so as not to impair their suitability for designation as wilderness "until Congress has determined otherwise." 43 U.S.C. §1782(c). But BLM does have the authority, under section 202 of FLPMA, to designate new WSAs which can be adjacent to existing section 603 WSAs. . . . In deciding whether to [designate new WSAs], the BLM may rely upon existing WSA information to the extent that it remains accurate. But the BLM may not refuse to consider credible new information which suggests that the WSA boundaries identified in the late 1970's do not include all public lands within the planning area that have wilderness characteristics and are suitable for management as wilderness.

U. S. Department of the Interior, Bureau of Land Management, Information Bulletin No. 2001-042, *Recently Issued Solicitor's Opinion Regarding Land Use Planning* (Jan. 12, 2001) (on file with authors). The Wilderness Inventory Handbook has come under recent fire from Republican lawmakers, led by Utah's Representative Chris Lennon.

¹⁹ UT 2001-092, note 16.

²⁰ See Mike Soraghan, *Comparison to Watt Gets Norton's Gander Up*, THE DENV. POST, Dec.31, 2000, at A1; Jeff Woods, *Norton vs. the Environment*, DEFENDERS (Summer 2002), at 6; Amy Goldstein and Helen Dewar, *Confirmation Hearing to Test Bush, Democrats*, WASH. POST, Jan. 14, 2001, at A1. See also *Landscapes Under Siege*, supra note 4.

²¹ See Bill McAllister, *Interior Gets Organization Chart*, THE DENV. POST, Dec. 30, 2001, at A9. See also Bill McAllister, *1st of Norton Subordinates is Confirmed*, THE DENV. POST, July 3, 2001, at A15; *Senate Confirms Griles for Pivotal Energy Post*, WALL ST., July 13, 2001, at A2. Ellen Nakashima and Dan Morgan, *Interior Official Challenges EPA Report on Energy Site*, WASH. POST, April 25, 2002, at A27 ("Griles once ran a consulting firm whose clients include several oil and gas companies that are drilling in the Powder River Basin[, Wyoming].").

As an aid to then Utah Congressman James Hansen, and director of the Utah Department of Natural Resources, BLM Director Kathleen Clarke is well-versed to the controversies of Utah public lands management.²² Though Ms. Clarke billed herself as an even-tempered moderate, after being nominated by President Bush her actions in supporting fast-tracked oil and gas development while at the same time putting wilderness planning and management on the back-burner have left little question that she is a strong industry advocate.²³

At the Utah BLM offices, State Director Sally Wisely, a Clinton/Babbitt era appointee, has been in office since 1999.²⁴ Since the Bush Administration came into power in early 2001, State Director Wisely has overseen a significant increase in oil and gas leasing and exploration on proposed wilderness lands.²⁵ Notably, while Clinton Administration-era BLM State Directors from neighboring states (Wyoming, Idaho, Montana, and Colorado) have all been replaced by Bush-era appointees, as has the manager of the Grand Staircase-Escalante National Monument, Ms. Wisely has remained in office.²⁶

How important has this management-level changing of the guard been for on-the-ground management? In a single word — critical. As we discuss *infra*, the tone and tenor of public lands management in Utah and across the west is dramatically different under the Bush Administration. Conservation groups are increasingly hard-pressed to respond to the one-two punch of extractive industry and state and local governments acting in concert with and emboldened by the DOI.

²² See Judy Fahys, *Senate Confirms Utah's Clarke to Head BLM*, SALT LAKE TRIB., Dec. 22, 2001, at B2. See also Donna Kemp-Spangler, *Utah OK'd to Lead BLM*, DESERET NEWS, Dec. 22, 2001, at B1; Robert Gehrke, *Clarke Meets Little Resistance From Senate Committee*, ASSOC. PRESS NEWSWIRE, Nov. 14, 2001; Bill McAllister, *Utah Resources Chief to Lead BLM*, THE DENV. POST, Aug. 28, 2001, at A8.

²³ See Dean Murphy, *U.S. Approves Power Plant in Area Indians Hold Sacred*, THE N. Y. TIMES, Nov. 28, 2002, at A32. See also Mike Soraghan, *Feds, Oil Group to Meet in Denver Amid Drill Fight*, THE DENV. POST, May 6, 2002, at A11; Judith Kohler, *BLM: Energy Streamline, Environmental Protection, Both Possible*, ASSOC. PRESS NEWSWIRE, March 18, 2002 (on file with authors).

²⁴ See *BLM Names Sally Wisely as New Utah State Director*, M2 PRESSWIRE, May 21, 1999 (on file with authors).

²⁵ See Lee Davidson, *Keep Drills Out of Utah Wilds*, DESERET NEWS, May 16, 2001, at A1. See also Judy Fahys, *Hope, Fear Await Energy Plan*, SALT LAKE TRIB., May 14, 2001, at A1; Brent Israelsen, *SUWA: BLM Favors Big Oil*, SALT LAKE TRIB., Oct. 20, 2002, at B1; Timothy Egan, *Bush Administration Allows Oil Drilling Near Utah Parks*, THE N. Y. TIMES, Feb. 8, 2002, at A11 ("Federal land managers, who control the scenic Utah lands, have been told that energy development is now the top concern.").

²⁶ See Brent Israelsen, *Politics Played Role in Staircase Boss' Departure*, SALT LAKE TRIB., Dec. 17, 2001, at B2. See also *Bennett named Wyoming BLM Director*, ASSOC. PRESS NEWSWIRE, Oct. 30, 2002.

480 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

1. Oil And Gas²⁷

“Nowhere is the conflict between wilderness designation and energy development more pronounced than in Utah.”²⁸

Perhaps in no other arena have the effects of the Bush Administration been so noticeable as in the surge of energy development projects on the western public lands. There is a palpable feeling in the air here in Utah that the stars have aligned for the oil and gas industry — a Republican president, a Republican Congress, Republican appointees staffing critical positions in the DOI and its agencies, and conflict in the Middle East — to help spike oil and gas prices. The Bush Administration has been creative in identifying ways to maximize opportunities for development — and minimize opportunities for preservation — on our nation’s public lands. They have capitalized on openings to couch environmental issues such as oil and gas development in broader concepts referred to as “energy independence,” as if drilling the relatively modest supplies under the public domain would free us of our dependence on foreign oil.²⁹

Indeed, given the string of policy statements and other actions by President Bush and the DOI, industry officials may be right. Clearly in their collective sight is the potential to explore and ultimately develop these resources across Utah’s spectacular public lands, including the resources within lands proposed for wilderness designation in ARWA. In the face of this onslaught, the Administration may have begun to overreach and, as recent court and administrative decisions have concluded, in its rush to approve industry proposed energy projects, federal laws have been violated.³⁰

In May of 2001, the Bush Administration made clear that domestic energy production was one of its top priorities by issuing both the National Energy Policy report (the product of a series a closed-door meet-

²⁷ This section highlights some of the most important changes to BLM policies that you, the reader, may have never heard about. With the exception of the highly publicized National Energy Policy report, the remainder of the policies discussed are a presidential Executive Order published in the Federal Register and BLM policies prepared and disseminated internally at the BLM Washington D.C. headquarters office and the Utah state office.

²⁸ Gary C. Bryner, *The National Energy Policy: Assessing Energy Policy Choices*, 73 U. Colo. L. Rev. 341, 401 (2002) (hereinafter Bryner).

²⁹ See Undermining Environmental Law, N. Y. TIMES, Sept. 30, 2002 at A7. See also Natural Resource Defense Council, *Dangerous Addiction! Early America’s Oil Dependence*, VI (2002).

