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and
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Testimony on "*The Impact of the Administration's Wild Lands Order on Jobs and Economic Growth.*"
March 1, 2011

On January 18, 2011, President Obama signed an Executive Order entitled "Improving Regulation and Regulatory Review." Section 1(a) of the Order states that,

> Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation. It must be based on the best available science. It must allow for public participation and an open exchange of ideas. It must promote predictability and reduce uncertainty. It must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. It must take into account benefits and costs, both quantitative and qualitative. It must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. It must measure, and seek to improve, the actual results of regulatory requirements.

Not one month earlier, Secretary Ken Salazar signed Secretarial Order 3310 (SO 3310), a document which, even if read in the most favorable light, casts a long shadow across much of our nation's public lands.

To those of us in the West, the paradox of Washington, D.C. is only perpetuated in the schizophrenic, contemporary existence of SO 3310 and the President's order aimed at curbing the very abuses furthered through SO 3310. To us, SO 3310 is typecast for scrutiny under President Obama's January 18, 2011 Executive Order. It risks billions of dollars of private, local, state and federal revenue, threatens much-needed job growth and disregards the custom and culture of our families, communities, states and nation – and does so without even a passing glance at those principles of robust scientific review, public participation and predictability outlined in the President's Executive Order. But such scrutiny does not seem forthcoming.

Certainly, the President should be allowed to hear from his agencies within the timeframes outlined in his Executive Order before we pass final judgment on the sincerity of his effort. Unfortunately, the early rhetoric and recently released guidance

handbooks from the Department of the Interior only underscore a stubborn resolve to defend SO 3310. Thus, those of us that are reliant on Bureau of Land Management lands for our livelihoods and for their multiple-uses must be proactive to underscore our concerns with SO 3310 and the guidance handbooks that go with it and direct both the policymaker and federal bureaucracy to a more thoughtful course.

At its core, the legal justification for SO 3310 and the guidance that goes with it enlist a healthy dose of bootstrapping. In the absence of legal authority to justify the Secretary's Order, general provisions of the Federal Land Policy and Management Act (FLPMA), the Wilderness Act of 1964 and the National Environmental Policy Act (NEPA) were offered to suggest Congress has endorsed the actions that have been taken. These same references, in particular references to FLPMA's general call to maintain lands in their "natural condition" (43 U.S.C. 1701(a)(8)) and requirements to develop inventories and engage in land use planning (Sections 102(a)(2), 201(a), and 202(c)(4) and (9) and Section 202), were cited to suggest that the BLM's newly minted handbooks (6301, 6302 and 6303) are in accordance with our nation's land use laws. The handbooks also cite to the existence of SO 3310 as added legal justification, essentially completing the circular legal argument.

Such an overly generalized and bootstrapped legal theory does not hold water, however. To begin, the Department of the Interior's use of FLPMA is misplaced and does not tell the whole story, even within the specifically cited provision found at 43 U.S.C. 1701(a)(8). Certainly, there is a discussion of protecting "natural condition," but it is noted in a string of other protections that include managing the public lands to protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values, providing food and habitat for fish and wildlife and domestic animals and providing for outdoor recreation and human occupancy and use. The conjunctive word "and" denotes that each of these considerations must be overlaid on the landscape to determine proper resource allocations.

The use of the inventory and land use planning citations is, in my view, a lawyerly effort at "perfuming of the pig." The public and others can be awed by legal citations, but the offered provisions do nothing more than reiterate a common practice of knowing what you have and making a plan to make the best use of it. The citations in no way justify protections for "lands with wilderness characteristics" or LWCs. Good planners inventory everything before they allocate use. Unfortunately, BLM has not been funded nor has it prioritized the maintenance of baseline data – for any purpose, much less LWCs. To this end, it seems quite peculiar that the Department of the Interior would prioritize what functionally equates to the development of baseline data for "wilderness characteristics" and not even mention the need for baseline information for any other use. To the outside observer, it would seem that "wilderness" will soon be trumping nearly every other consideration, both in terms of funding and protection, when the very

provision cited by the Department to justify LWC inventories and land use planning tied to their protection, clearly requires an understanding (inventory and plan) of all potential uses.

But the bootstrapping by the Department of the Interior is more insidious than simply being overly general. It neglects statutes and long-standing legal precedent that are clearly at odds with SO 3310 and its implementing handbooks, as was clearly outlined in the Wyoming County Commissioners Association comments on SO 3310 dated January 28, 2011 (attached hereto as Attachment A). To put these detailed comments in a somewhat condensed version, only Section 603 of FLPMA allows BLM to manage lands so as to ensure that wilderness characteristics are not impaired. Non-impairment only applies in Wilderness Study Areas (WSAs) – every other tract of BLM land is to be managed so as to not unduly or unnecessarily degrade the resources on those lands.