³⁰ Eric Pianin, *For Environmentalists, Victories in the Courts*, WASH. POST, Jan. 27, 2003, at A3 (noting that recent environmental victories include “blocked oil and gas exploration in southern Utah”); *Can the Courts Save Wilderness*, *supra* note 4.

ings between Vice-President Cheney and industry executives)³¹ and Executive Order 13,212, entitled "Actions to Expedite Energy-Related Projects."³² Importantly, the Executive Order stated that "[i]t is the policy of this Administration that executive departments and agencies [] shall take appropriate actions, to the extent consistent with applicable law, to expedite projects that will increase the production, transmission, and conservation of energy."³³

Additionally, in August 2001 the BLM's Washington D.C. office issued an Instruction Memorandum which explained the agency's policy that even when it is in the process of amending out-of-date land use plans — plans that in some instances were close to twenty years old — BLM offices should continue to process and approve oil and gas development projects.³⁴ The importance of this policy cannot be understated as two of Utah BLM's most important field offices for oil and gas extraction, the Price and Vernal field offices located in eastern Utah, announced in 2001 that they were beginning land use plan revisions because, in large part, their oil and gas activities had exceeded those anticipated in their governing land use plans.³⁵

³¹ NAT'L ENERGY POL'Y DEV. GROUP, *National Energy Policy: Reliable, Affordable, and Environmentally Sounds Energy for America's Future* (2001). See *supra* note 22, at 343-51 (discussing evolution of National Energy Plan). See also Robert Gehrke, *Activists Urge Against Sacrificing Utah's Wild Lands for Energy*, SALT LAKE TRIB., May 17, 2001 (on file with authors); Brice Wallace, *Sparks Fly Over Bush Proposal*, DESERT NEWS, May 17, 2001, at A1; *Keep drills out of Utah wilds*, *supra* note 26. The Vice-President's refusal to disclose who attended these meetings has been the subject of considerable controversy and federal court litigation. See Mike Allen, *GAO to Sue Cheney Within 2 or 3 Weeks; Hill Agency Seeks Energy Panel Records*, WASH. POST, Jan 31, 2002, at A4.

³² Exec. Order No. 13,212, 66 Fed. Reg. 28,357 (May 18, 2001). See Don Van Natta Jr., *Executive Order Followed Energy Industry Recommendations, Documents Show*, THE N. Y. TIMES, April 4, 2002, at A14. See also Dana Milbank, *Bush Energy Order Wording Mirrors Oil Lobby's Proposal*, WASH. POST, March 28, 2002, at A27.

³³ 66 Fed. Reg. 28, 357 § 1. The Executive Order further states that "[f]or energy related projects, agencies shall expedite their review of permits or take other actions as necessary to accelerate the completion of such projects . . . [t]he increased production and transmission of energy in a safe and environmentally sound manner is essential to the well-being of the American people." *Id.* § 1-2.

³⁴ See U. S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2001-191, *Processing of Applications for Permit to Drill (APD), Site-Specific Permits, Sundry Notices, and Related Authorizations on Existing Leases and Issuing New Leases during Resource Management Plan (RMP) Development*, Aug. 6, 2001, at 1. Allegedly at the urging of Utah BLM officials, this Instruction Memorandum replaced an earlier one, Instruction Memorandum 2001-146, issued in May 2001, that had raised concerns about BLM field offices selling leases and approving drill permits in offices where the land use plans no longer accurately reflected current on-the-ground situations. See *id.* at 2. See also U. S. Department of the Interior, Bureau of Land Management, Instruction Memorandum 2001-146, *Oil and Gas Lease Implementation Actions During Resource Management Plan Development*, May 11, 2001.

³⁵ See U.S. Department of the Interior, Bureau of Land Management, *Report to the Congress: Land Use Planning for Sustainable Resource Decisions*, at 31 (Feb. 2000) (noting that both Vernal and Price land use plans were deficient in oil and gas leasing planning decisions). See also 66 Fed. Reg. 14415 (March 12, 2001) (Environmental Impact Statement; Vernal Resource Manage-

482 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

Also in August 2001, Washington D.C. BLM officials came to Utah to conduct an on-site review of Utah BLM's oil and gas program (including leasing, drilling, and production) and its NEPA compliance process, with the stated goal of "develop[ing] recommendations, as necessary, to maintain or improve the effectiveness of Utah's oil and gas program."³⁶ On January 4, 2002, Utah BLM State Director Wisely released an intra-agency Information Bulletin reiterating that the Administration "has assigned a high priority to oil and gas exploration and production . . . including increased access to oil and gas resources on public lands" and attaching the findings of the oil and gas review team.³⁷ The Information Bulletin's most telling statement was regarding what the review team believed to be the cause for inappropriate delays in the oil and gas process — compliance with federal environmental laws and wilderness reviews:

The purpose of the subject review is to improve the oil and gas program in Utah. The review team believes the oil and gas program should be a high priority program in Utah. Utah management should work with Washington to acquire whatever resources are necessary to reduce oil and gas leasing delays and drilling backlogs.³⁸

The Information Bulletin further stated:

The leasing delays and APD [application for permit to drill] backlogs are created by the people responsible for performing the wilderness reviews and NEPA analysis. *Utah needs to ensure that existing staff un-*

ment Plan, Utah -- Notice of intent to plan, prepare an environmental impact statement, and call for information); see also 66 Fed. Reg. 56343 (Nov. 7, 2001) (Notice of Intent to Prepare a Resource Management Plan (RMP) and Environmental Impact Statement (EIS) for the Price Field Office).

³⁶ U. S. Department of the Interior, Bureau of Land Management, Information Bulletin No. UT 2002-008, *Oil and Gas Program Review Final Report*, Jan. 4, 2002 at 2. BLM is bound by the terms of its Instruction Bulletins and Information Memoranda. See, e.g., *Lassen Motorcycle Club*, 133 IBLA 104, 108 (1995) ("where BLM adopts agency-wide procedures that are reasonable and consistent with the law, the Board will not hesitate to follow these procedures and require their enforcement"); *Sierra Club, The Mono Lake Committee*, 79 IBLA 240, 249 (1984) ("BLM instruction memoranda and BLM organic act directives are binding on BLM.") (citations omitted). Information Bulletins are also used to "call attention to existing policy" and to disseminate information to BLM employees, transmit publications, call attention to existing policy, request review of draft documents, etc. BLM Manual 1220.13D (Records and Information Management) (on file with authors).

³⁷ See Information Bulletin No. UT-2002-008, *supra* note 37 at 3.

³⁸ See U.S. Department of Interior Bureau of Land Management Instruction Memorandum No. 2002-008, *Documentation for Actions Involving Lands with Wilderness Concerns* (on file with authors).

*derstand that when an oil and gas lease parcel or when an APD comes in the door, that this work is their No. 1 priority.*³⁹

Later in 2001, BLM's Washington, D.C. headquarters issued an Instruction Memorandum that required agency staff to prepare a "Statement of Adverse Energy Impact" to justify and explain an agency decision that did not approve in part or in whole an energy-related project.⁴⁰ At least one of these Adverse Energy Statements has been prepared by Utah BLM staff when a field office decided not to sell a number of oil and gas leases that conflicted with a citizens' proposed wilderness area.⁴¹ In June of 2002 the Southern Utah Wilderness Alliance submitted a request under the Freedom of Information Act of copies of all Adverse Energy Statements submitted by Utah BLM field offices.⁴² In its response, Utah BLM stated that no such Statements had been prepared pending forthcoming guidance from the BLM's Washington, D.C., headquarters office.⁴³ This guidance has never been issued.

2. *Implementing The Bush Energy Plan In Utah*

The first two years of the Bush Administration's early policy had had significant implications for Utah's Public Lands. The on-the-ground implications in Utah of the first two years of the Bush Administration's energy policy have been significant.⁴⁴ Indeed, across much of eastern Utah's public lands, seismic exploration testing and leasing has become common place, and with the green light from Washington, D.C., Utah BLM has pursued an aggressive policy of expediting and approving both

³⁹ *Id.* at 12-13 (emphasis added). The "No. 1 priority" memorandum, as it has come to be known, epitomizes the Bush Administration's unbalanced approach to public lands management. See Eric Pianin, *Judge Halts Utah Oil Project*, WASH. POST, Nov. 1, 2002 at A3 ("A Jan. 4 memorandum from the [BLM] to its field offices said the Administration 'has assigned a high priority to oil and gas exploration and production in this country,' and spelled out dozens ways to expedite permit applications for energy exploration in Utah."). See also Isrealson, *supra* note 26; Egan, *supra* note 26; *Landscapes Under Siege*, *supra* note 4 (discussing "No. 1 priority" memo and stating that "[w]ith pressure like this, it is little wonder that Utah's land managers are moving so fast that they trip over the law").

⁴⁰ U. S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2002-53, *Preparation of a Statement of Adverse Energy Impact* (Dec. 12, 2001).

⁴¹ See Memorandum, from Acting Price field office manager Thomas Rasmussen to State Director, Jan. 11, 2002.

⁴² See Freedom of Information Act Request from Stephen Bloch, Southern Utah Wilderness Alliance to Sally Wisely, Bureau of Land Management (May 30, 2002) (on file with authors).

⁴³ See Letter from Sally Wisely, Bureau of Land Management to Stephen Bloch, Southern Utah Wilderness Alliance (June 21, 2002) (on file with authors). See also Information Bulletin No.2002-061, *Workshop on Statement of Adverse Energy Impact* (Feb. 28, 2002) (on file with authors). This February information bulletin included a four page "questions and answers" for the preparation of Statement of Adverse Energy Impact. *Id.*

⁴⁴ See, e.g., *supra* note 26.

484 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

oil and gas exploration and leasing across Utah's most sensitive lands, including those proposed for wilderness designation.⁴⁵ This section describes how the conservation community has responded to BLM's unbridled actions.⁴⁶

a. Expedited Oil and Gas Exploration

Oil and gas seismic exploration is the process by which private third party contractors, typically, but not always, acting on behalf of federal lessees or private landowners, probe the subsurface for oil and gas resources.⁴⁷ Though Utah has seen periods of high interest in seismic exploration in the past,⁴⁸ the scope and intensity of these projects has reached a crescendo under the Bush Administration.⁴⁹ Just since 2000, Utah BLM has approved or is considering nine separate seismic exploration projects across eastern Utah, totaling over 2.1 million acres of primarily federal lands.⁵⁰ Of these nine projects, six have or would involve surface disturbing activities on lands proposed for wilderness designation in ARWA.

⁴⁵ See *Can the Courts Save Wilderness?* *Supra* note 4. See also *Undermining Environmental Laws*, THE N. Y. TIMES, Sept. 30, 2002, at A; *Landscapes Under Siege*, *supra* note 4.

⁴⁶ Notably, however, this section will not focus on BLM's near record-setting pace of approving oil and gas drilling in northeastern Utah's highly productive Uintah Basin. See Fahys, *supra* note 26 (discussing energy boom in eastern Utah). Because the vast majority of this drilling is taking place on lands that have not been proposed for wilderness, conservationists in Utah only challenged a single drilling permit in the Uintah Basin between 2000-02, the one that was proposed to take place on wilderness quality lands. Nevertheless, the high intensity of oil and gas activities have prompted conservationists to petition the United States Fish and Wildlife Service to protect imperiled plant and animal species that make their home in the greater Uintah Basin. See Greg Burton, *Conservation Groups Petition to Put Flower on Endangered List*, SALT LAKE TRIB., Oct. 10, 2002, at B9; see also Donna Kemp-Spangler, *Plea for Prairie dogs*, DESERT NEWS, July 13, 2002, at B1. At the same time oil and gas exploration and development in the Uintah Basin has dramatically increased, the State of Utah has adopted rules to re-evaluate and reduce the number of species on its "sensitive species list," a list that includes species not currently protected under the federal Endangered Species Act. See Tom Wharton, *New Wildlife Rule Called Threat To Species*, SALT LAKE TRIB. June 14, 2001 at B4.

⁴⁷ See generally 43 C.F.R. part 3150 (discussing onshore oil and gas geophysical exploration).

⁴⁸ A review of the Interior Board of Land Appeals' reported decisions reveals that the last period of intense seismic exploration activity in southern Utah occurred in the late 1980's and early 1990's. See *Southern Utah Wilderness Alliance*, 122 IBLA 334 (1992) (challenging geophysical exploration near Moab, Utah); see also *Southern Utah Wilderness Alliance*, 123 IBLA 13 (1992) (appeal of geophysical exploration in Utah's west desert); *Southern Utah Wilderness Alliance*, 122 IBLA 165 (1992); *Southern Utah Wilderness Alliance*, 114 IBLA 326 (1990) (challenging geophysical exploration in wilderness study area and adjacent public lands).

⁴⁹ Israelson, *supra* note 26.

⁵⁰ See *id.* See also Eric Pianin, *Judge Halts Utah Oil Project*, *supra* note 40; Greg Burton and Brent Israelson, *Federal Lawsuit Puts Oil Exploration Near Book Cliffs on Hold*, SALT LAKE TRIB., Oct. 13, 2002, at B5; Brent Israelson, *BLM Oks Seismic Exploration in Eastern Utah*, SALT LAKE TRIB., Oct. 8, 2002, at D3.

Because of their controversial nature, three of these projects have drawn considerable national attention and have been the subject of federal court litigation: the 1.9 million acre Veritas 2-D seismic exploration project in Utah's wild Book Cliffs; the 23,000 acre Yellow Cat 2-D seismic exploration project located just east of Arches National Park, and the 36,000 acre Veritas Bull Canyon/Big Flat 3-D seismic exploration project located between Canyonlands National Park and Utah's Dead Horse Point State Park.⁵¹

In particular, the so-called Yellow Cat seismic exploration project was on the national stage throughout much of 2002 and stood as a showcase for all that was wrong about the Bush Administration's push to expedite oil and gas projects in the west.⁵² One of the recurring themes throughout all three seismic projects, and highlighted in the Yellow Cat project, was the BLM's rush to approve the seismic projects at the expense of following environmental laws.⁵³ In his decision to remand BLM's flawed Yellow Cat environmental assessment document back to the agency, federal district judge James Robertson stated, "BLM's hurried analysis was not the 'hard look' required by the law."⁵⁴

In all three projects, the BLM put its decisions approving the proposed seismic exploration activity into "full force and effect," thus authorizing the company to begin work immediately forcing conservation groups to seek emergency injunctive relief to try and stop on-the-ground impacts before a challenge to the project could be heard on the merits.⁵⁵

⁵¹ See *Can the Courts Save Wilderness?*, supra note 4; *Environmental Safeguard Law Under Threat?*, National Public Radio, Oct. 14, 2002, available at www.npr.org/programs/atc/features/2002/oct/nepa/index.html (last visited Feb. 7, 2003); Bob Burtman, *Open Season on Open Space*, MOTHER JONES, July/Aug. 2002, at 44; *Landscapes Under Siege*, supra note 4; Egan, supra note 26. Conservation groups unsuccessfully challenged the Bull Canyon/Big Flat project in federal court, see *Southern Utah Wilderness Alliance v. Wisely*, Case No. 01-CV-616J (D. Utah), and have a lawsuit currently pending challenging the Veritas 2-D project. See *Southern Utah Wilderness Alliance v. Norton*, Case No. 02-CV-1118PGC (D. Utah). Another seismic exploration project, the Horse Point 3-D project, also authorized exploration activities within proposed wilderness lands, including a BLM wilderness study area. See *BLM Approves Seismic Exploration*, VERNAL EXPRESS, Nov. 13, 2002. This project was appealed to the Interior Board of Land Appeals, which denied a request to "stay" the project, but has not yet decided the case on its merits. See *Southern Utah Wilderness Alliance*, IBLA 2002-46 (Nov. 26, 2002).

⁵² See *Landscapes Under Siege*, supra note 4. See also Christopher Lee, *Judge Halts Search For Oil at Utah Park*, WASH. POST, Dec. 24, 2002, at A13; Elizabeth Shogren, *More Thorough Review Ordered on Utah Drilling*, THE L.A. TIMES, Dec. 24, 2002, at A10; *Judge Halts Utah Oil Project*, supra note 32; *Undermining Environmental Law*, supra note 37; *Oil Project Is Halted Outside Utah Park*, THE N. Y. TIMES, Feb. 26, 2002, at A; Terry Tempest Williams, *Chewing Up a Fragile Land*, THE N. Y. TIMES, Feb. 21, 2002, at A.

⁵³ See *Southern Utah Wilderness Alliance v. Norton*, 237 F.Supp. 2d. 48, 51 (D. D.C. 2002).

⁵⁴ *Id.* at 50-53. In particular, Judge Robertson held that the BLM violated NEPA when it failed to consider a reasonable range of alternatives. *Id.* Judge Robertson also held that the IBLA fatally erred when it refused to consider evidence submitted by SUWA during the course of its administrative appeal. See *id.* at 52-55.

⁵⁵ *Id.* at 48 (describing the procedural history of the litigation appeal).