One might then simply suggest that you merely need to designate new WSAs. That would seemingly be an answer, but the ability to designate new WSAs ended on October 21, 1993, when Congress received the wilderness suitability recommendations required under Section 603 of FLPMA. Clearly, when read together with the Wilderness Act of 1964, Congress wanted to reserve to itself – and only to itself - the authority to create wilderness and WSAs, and this makes sense when one considers the functional effect of a wilderness designation of any sort: it shuts things down.

It also makes sense when you consider the practical reality that "new wilderness" is, in most cases, a fallacy. Little has changed, in terms of the environmental landscape, that would change the inventories completed pursuant to FLPMA prior to 1993. Where the environment has changed, it has most likely moved away from a wilderness condition. Simply put, Mother Nature does not "create" new wilderness in the span of 20 years. She does so either very abruptly with eruptions, earthquakes and floods or very gradually, over hundreds of years. Thus, this present day call to arms to protect wilderness lands is merely an excuse to loop in hundreds of thousands of acres of public land into an overly prescriptive management regime, when in fact, the land in question is no more wilderness than it was in 1964 following the passage of the Wilderness Act or at the conclusion of the FLPMA inventory in 1993. It seems that after 20 years of effort to control land use in other ways, the radical fringe of the environmental movement has once again returned to its old and trusted friend, the wilderness designation, even if it no longer fits in the legal and physical plane of public land management.

Regarding NEPA, I anticipate that the Administration's argument will be that no areas will be declared "wildlands" except through the Resource Management Plan (RMP) planning process, which necessarily includes NEPA. However, this ignores the reality that the required wilderness inventories will immediately and dramatically affect activity on the land even without reaching the point of consideration under the planning process.

Thus, the only way to meet the intent of NEPA is to conduct NEPA analysis on the mandate of SO 3310. As a corollary, BLM deems it necessary to comply with NEPA in the issuance of a grazing permit under the same terms and conditions as an expiring permit, even though that action clearly has no resource impacts. There are undoubtedly numerous other examples, but the clear and proper course is for SO 3310 to undergo prompt and thorough NEPA analysis through a full-fledged Environmental Impact Statement.

A skeptical and calloused view might be that the Department of the Interior is attempting an end-run on Congress by repackaging what we once knew to be a WSA and simply calling it something different. But looking at the guidance used to implement SO 3310, it seems that an end-run is exactly what is being attempted. In fact, the Department has referred to the guidance manuals for SO 3310 as "new wilderness guidance." With wilderness designations being the sole province of Congress and existing WSAs already being protected by a non-impairment standard, what new "wilderness guidance" is truly required and why is BLM issuing it? Further, why do BLM and the Department go out of their way to say that SO 3310 does not create WSAs when the manuals that implement the Secretary's Order use the exact same criteria that were used in 1978 to identify WSAs? The manuals even go so far as to say that the LWCs will be managed under the same legal criteria as WSAs. At some point, if it walks like a duck, talks like a duck and looks like a duck – it is a duck, even if you want to call it a chicken.

Ultimately, SO 3310 is not supported by anything other than itself. Disregarding the clear weight of the law for purposes of argument, one might suggest that, if properly identified, there is no harm in protecting these lands with wilderness characteristics. Such a suggestion ignores two serious problems. First, initial, good-faith efforts at "proper identification" of LWCs by the BLM have been fraught with examples of misidentification. Second, the harm in protecting lands with wilderness characteristics, especially when they are protected under the same legal criteria as WSAs as required in the implementing manuals, is severe and real.

While it would be most instructive to give actual evidence of misidentification of LWCs in specific BLM resource management plan revisions, as cooperating agencies, counties and other cooperators are not permitted to share such "pre-decisional" information. However, speaking in general terms, it has become very apparent during the inventory process that misidentification is real. In specific cases, BLM came to the conclusion that a certain area possessed "wilderness characteristics." In the same, exact geographical area, the county cooperators identified almost 60 miles of two-track roads, almost 11 miles of ATV trails, nearly 2 miles of graded soil, existing oil and gas fields containing 14 oil and gas wells, over 40 miles of fence, 1 mile of water pipeline, 36 reservoirs, 6 water wells, 2 cattleguards and 1 corral chute. Seven, large tracts of state school trust land are interspersed in the area as well, which cannot be made subject to anything but

the management prescriptions set forth by the State Land Board or Legislature, unless the BLM wants to take on the obligation of funding Wyoming's schools going forward.