486 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

Another recurring theme is the BLM's refusal to comply with NEPA's mandate that the agency "study, develop, and describe" alternatives to the proposed action.⁵⁶ More than a mere procedural hurdle, NEPA's alternative requirement mandates that federal agencies investigate whether there are other, less environmentally impacting means to accomplish the goal of the federal action.⁵⁷ Judge Robertson held that the BLM failed to seriously investigate whether such means existed in the Yellow Cat project,⁵⁸ and conservationists have raised this same argument in their challenge to the 1.9 million acre Veritas 2-D seismic exploration project.⁵⁹

As we noted *supra*, Utah public lands are certainly no strangers to seismic exploration projects. Nevertheless, there is little question that oil and gas companies see this as a prime opportunity to explore public lands with the Administration's explicit stamp of approval, no matter the environmental costs.⁶⁰

b. Oil and Gas Leasing — Proposed Wilderness at Risk

Hand-in-hand with expanded public lands oil and gas exploration has been a substantial increase in Utah BLM's oil and gas leasing program in wilderness quality lands.⁶¹ Required by federal regulation to conduct at least quarterly competitive oil and gas lease sales,⁶² Utah BLM follows an abbreviated NEPA process to approve individual lease

⁵⁶ National Environmental Policy Act of 1969, Amended 1975, Title I § 102(E), 42 U.S.C. § 4332(E). See 40 C.F.R. § 1502.14 (Alternatives including the proposed action) ("This section is the heart of the environmental impact statement). See also *id.* § 1508.9(3)(b) (environmental assessments shall "include a brief discussion . . . of the environmental impacts of the proposed action and alternatives").

⁵⁷ See *Southern Utah Wilderness Alliance*, 2002 WL 31867796, at 50-54.

⁵⁸ *Id.* ("BLM failed to adequately study, develop, and describe appropriate alternatives to recommended courses of action").

⁵⁹ *Southern Utah Wilderness Alliance v. Norton*, 02CV1118-PGC (filed Oct. 10, 2002).

⁶⁰ See Israelsen, *supra* note 26 ("Energy exploration on public lands has become a high priority for the petroleum industry-friendly Bush Administration."). See also Bryner, *supra* note 28, at 400-404 (discussing conflicts between energy exploration and proposed wilderness); Morgan and Nakashima, *supra* note 5 (discussing Administration's policies to expedite oil and gas projects).

⁶¹ BLM is prohibited from selling new oil and gas leases in existing wilderness study areas, see 43 C.F.R. § 3100.0-3(2)(viii), and has taken the informal position that it will not sell leases in areas identified during the 1996-99 inventory of Utah BLM lands that the agency believes have wilderness characteristics. See *supra* note 18 (discussing BLM WIAs). See also *supra* note 16.

⁶² See 43 C.F.R. § 3120.1-2(a). Federal regulations further provide that industry and private individuals, not the BLM, nominate lands for the agency to offer for lease. See *id.* § 3120.3 (nomination process). BLM, however, retains the authority not to offer a particular nominated parcel for lease for a number of reasons, foremost among them being if the agency believes that its underlying land use plan and NEPA analysis are deficient. See U. S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2001-062, *Documentation of Land Use Plan Conformance and National Environmental Policy Act (NEPA) Adequacy* (Dec. 29, 2000) (on file with authors).

parcels for sale.⁶³ During the Clinton Administration, oil and gas leasing on Utah BLM lands was rarely confrontational.⁶⁴ Although BLM increased the total number of oil and gas leases sold, it often refused to sell leases on lands proposed for wilderness designation.⁶⁵ This pattern radically changed under the Bush Administration.⁶⁶

Beginning with the February 2001 oil and gas lease sale and continuing throughout 2001-2, the BLM has established a new *de facto* policy of offering leases in citizen proposed wilderness.⁶⁷ As a result, conservation groups have protested and appealed to the Interior Board of Land Appeals every single Utah BLM oil and gas lease sale since February 2001 when the agency has offered leases in proposed wilderness lands,⁶⁸ and the Interior Board of Land Appeals has five appeals pending before it from the following Utah BLM lease sales: May 2001, September 2001, November 2001, March 2002, and August 2002.⁶⁹

Perhaps unsurprisingly, the legal issues that are at the heart of these leasing appeals, by-in-large, could have been raised during the Clinton-era leasing program. In other words, the BLM was violating the same laws — namely NEPA and the National Historic Preservation Act⁷⁰ — when it sold leases between 1992-2000, but because the agency did not lease in wilderness quality lands, it went unchallenged. As BLM action's under the Bush Administration have shown, however, it intends to continue offering oil and gas leases in Utah's most sensitive places and, as a result, conservationists have and will challenge these leasing deci-

⁶³ See U. S. Department of the Interior, Bureau of Land Management, Instruction Memorandum No. 2001-062, *supra* note 63.

⁶⁴ See *supra* note 4 (referring to Landscapes Under Siege).

⁶⁵ *Id.*

⁶⁶ See Brent Israelsen, *Lawsuit Targets BLM Leases*, SALT LAKE TRIB., Dec. 7, 2001, at D1; Davidson, *supra* note 26; Donna Kemp-Spangler and Lee Davidson, *Wilds group says Bush imperils Utah Lands*, DESERT NEWS, April 20, 2001, at B1; Brent Israelsen, *Panel to Discuss Plans to Increase Drilling for Natural Gas*, SALT LAKE TRIB., March 15, 2001, at D7; Paul Fox, *Battle Looms Over Utah Drilling — Company Racing to Stay Ahead of Enviros*, IDAHO FALLS POST REG., Feb. 5, 2003, available at www.headwaters.org/pr.utahseismic.html (last visited March 3, 2003).

⁶⁷ Specifically, in the roughly 3.4 million acres of lands that the BLM has not yet inventoried for wilderness character, as well as the lands BLM has inventoried but incorrectly concluded that no wilderness character exists. See *supra* note 18 (describing different wilderness quality BLM lands).

⁶⁸ See 43 C.F.R. § 3120.1-3 (describing protest and appeal procedures). See also *id.* § 4.21 (appeal procedures); Instruction Memorandum No. UT 2003-010, *Decision, Protest and Appeal Procedures for Oil and Gas Leasing* (Nov. 12, 2002).

⁶⁹ In addition, SUWA and the Natural Resources Defense Council dismissed a part of their appeal of the September 2001 lease sale and in December 2001 filed a complaint in the federal district court for the District of Columbia that sought to overturn BLM's leasing decision. See *Southern Utah Wilderness Alliance v. Norton*, Civ. No. 01-2518-CKK (filed December 7, 2001). In June 2002, the district court granted the government's motion to transfer this case from the District Court for the District of Columbia to the District of Utah, where it is currently pending. See *Southern Utah Wilderness Alliance v. Norton*, Case No. 2:03cv221 PCC, available at www.pacer.gov.

⁷⁰ 16 U.S.C. §§ 470 et seq (2000).

488 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

sions.⁷¹ The most pivotal legal issue revolves around the long-disputed question of what level of NEPA analysis is appropriate before a federal land management agency can sell and issue oil and gas leases.⁷² Additionally, conservationists have raised a series of other procedural claims questioning whether BLM has taken a “hard look” at the impacts of oil and gas leasing on a variety of resources, including sensitive wildlife, soils, and vegetation.

III. R.S. 2477: A TROJAN HORSE RIDES THE WESTERN RANGE

One of the defining characteristics of the Bush Administration is its penchant for secrecy and its policies on public lands are no exception. The Bush Administration has taken advantage of obscure statutory and regulatory provisions to implement a decided development agenda. This strategy allows the Administration to effect significant rollbacks of public participation opportunities and existing environmental protections while minimizing the potential for timely, well-informed opposition. This strategy also places an enormous burden on conservation groups who must educate the public, media, and law makers about issues that generally do not attract their attention otherwise.

R.S. 2477 could be Exhibit A in this strategy. Congress enacted this law in 1866 as a way to encourage settlers to “construct” infrastructure like highways in the western frontier. It provides, in its entirety, “the right of way for the construction of highways across public lands, not reserved for public uses, is hereby granted.”⁷³ As described below, R.S.

⁷¹ Conservationists in Wyoming have recently had considerable success stopping BLM’s coalbed methane gas leasing program in the Powder River Basin. See *Wyoming Outdoor Council*, 156 IBLA 347, 357 (2002), *reconsideration denied*, 157 IBLA 259 (2002) (holding that BLM violated NEPA when it sold oil and gas leases without sufficient analysis of the unique impacts of coalbed methane gas development).

⁷² Compare *Conner v Burford*, 848 F.2d 1441, 1448-51 (9th Cir. 1988) and *Sierra Club v. Peterson*, 717 F.2d 1409, 1414 (D.C. Cir. 1983) with *Park County Resource Council v. United States Dept. of Agric.*, 817 F.2d 609, 623-24 (10th Cir. 1987). The *Conner* and *Peterson* decisions hold that federal agencies must prepare a pre-leasing environmental impact statement (“EIS”) before they sell oil and gas leases that authorize surface disturbance (known as non-no surface occupancy leases or “non-NSOs”). See *Conner*, 848 F.2d at 1448-51; see also *Peterson*, 717 F.2d at 1414. In contrast, the Tenth Circuit’s *Park County* decision holds that agencies may sell non-NSO leases without a pre-leasing EIS because the application for permit to drill (APD) phase is the more appropriate time for an intensive environmental analysis. See *Park County*, 817 F.2d at 623-24. This circuit split has not been definitively resolved, and although in 1992 the BLM issued an information bulletin stating that it would follow the logic of *Conner* and *Peterson*, the agency has thus far declined to adhere to this requirement of preparing a pre-leasing EIS for non-NSO leases. See Information Bulletin No. 92-198, *Conner v. Burford Decision* (Jan. 21, 1992) (“The simple rule coming out of the *Conner v. Burford* case is that we will comply with NEPA and ESA prior to leasing.”).

⁷³ See 43 U.S.C. § 932, (repealed, FLPMA, Title VII § 706, 43 U.S.C. § 1701 (1976)). Rights of way across federal public land are now granted under the authority of FLPMA Section 503, 43 U.S.C. § 1763. Such grants are made with public participation and environmental review

2477 has become the tool of choice for some western states, counties and off-road vehicle groups in their quest to minimize protection of federal public lands like wilderness, national parks and other ecologically fragile areas.⁷⁴

Now the Bush Administration, in consultation with these latter-day Sagebrush Rebellionists, has jumped on the R.S. 2477 bandwagon. On January 6, 2002, after nearly a year of administrative review and over 18,000 public comments in opposition to its proposal, the DOI issued a new regulation that would make it far easier for claimants to assert that cow paths, abandoned jeep trails, hiking paths and other faint tracks in the desert are actually "county highways."⁷⁵

In essence, the Bush Administration has crafted a strategy that will facilitate the transfer of public lands to anti-wilderness state and local governments using an obscure statute passed in 1866 and repealed 110 years later. This strategy is difficult for the public to understand, involves no charismatic megafauna or single iconic landscape, will entail no public review or environmental studies, and the strategy's full impact on western wilderness may only gradually unfold. For an Administration that prefers to fly low under the radar screen, it is an ideal plan.

Yet it is hard to imagine a policy that could have more of an impact for the nation's public lands treasures. For example, the state of Utah claims that hiking trails in virtually every park in Utah's scenic treasures, like Arches, Zion, Bryce, and Canyonlands National Parks as well as the Grand Staircase-Escalante National Monument, are actually immune from federal protection and management. Additionally, the State of Utah and a number of rural counties have asserted at least 10,000⁷⁶ and as many as 20,000⁷⁷ R.S. 2477 claims throughout national parks, wilderness areas, proposed wilderness areas, and critical wildlife habitat. Most of these are abandoned mining trails, dry stream bottoms, off-road vehicle routes, and some are not even visible on the ground.⁷⁸ The vast majority

under the NEPA, 42 U.S.C. § 4332 (1969). Further, "the Secretary concerned shall take into consideration national and State land use policies, environmental quality, economic efficiency, national security, safety and good engineering and technological practices" in deciding whether to issue rights of way. 43 U.S.C. § 1763.

⁷⁴ See *infra* notes 75-83 and accompanying text.

⁷⁵ 68 Fed. Reg. No. 3, pp. 494-503 (Jan. 6, 2003).

⁷⁶ Testimony of Barbara Hjelle on behalf of the Utah Association of Counties presented before the House Subcommittee On National Parks, Forests and Lands (March 16, 1995)(the ten southern Utah counties possess roughly 9,900 2477 right-of-ways). Note: there are a total of 29 counties in Utah.

⁷⁷ Personal communication with Ted Stephenson of the Utah State Office of the Bureau of Land Management, Jan. 20, 2003.

⁷⁸ See AOL MEMBER SITE, available at www.members@aol.com/gshiker999/index.html (last visited March 3, 2003) (provides photographs and descriptions of R.S. 2477 claims in Utah).

490 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

have never been maintained or constructed and these routes may be granted to the state with little public say.

The state of Utah and the DOI have had extensive closed-door discussions about a broad “settlement” by which Utah could receive thousands of R.S. 2477 claims. Both parties refuse to disclose the location and identity of these so-called state highways to the public, claiming that they are protected by a litigation privilege.⁷⁹

The R.S. 2477 movement has spread beyond Utah. In California, for example, San Bernardino County has begun the process of compiling its R.S. 2477 claims.⁸⁰ With its review eighty percent complete, the county has thus far claimed 4,986 miles of “highways”, 2,567 of which are in the Mojave National Preserve, protected by the California Desert Protection Act of 1994.⁸¹ In Colorado, Moffatt County officials have claimed a spiderweb of trails in Dinosaur National Monument.⁸² In Alaska, the state has claimed that nearly 900,000 miles of section lines (used for survey purposes) with no apparent surface manifestation, are R.S. 2477 highways.⁸³

These claims all have one characteristic in common: they are used as ammunition in the battle against wilderness designation, land preservation and against attempts to regulate the proliferation of off-road vehicles on the public lands.

A. STATUTORY BACKGROUND

There is no legislative history to provide background on the meaning of the key terms of the statute, like “highway” and “construction”, but RS 2477 only makes sense in light of the other land grant statutes enacted at about the same time.⁸⁴ In other words, Congress would not

See also Earthjustice Website, available at www.earthjustice.org/news/display.html?ID=522 (last visited March 3, 2003). (provides photographs and descriptions of R.S. 2477 claims in Utah).

⁷⁹ See *Open Road Talks*, SALT LAKE TRIB., June 6, 2002 at A20.

⁸⁰ See *Bush Opens Way for Counties and States to Claim Wilderness Roads*, LOS ANGELES TIMES, Jan. 21, 2003 at B12.

⁸¹ *Id.* Policy could allow vehicles into vast areas of wilderness, some in national parks, Critics fear harm by miners, off-roaders and others, Julie Cart A1. See also California Wilderness Coalition, Bogus road claims threaten Mojave National Preserve and many desert wilderness areas, available at www.calwild.org/campaigns/rs2477.php (last visited Feb. 7, 2003). The California Wilderness Coalition has documented R.S. 2477 claims in Death Valley National Park, Joshua Tree National Park, Mojave National Preserve, eleven wilderness areas; and numerous other ecologically significant landscapes like proposed wilderness areas and areas of critical environmental concern. *Id.*

⁸² *Road Resolution Adopted-Environmental Groups, Government Agencies Oppose County Move*. By Josh Nichols, Monday, Jan. 13, 2003, Craig Daily Press (on file with authors).

⁸³ *Id.*

⁸⁴ The Mining Act of 1872, 30 U.S.C. §§ 522 et seq. (granting fee simple to miners in exchange for the development of mineral resources); the Desert Lands Act of 1877, 43 U.S.C. §§321 et seq. (granting fee simple to settlers in exchange for irrigating desert lands); the Homestead Act of

likely have wanted to give away vast tracts of federal land in exchange for the haphazard wanderings of prospectors or other frontier-era travelers. Instead, it specifically granted a right-of-way for the "construction" of "highways" across unreserved public lands. As in other land grant statutes in which claimants obtain land in exchange for building a homestead, irrigating the desert, or developing a mine, Congress expected claimants to work for the land.

After its passage in 1866, the statute received little attention. There are a number of cases in which private parties contested R.S. 2477 claims which allegedly arose while the property was once in the public domain.⁸⁵ Disputes in which local governments, however, claimed rights-of-ways against the federal government were relatively rare until the mid-1980s. Meanwhile, Congress repealed R.S. 2477 in 1976, subject to valid existing rights, and instituted a new procedure for the issuance of rights-of-ways across public lands in which environmental impacts and public input are both weighed.⁸⁶

The circumstance that breathed new life into the dead law was the emergence of substantial wilderness proposals for BLM lands, developed by citizen activists and introduced in Congress. These proposals sprang from Congress's interest in wilderness preservation for primarily arid, desert lands of the west whose wilderness potential had, prior to 1976, been overlooked.⁸⁷ Section 603 of FLPMA⁸⁸ required the BLM to inventory all lands, which qualify for wilderness designation under the Wilderness Act of 1964. The Wilderness Act poetically describes eligible lands as those tracts of public land 5,000 acres or more in size, "where the earth and its community of life are untrammelled by man, where man is a visitor who does not remain . . . retaining its primeval character and influence, without permanent improvements or human habitation . . ."⁸⁹

Importantly, lands marred by roads do not qualify. Therein lies the motivation for the proliferation of R.S. 2477 claims across the west. However, while it appears that the popularity of wilderness proposals across the west served as the initial catalyst for the widespread assertion

1877, 43 U.S.C. §§ 161 et seq. (granting fee simple in exchange for the development of farms and ranches). These statutes were repealed by the Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701 et seq. (1976).