On a more broad scale, in a specific RMP planning area, almost 20% of the BLM lands were erroneously identified as having wilderness characteristics. In this area, the BLM has identified 56 areas comprising a total of 571,000 acres. Within this area there are 634 miles of roads, of which 518 miles are two track, 442 reservoirs, 296 miles of fence, 569,273 acres of active allotments, 154 range improvements, 10 miles of water pipeline, 17 water wells, 8 oil fields, 68 miles of oil and gas pipeline, 8 active oil and gas wells, 59 plugged and abandoned oil and gas wells, and 248,315 acres (43%) have oil and gas leases.

While the new implementing manuals for SO 3310 might add clarity to the specific planning effort in question, the identification of oil fields, roads and fences is not exactly an exercise in discretion. They either exist or they don't and if they do exist, the word "wilderness" is not an appropriate descriptor.

But assume, again for sake of argument only, that the LWCs in the RMP planning area described previously were properly identified, the question then becomes: what is [t]he Impact of the Administration's Wild Lands Order on Jobs and Economic Growth?

As an initial matter, it is important to understand what SO 3310 actually requires. First, it requires the BLM to protect potential LWCs during the planning process so as to not foreclose the option of actually designating them in the final plan. Even with a conservative approach, the temporary "setting aside" of possible LWCs could lead to hundreds of thousands of acres being rendered functionally useless for at least three years and likely much longer. Where groups and individuals are motivated to use the process for abuse during the interim phases of plan development, millions of acres could be set aside as de facto wilderness for 3-7 years. Even where the LWCs are not carried forward in planning, they are usually kept as part of the analysis no matter how ridiculous they might be in terms of the actual state of the landscape, either as one of the alternatives or simply in the inventory. Of itself, this would seem a benign proposition. But in field offices that experience rampant turnover with very little institutional memory retained, the risk of having a new staffer dust off an old plan and resurrect either interim or long-term protections is real and part of our recent history.

But beyond these sorts of interim protections, lies the ultimate reality that actually designated lands are made subject to a non-impairment standard. As we have learned with roadless areas and other wilderness lands, this standard figuratively and, in most cases, literally places a stop sign at the edge of the protected landscape. The protective bubble of wilderness and roadless is seldom pierced by human disturbance, ending even the thought of a new nature trail, no less a drilling rig. It shuts things down.

Using the very model used by the BLM in its planning efforts, the local cooperators were able to quantify the answer to this Committee's basic inquiry. Within the areas that have been identified as potential LWCs, the reasonable foreseeable development scenario pegs the total number of wells that could be drilled during the 20 year life of the Resource Management Plan at 569 wells. According to the model, 569 wells would generate 258.4 jobs per year for drilling and up to 614.5 jobs for production by the year 2025. This would generate $13,760,344 in labor income per year for drilling. The average wages for those workers engaged in drilling is $53,252.00 per year, a fairly substantial sum considering the current state of the economy.

Beyond the drilling phase, though, there is the production side of oil and gas development. Again, using the same model employed by the BLM in the same planning area that has previously been discussed and even then, only within the LWCs, the counties project that the production phase could result in up to 614.5 new jobs during the life of the plan. With an average salary of $83,660.00 per year, the yearly production phase labor income could total over $51 million per year.

In addition to jobs, the total revenue generated in the economy, in terms of oil and gas production from within the potentially designated LWCs would exceed $2.1 billion over the 20 year life of the resource management plan. More than $523 million in local, state and federal tax revenue would result over the same period of time within the same potentially designated LWCs, with the federal share reaching nearly $140 million. Please understand that this particular BLM planning area contains only a fraction of the federal land in Wyoming. If the same percentage (18%) of LWCs were introduced on other BLM lands within Wyoming, and the assumptions in the model were carried forward, the revenues that could be derived from potentially designated LWCs would be nearly $12 billion and the potential local, state and federal tax revenue generated from these same lands would top nearly $3 billion over a twenty-year period.

Even with a significant discount factor, the impact is astounding, especially in a corner of Wyoming that is depressed economically. Given the current economic and employment conditions in our nation, even the creation of one job is significant, especially to the family that is lucky enough to find it. But oil and gas development is not the only industry that would feel the effects from the designation and restrictive management of LWCs.

According to the draft policy, grazing may be consistent with wilderness characteristics however; grazing management practices (range improvement projects, vegetation manipulation, and motorized access) "could conflict with protection of wilderness characteristics". Reservoirs, stock water tanks, pipelines and fences have all been installed (often at permittee expense) to distribute livestock across the allotments and improve the range resources (water, wildlife, soil, vegetation). These projects and their

maintenance are vital to the economic viability of the ranching unit. Treating grazing and grazing management practices differently under this policy would have significant cumulative impacts on the grazing industry.