⁸⁵ See Lockhart, Federal Statutory Grants are not Placeholders for Manipulated State Law: A response to Ms. Itjelle, 14 J. ENERGY, NAT. RES. & ENVTL. L. 326 (1994). Professor Lockhart notes that in several state actions local governments sought R.S. 2477 claims across privately held land over the owner's objections. *Id.* at 324.

⁸⁶ See generally *supra* note 84.

⁸⁷ The Wilderness Act of 1964 offered protection only to Forest Service lands.

⁸⁸ See 43 U.S.C. § 1782(c) (2000).

⁸⁹ The Wilderness Act of 1964, 16 U.S.C. § 1131(c) (2000).

492 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

of R.S. 2477 claims, counties have expanded the reach of their claimed rights, asserted that they have “highways” in the form of trails and paths in national parks, national monuments, wildlife refuges and other ecologically fragile landscapes.⁹⁰ Counties have even asserted that they own rights-of-ways across private property, and in one Utah case, repeatedly cut the locks to the entryway to a ranch, opening the door for destructive off-road vehicle access.⁹¹

IV. SECRETARY BABBITT’S ATTEMPT TO RESOLVE RS 2477 DISPUTES

President Clinton’s Secretary of Interior Bruce Babbitt, was aware of the threat that R.S. 2477 posed to wilderness areas, national parks, and other protected landscapes, and undertook an energetic effort to put the issue to rest. In 1994, in response to a request by Congress, the DOI conducted an exhaustive study of the issue and concluded that comprehensive regulations were the most effective way to address the problem of ever-expanding R.S. 2477 claims on the federal lands.⁹² The report specifically focused on the need to define the terms “construction” and “highway” as used in R.S. 2477.⁹³

At about the same time, the Congressional Research Service (“CRS”) issued a report concluding that R.S. 2477 could disrupt management of the federal lands and disqualify areas from protection under the Wilderness Act.⁹⁴ The CRS Report concluded “while the issue is not free from doubt, R.S. 2477 seems to have been intended to grant rights of way for ‘highways’ in the sense of principal or significant roads.”⁹⁵

Ultimately, in 1994, the DOI issued proposed regulations which built on the existing studies, and which would have taken enormous forward strides in resolving the R.S. 2477 controversy.⁹⁶ Specifically, the proposed regulation contained three key elements. First, it required claimants to provide notice to the BLM of their right-of-way assertions within two years, eliminating the potential for claimants to undermine

⁹⁰ See, e.g., *Southern Utah Wilderness Alliance v. Dabney*, 222 F.3d 819 (10th Cir. 2000).

⁹¹ Personal communication with property owner in Kane County, Utah, 2000.

⁹² United States Department of the Interior, Report to Congress on R.S. 2477, *The History and Management of R.S. 2477 Rights-of-ways Claims on Federal and Other Lands*, June 1993 (on file with authors).

⁹³ *Id.* at 2 of introductory letter from Bruce Babbitt to Sidney R. Yates, Chairman, Subcommittee on Interior Committee on Appropriations, U.S. House of Representatives (on file with authors).

⁹⁴ CRS REPORT FOR CONGRESS: Highway Rights of Way: The Controversy Over Claims Under R.S. 2477, January 15, 1993, Updated April 28, 1993, Congressional Research Service, The Library of Congress (on file with authors).

⁹⁵ *Id.*

⁹⁶ 59 Fed. Reg. 39216 (Aug. 1, 1994).

the public lands management and protection in perpetuity with “surprise” claims.⁹⁷ Second, it defined “construction” as “an intentional physical act . . . intended to, and that accomplished, preparation of a durable, observable, physical modification of land for use by highway traffic.”⁹⁸ Third, it defined highway as a “thoroughfare that is currently and was prior to the latest available date used by the public, without discrimination against any individual or group, for the passage of vehicles carrying people or goods from place to place.”⁹⁹

Predictably, the proposed regulations were not popular with the counties who had always argued that R.S. 2477 claims arose simply by the passage of vehicles alone, and that they were not required to provide BLM any notice of their claims.¹⁰⁰ This position gave the counties maximum flexibility to assert previously unknown R.S. 2477s whenever lands were proposed for protection.¹⁰¹ As a result, counties marshaled the support of the Alaska and Utah Congressional delegations, which attached a rider to a spending bill that imposed a moratorium on the implementation of the proposed regulations.¹⁰² That was the end of the proposed regulations, until the Bush Administration finalized rules that veered abruptly in the opposite direction.

V. LITIGATION BEGINS TO BETTER DEFINE R.S. 2477 RIGHTS

Attempts to broaden the reach of R.S. 2477 run headlong into developing case law. These cases grounded in several opinions with roots in the early 20th Century, began to take shape in the 1980s and 1990s. First, to provide analytical context, federal land grant statutes such as R.S. 2477 are uniformly construed “favorably to the government . . .

⁹⁷ *Id.*

⁹⁸ 59 Fed. Reg. 39225(f).

⁹⁹ *Id.*

¹⁰⁰ See generally Utah Association of Counties Sponsored Website, available at www.rs2477roads.com/2simpexp.html (last visited March 3, 2003) (discussion provided by sponsorship from the Utah Association of Counties).

¹⁰¹ For example, in San Juan County, Utah, county officials graded faint jeep trails in an area that the BLM was reviewing to determine if it had wilderness character and warranted protection. (document on file with author). None of the routes had even been graded, constructed or maintained before. (document on file with author).

¹⁰² Other bills on both sides of the R.S. 2477 debate have been introduced in Congress. In 1991, Congressman Bruce Vento (D-Minn.) introduced a bill that would give claimants three years, until 1994, to provide notice of their claims and supporting evidence of construction, maintenance, and the existence of a highway. H.R. 1096. That bill passed the House, but did not pass the Senate. In 1995, Congressman Hansen of Utah introduced a bill that would, among other things, place the burden on the federal government to *disprove* the existence of rights-of-ways within two years or they would be deemed valid — an impossible task given that Utah has at least 10,000 and as many as 20,000 R.S. 2477 claims. H.R. 2081, S 1425 (introduced in 1996 by Sen. Murkowski (R-AK), Stevens (R-AL), Hatch (R-VT) and Bennett (R-VT)). That bill did not pass the House.

494 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

[N]othing passes but what is conveyed in clear and explicit language — inferences being resolve not against but for the government.”¹⁰³ Further judicial interpretation of R.S. 2477 must adhere to the statute’s plain language and give every word in the statute meaningful, operative effect.¹⁰⁴ Thus, the words “construction” and “highway” in particular, as used in R.S. 2477, must be read to require some sort of act of construction, and secondly, a route or “high road” to public destinations.¹⁰⁵

One of the most important R.S. 2477 cases is also one of the oldest. In 1896, the Supreme Court decided *Bear Lake & River Waterworks and Irrigation Co. v. Garland*,¹⁰⁶ in which it interpreted a parallel provision of the 1866 Mining Act which granted rights-of-ways for the “construction” of canals. The court held that no rights vested against the government under this statute’s “construction” requirement without the “performance of any labor.”¹⁰⁷ “Until the completion of this work, or, in other words, until the *performance of the condition upon which the right . . . is based*, the person taking possession has no title, legal or equitable, as against the government.”¹⁰⁸ Given the principle of statutory construction that “when the same words are used in different sections of the law, they will be given the same meaning,”¹⁰⁹ the Supreme Court’s decision in *Bear Lake* is highly influential — if not determinative — in the interpretation of the “construction” requirement of R.S. 2477.

Nearly seventy-five years later, case law began to frame the parameters of the R.S. 2477 elements further. While many addressed issues that

¹⁰³ *Caldwell v. United States*, 250 U.S. 14, 20 (1919). See also *Missouri, Kan. & Tex Ry. Co. v. Kansas Pac. Ry. Co.*, 97 U.S. 491, 497 (1878).

¹⁰⁴ See *Platt v. Union Pac. R.R. Co.*, 99 U.S. 48, 58 (refusing to interpret a federal land grant in a manner rendering words superfluous); *Finley v. United States*, 123 F.3d 1342, 1347 (10th Cir. 1997) (“Absent a clearly expressed legislative intent to the contrary, that language must . . . be regarded as conclusive”).

¹⁰⁵ These terms were commonly used as such at about the time Congress enacted R.S. 2477. Noah Webster, *American Dictionary of the English Language* (1865) defined “construction” as “1. The act of construction; the act of building, or of devising and forming; fabrication; composition. 2. The manner of putting together the parts of anything so as to give the whole its peculiar form; structure; conformation.”

Moreover, this definition is consistent with common highway construction practices at the time. An 1837 treatise by a leading authority on highway construction addressed drainage, materials, grading and laying a foundation. Frederick W. Simms, *A Treatise on the Principles and Practices of Leveling, Showings its Application to Purposes of Civil Engineering Particularly in the Construction of Roads 102-107* (1837). Surfaces consisted of wooden planks, broken stones or beaten earth. *Id.*

Similarly, Utah highway construction practices in the mid-19th century involved detailed surveys and plans, and the building of bridges, aqueducts, culverts, turnpikes and other fixtures. Ezra C. Knowlton, *History of Highway Development in Utah* 11-12 (Utah State Department of Highways 1964).

¹⁰⁶ 164 U.S. 1 (1896).

¹⁰⁷ *Id.* at 18.

¹⁰⁸ *Id.* at 19 (emphasis added).

¹⁰⁹ *In re Harline*, 950 F.2d 669, 674 (10th Cir. 1991).

were peripheral to the key definitional questions upon which the existence of a valid R.S. 2477 claim is based,¹¹⁰ the bottom line is that no federal case has ever, upon presentation of a case in which the construction issue was squarely measured by the facts, held that a claimant may gain rights to federal public lands simply by the passage of vehicles alone — the characteristic that most of the controversial claims throughout the west hold in common.

In 2001, the U.S. District Court for the District of Utah handed down a watershed decision that clarified each of the R.S. 2477 elements in the context of sixteen claims to rights-of-ways in spectacularly scenic yet politically contentious places like the Grand Staircase-Escalante National Monument, in wilderness study areas, and in areas proposed for wilderness designation.¹¹¹ In *Southern Utah Wilderness Alliance v. Bureau of Land Management*,¹¹² the U.S. District Court for the District of Utah upheld the BLM's administrative determinations that all but one of the alleged rights of way claims failed to meet the R.S. 2477 requirements.¹¹³ More specifically, the court found that the BLM's requirement that the routes be "constructed" was consistent with R.S. 2477 and that routes that had been created by passage of vehicles alone did not meet the statutory standard.¹¹⁴ The court also upheld the BLM's determination that routes that vanish in the desert with no apparent destination did not amount to "highways," and lastly, that a 1906 coal withdrawal was a "reservation" within the meaning of R.S. 2477 and, accordingly, routes that were not constructed highways as of the date of the reservation were not valid R.S. 2477 claims.¹¹⁵

VI. DOI AND UTAH GO AROUND THE CASE LAW: SECRET NEGOTIATIONS AND OBSCURE NEW REGULATIONS

In June 2000, almost a year before the court handed down its decision in *SUWA v. BLM*, the State of Utah sent the DOI a notice of intent to

¹¹⁰ See, e.g., *Central Pacific RR v. Alameda County*, 284 U.S. 463 (1932) (court found R.S. 2477 right-of-way where route first developed by passage of vehicles had later been constructed); *U.S. v. Vogler*, 859 F.2d 638 (9th Cir. 1988), cert denied 488 U.S. 1006 (1989) (Park Service had authority to regulate R.S. 2477 claim); *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988) (decision on scope of R.S. 2477 right-of-way); *U.S. v. Gates of the Mountains Lakeshore Homes, Inc.*, 732 F.2d 1411 (9th Cir. 1984) (state law could not authorize power lines to be placed in R.S. 2477 right-of-way).

¹¹¹ 147 F. Supp. 2d 1130 (D. Utah 2001).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See *id.* at 1138-1143.

¹¹⁵ See *id.* at 1143-1145.

496 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

sue under the Quiet Title Act¹¹⁶ to establish its alleged rights to about one thousand R.S. 2477 rights-of-ways. With the election of the Bush Administration and the hope that the new regime would be friendlier to the establishment of these claims, combined with the Campbell decision in *SUWA v. BLM*, the state of Utah abandoned its litigation plan and linked arms with newfound allies in the Bush Administration.

They were right. Shortly after the new DOI assumed its responsibilities, it began secret negotiations with the State of Utah and the counties on their R.S. 2477 claims.¹¹⁷ Any “settlement” reached between DOI and the state and counties would not necessarily be bound by the *SUWA v. BLM* decision; the parties could aggressively pursue thousands of claims for hiking trails, jeep tracks, and other faint routes that had never seen the blade of a road grader.

On January 6, 2002, the DOI issued new regulations that would make it easier for it to transfer R.S. 2477 rights-of-ways to states and counties.¹¹⁸ It did so by amending an obscuring regulation implementing an equally obscure provision of FLPMA with a decidedly uninteresting title regarding relating to the “disclaimer of interest in lands.”¹¹⁹ This disclaimer provision, set forth in FLPMA Section 315, authorizes the Secretary of Interior to issue a disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.¹²⁰ Section 315 (c) provides that the disclaimer “shall have the same effect as a quit-claim deed from the United States.”¹²¹

¹¹⁶ 28 U.S.C. 2409a(e) (2000). The Quiet Title Act, 28 U.S.C. 2409a provides that “[a]ny civil action under this section, except for an action brought by a state, will be barred unless it is commenced within twelve years of the date upon which it accrued. Such action will be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.” *Id.* at (g).

¹¹⁷ See Opinion “Open Road Talks”, SALT LAKE TRIB. (June 6, 2002) (“to avoid . . . contention”, Utah and the DOI “are currently negotiating the issue [R.S. 2477] behind closed doors”).

¹¹⁸ 68 Fed. Reg. 494-503 (January 6, 2002) (amending 43 C.F.R. Part 1860).

¹¹⁹ FLPMA Title III §315, 43 U.S.C. § 1745 (1976).

¹²⁰ *Id.*

¹²¹ The following statutory requirements must be met before the Secretary can issue a disclaimer:

1. An applicant must file a written application with the Secretary.
2. The Secretary must publish a notice in the Federal Register of the application setting forth the grounds supporting it at least ninety days before the issuance of the disclaimer.
3. The applicant must pay the Secretary the administrative costs associated with issuance of the disclaimer. The Secretary determines the amount of the costs.
4. The Secretary must consult with any affected Federal agency.

The original regulations, promulgated in 1984, provided that only a "present owner of record" could apply for such a disclaimer of interest, and that the claimant was bound by a twelve-year statute of limitations.¹²² The revisions do two important things: first, they eliminate the requirement that the claimant be a "present owner of record," and open the door to both states and counties to make claims;¹²³ and second, they eliminate the twelve-year statute of limitations.¹²⁴

Referring modestly to the rules as simply "technical changes," the Department apparently sought to downplay the broad impact that these revisions pose for federal lands in national parks, wildlife areas, wildlife refuges and other fragile landscapes.¹²⁵ Many are worried, however, that the Department that has raised red flags by its secretive approach and pro-development policies will use these revisions as the jumping off point in a long-term strategy that will ultimately result in the transfer of hundreds or thousands of R.S. 2477 claims to anti-conservation interests.¹²⁶

There are numerous reasons to be concerned about the impacts of this rule to federal public lands. Easing the ability of claimants to obtain rights-of-ways without environmental or public review can only do harm. For example:

- The BLM manages the public lands according to resource management plans that are in effect for 15 years or more and are de-

¹²² 43 C.F.R. § 1864.1-3

¹²³ The rule now reads:
Sec. 1864.1-1 Filing of application.