Restrictions on the placement, construction, or maintenance of range improvement projects would have a significant financial impact on both the individual operator and local economy, most notably tied to increased labor cost associated with potential restrictions on motorized use within LWCs. Further, the loss of vital water sources (used heavily by wildlife as well as livestock), tied to maintenance and water development restrictions, would likely cause livestock to concentrate around remaining water sources making it difficult or impossible to achieve the Wyoming Standards for Healthy Rangelands (a permit requirement). In addition, the loss of range improvements would likely result in a reduction in stocking rates (AUMs). Finally, predator control would be severely limited due to motorized use restrictions, which in turn would increase predation on livestock as well as wildlife.

Within the planning area that was previously mentioned, there are 687 grazing allotments and of those, 203 have all or a portion of LWCs identified within their boundaries. These inventoried LWCs cover 569,277 acres or approximately 27% of the acres in the allotments. The permitted AUMs on these allotments are approximately 138,508. In addition there are 154 range improvements (wells, guzzlers, cattle guards, stockwater tanks), 296 miles of fence, 442 reservoirs and 10 miles of pipelines located throughout the LWCs in the allotments. There are also 634 miles of two track trails and graded dirt roads within these LWCs. This information does not appear to include roads adjacent to fences that are used for maintenance or roads used to maintain stockwater tanks or reservoirs. Therefore, the miles of road within the LWCs could be considerably more.

Assuming that the AUMs within the potentially designated LWCs are necessary for the viability of the ranches that are dependent on them, which is a very safe assumption in the West, the economic impact of a change in management tied to grazing could be quite significant. Using the BLM's model, the AUMs within the LWCs have an economic value to local communities within the planning area or $26,900,000 in livestock production, $12,400,000 in employment earnings, and 382 annual jobs.

But Wyoming and the West are not simply dependent on oil and gas and agriculture for their well-being. From coal to trona to uranium production and the many jobs that are made possible in the grocery stores, service stations, schools, cafes and feed stores in our small towns because of mineral extraction and agriculture, we are highly dependent on the multiple-use mandate of FLPMA for our survival. With the burgeoning potential of wind development and value added processes tied to coal and natural gas, "de facto" wilderness designations could literally mark the end of these emerging industries, especially as these LWCs would likely preclude transmission line and pipeline siting in

large swaths of the West. Absent the ability to use our public lands, in accord with the thoughtful designs of Congress, the West will suffer irreparable harm – but not only in terms of economic hardship.

People do not live and work in Wyoming to go to the opera. We are here because we love to hunt, fish, hike, camp and ride our 4-wheelers. There are certainly some that want complete solitude – whatever that really means – when they head into the backcountry. Frankly, they are perfectly suited for the WSAs and wilderness areas. Certainly most of our photo albums contain pictures of the wide open spaces and breath-taking views, but nearly every picture also contains us. We are hunting. We are fishing. We are hiking. We are moving cows. We are drilling. We are there. While the implementing handbooks for SO 3310 might pay some heed to such a concept, we are generally adverse to even the slightest thought that we might be precluded from engaging our surroundings in one way or another. This is truly our custom and our culture, in addition to most of our way of life and way of making a living.

Had we been engaged by the Department of the Interior in a truly public process, the comments might be a bit less harsh. As it stands, SO 3310 and its implementing guidance is a playground for the environmentalists. Had we encountered past implementation of land use restrictions that was thoughtful and narrowly tailored, perhaps the seemingly extensive intrusions of SO 3310 would not be viewed with such skepticism. As it stands, we watch the BLM label land as "containing wilderness characteristics," when we know that same land is permeated with oil wells, roads, fences and man-made reservoirs. Had the Department of the Interior shown flexibility and a commitment to innovation in its past endeavors, we might not fear the intractable bureaucrats we have come to know in our BLM field offices, national parks, refuges and national forests. As it stands, we are left to watch our trees turn red as the beetles ravage our forests after years of inaction by federal officials. We are left to watch wild horse numbers skyrocket, affecting both livestock and other wildlife populations, only to be controlled when the state steps in and sue. We are left to watch wolves and grizzly bears decimate our big game herds and kill our livestock, pets, and, as of last summer, our neighbors.