(a) Any entity claiming title to lands may file an application to have a disclaimer of interest issued if there is reason to believe that a cloud exists on the title to the lands as a result of a claim or potential claim of the United States and that such lands are not subject to any valid claim of the United States. 43 C.F.R. § 1864.1-1 (2003).

Sec. 1864.0-5 Definitions, now provides:

(h) State means "the state and any of its creations including any governmental instrumentality within a state, including cities, counties, or other official local governmental entities." 43 C.F.R. § 1864.0-5 (2003).

The comments accompanying the rule further broaden the class of potential claimants to include "among others, a state, corporation, county, or a single individual." This troubling expansion leaves open the possibility that off-road vehicle groups, whose activities have left significant damage to the public lands and who are notoriously anti-wilderness, will assert R.S. 2477 claims.

¹²⁴ See 68 Fed. Reg. at pp. 494-503.

¹²⁵ *Id.*

¹²⁶ The Department acknowledges that the new rules apply to R.S. 2477 claims. "For example, after adjudicating the claim, BLM may issue a recordable disclaimer of interest to disclaim the United States' interest in a highway right-of-way under R.S. 2477." 68 Fed. Reg. at 498.

498 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3]

veloped through lengthy study, balancing of uses and public participation.¹²⁷ The overlay of thousands of R.S. 2477 claims, heretofore unacknowledged, would undermine the management goals and common assumptions that form the basis for these plans.

- Once rights-of-ways claims are validated, they are a permanent fixture on the public land. They cannot be changed or modified to meet countervailing public demands for resources that are adversely harmed by the new “highway.”
- Granting rights-of-ways across public lands is an open invitation to off-road vehicle (“ORV”) riders, many of whom have bridled under the BLM’s recent attempts to regulate their use of the public lands. ORVs leave water pollution, degraded riparian habitat, loss of wildlife and fragmented wildlife habitat, soil erosion and other impacts in their parties. Excessive R.S. 2477 claims would institutionalize these abusive uses just as the BLM is starting to assert its management responsibilities in this area. Indeed, in one case, ORV groups and the State of Utah intervened in a suit challenging the BLM’s failure to protect lands from ORVs. They argued that the court could do nothing to stop the ORV use since the contested routes were all R.S. 2477 “highways.”¹²⁸
- Counties can use R.S. 2477 to challenge restrictions on ORV and other vehicle use in National Parks,¹²⁹ and even to pave highways in fragile park areas.
- As noted above, R.S. 2477 claims are frequently made to disqualify lands from protection as designated wilderness areas.
- As the DOI puts it, “a disclaimer would merely provide evidence of an existing title. Because the state already owns such lands, there would be no need for environmental studies.”¹³⁰ In other words, the individual and cumulative impacts of recognizing thousands of R.S. 2477 claims would never be analyzed, and there would be no opportunity for public input under NEPA.

There are potential legal barriers to the Department’s application of the rule. For example, it appears to run afoul of a moratorium Congress imposed on the implementation of any “final rule or regulation of any agency of the Federal Government pertaining to the recognition, management, or validity of a right-of- way pursuant to Revised Statute 2477

¹²⁷ 43 U.S.C. 1712 (2000); 43 C.F.R. §§ 1600 et seq. (2000).

¹²⁸ *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2002).

¹²⁹ *See Southern Utah Wilderness Alliance v. Dabney*, *supra* note 91.

¹³⁰ 68 Fed. Reg. at 498.

(43 U.S.C. 932) . . . unless expressly authorized by an Act of Congress subsequent to the date of enactment of this Act.”¹³¹

Moreover, there are serious questions about whether Congress intended that Section 315 be utilized as a mechanism to lands transfers that pose the threat of undermining the planning and management strategy that it sought to impose on federal lands.¹³²

Despite the potentially fatal flaws inherent in the new disclaimer rule, it is difficult to predict whether a court will ultimately hold the rule unlawful and prevent its implementation. Thus, the disclaimer rule, and the philosophy of the Bush Administration and its DOI on this issue, bode ill for the future preservation of our unique and scenic western landscapes.

VII. CONCLUSION

“The courts may be the last best hope for stopping the Administration’s assault on the environment.”¹³³

Dark days are here. With a Republican Administration and a Congress largely friendly to extractive industry and local governments, coupled with war in the Middle East and the ongoing war against terrorism — which act as ill-conceived excuses to drill for oil in public lands, Utah’s Redrock Wilderness has never been more at risk. Indeed, hardly a day goes by without word of a drilling permit just filed, an ongoing seismic exploration project that strayed into a proposed wilderness area, or a southern Utah county that is saber rattling about long-forgotten county “roads” it must maintain. Some projects nibble at the edges of wilderness quality lands, other strike at their heart, seeking to forever

¹³¹ Section 108 of the Fiscal Year 1997 Department of the Interior and Related Agencies Appropriations Act (Interior Appropriations Act, 1997) (Pub. L. 104-208, 110 Stat. 3009, 3009-200 (1996)). In 1997, the General Counsel of the General Accounting Office (GAO) issued an opinion concluding that section 108 is permanent law and did not expire at the end of the 1997 fiscal year (Letter of Robert P. Murphy, General Counsel, GAO, B-277719, at 1 (Aug. 20, 1997) (on file with the authors)).

¹³² See FLPMA Title II § 201, 43 U.S.C. § 1711 (requiring the Secretary to “prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values” in a way that “reflect[s] changes in conditions and to identify new and emerging resource and other values”). See also *id.* § 1712 (requiring the preparation of resource management plans based on the comprehensive inventories, using a “systematic interdisciplinary approach to achieve integrated consideration of . . . resources” and giving priority to the designation of areas of critical environmental concern); *Id.* § 1762-1764. (providing for the orderly development of roads based on environmental and transportation concerns).

¹³³ *Can the Courts Save Wilderness?*, *supra* note 2.

500 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33:3

disqualify them from the potential of Congressional wilderness designation.

As the editorial quoted above suggests, in a challenging political environment like this, conservationists are counting on a federal judiciary that is willing to enforce environmental laws when the Administration's excesses are exposed. What we have seen so far is modestly encouraging. As discussed *supra*, a federal court recently overturned a tendrill of the Administration's energy plan — the Yellow Cat seismic project — but at the same time more projects appeared on the horizon. Likewise, in a landmark decision a federal judge upheld a BLM determination that county RS 2477 road claims were invalid, though at the same time the Administration has met behind closed doors with the State of Utah to settle over 10,000 of the State's claims, and has issued a rule that would facilitate such a process.

Is litigation the only answer to the Bush Administration? No. Does it provide a vehicle to maintain the status quo — that is, the wilderness quality of lands proposed in America's Redrock Wilderness Act? Yes. When partnered with an aggressive on-the-ground presence, coherent, rational policy analysis, a strong public outreach program, and an ability to educate members of Congress, litigation is a powerful tool to respond and challenge this Administration's efforts.

In Utah, at bottom, it is the land and its resources that we are working to protect. Spend a few days (or better yet a few years) roaming Utah's magnificent redrock country, meeting the land on its terms, and you will know what we're talking about. This wilderness landscape is a national treasure that deserves our efforts to protect it from short-term schemes (and schemers) and long-term degradation; we plan to keep doing just that. We are in for quite a ride.

VIII. POSTSCRIPT

On April 14, 2003, a federal district court judge in Salt Lake City approved a stunning settlement between Secretary Norton's Interior Department and the State of Utah that purported to relinquish the Interior Department's authority to identify additional wilderness quality lands above and beyond FLPMA Section 603 WSAs.¹³⁴ In addition, as part of the settlement agreement the BLM is required to withdraw its 2001 Wilderness Inventory Handbook and several of the Instruction Memoranda and Information Bulletins cited in this article, as

¹³⁴ See *State of Utah v. Norton*, 2:96CV870B (Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint). See also *supra* note 18 (describing BLM authority under FLPMA sections 202 and 603 to identify and designate wilderness study areas).

well as to revise the scope of its ongoing land use planning processes in the Vernal, Price, and Richfield field offices to exclude any mention of additional wilderness designation.¹³⁵ Remarkably, the vehicle for this settlement was a seven year-old lawsuit that had been entirely inactive since 1998, and in which the plaintiffs filed a third amended complaint only days before the settlement agreement was filed and approved by the court. Because the terms of the settlement agreement purport to apply throughout the country, conservationists are moving quickly to challenge the settlement on a variety of fronts, although at the time this article went to print, no final decisions or steps had been taken in response.

¹³⁵ See *supra* note 18.