We do not cast doubt on SO 3310 without good reason. Our recent experience with a similar sort of "de facto" wilderness designation, coming in the form President Clinton's Roadless Rule, lends credence to our worst fears. During the pendency of the Roadless Rule, states and local governments clamored for access to the process, were promised it, and it was never forthcoming. While the maps and inventories were being developed for the Roadless Rule, states and local governments suggested that the inventory was flawed and that hundreds of millions of acres of the forest were being improperly set aside. Today, even a cursory glance at a Forest Service map underscores the points we attempted to make in 2000, with supposed "roadless" areas lined with old clear-cuts and a

spider web of roads that would make the federal and state highway departments envious. Finally, states and local governments commented and testified that the Roadless Rule would put a halt to nearly any human activity, even in areas that were heavily roaded already. We were called paranoid and promised revisions once time permitted. No revisions have been made and even the slightest intrusion into these so-called roadless areas to manage pine beetle killed swaths of our dying forests – through the existing road network, mind you – has been met with years of delay and a bureaucratic two-step only befitting a dance hall. Our fears were well-founded then, and history will no doubt reveal that our fears today, relative to SO 3310, are equally justified.

From the other side of the Potomac River, President Obama's Executive Order to trigger regulatory reform is about 50 years past due. Most certainly, it came about a month late relative to the issuance of SO 3310. We can do better than a half-baked, one-sided and likely illegal concoction to manage our public lands and the jobs and revenues we derive from them. Too much is at stake to leave the decision to a faction of our country who can barely stand the thought that we would even walk on certain lands. For too long the pendulum of public discourse relative to the public's lands has been allowed to swing wildly from side to side, never resting in the thoughtful middle. We owe the next generation a better discourse and a shot at a good job and stable community, state and country. Secretarial Order 3310 is no prescription for that sort of future. We can and must do better.

As an elected official, I easily tire of those that appear at commission meetings and rail against a proposal but never offer a thought as to how to fix a problem. Clearly, SO 3310 should be rescinded, along with the guidance to implement the Order. It is not supported by the law and is contrary to thoughtful public policy. New wilderness designations are and should remain the province of Congress.

Should the Department of the Interior re-engage a process to set aside millions of acres from FLPMA's multiple-use mandate, it will and should meet a very skeptical reception. But, in the event that the Department does proceed on such a course, it should only do so after offering meaningful notice to and full consultation and coordination with city, county and state governments – not just the select few in the environmental community that were privileged enough to be invited to the process with SO 3310. Then, the Department must be funded to complete the required inventories in a thoughtful and science-based manner.

The inventories should include all potential uses and should not be conducted with an eye towards finding "lands with wilderness characteristics." These inventories must be blind to motive and ultimate management and, instead, focus on the reality of our present circumstance and the actual baseline scenario from which the planning effort should emanate. This has been a constant refrain of every local cooperating agency in every

BLM plan revision to date in Wyoming, which has universally been met with admonitions from the BLM that the development of such "Analysis of the Management Situation" data is not and will not be a priority in the revision.

In the narrow event that some new protection is required, where it impacts private property rights – the affected rights should be fully and fairly compensated, but only after the protection is very narrowly tailored and made to fit within our public land laws, a tough task to be sure, given the nature of those laws. These protections should never be drawn to impede the full use of school trust lands and other state and local land, either through direct proscriptions tied to the land itself or as a function of reduced or discontinued access to the parcel.

To close, the law is clear to preclude even a partial implementation of SO 3310. Where the Administration cites to overly generalized legal theories to support the Secretarial Order, the law is rife with specific prohibitions to not proceed on the course outlined in SO 3310 and its implementing regulations. Even in the quietest corner of Wyoming, hundreds of jobs and billions of dollars are at stake – all to offer the environmental movement another bite at an apple that they didn't think to take or were not allowed to take before 1993. But almost more importantly, our custom and culture are at stake. From the family ranch that has been in production for over 100 years to our ability to grab hold of and actively engage our land, SO 3310 requires that we elevate so-called "wilderness use" above every other use. Even if this intrusion into our nation's multiple use mandate is for the briefest time – during the pendency of an inventory or otherwise – it is an unlawful step on a very slippery slope toward longer and even permanent limitations being placed on the landscape. Such efforts, being contrary to our laws and the weight of other public laws and expectation, must be stopped in their tracks and erased from the public discourse, lest they be allowed to lay dormant, germinate and take root at a later date. They have no place on our landscape, absent Congressional direction to the contrary.

ATTACHMENT "A" SUBMITTED BY COMMISSIONER JOEL BOUSMAN for "*The Impact of the Administration's Wild Lands Order on Jobs and Economic Growth*" March 1, 2011

January 28, 2011

Robert V. Abbey, Director
Bureau of Land Management (BLM)
1849 C Street N.W. Room 5655
Washington, DC 20240

Re: Comments on Wild Lands Policy Manuals

Dear Director Abbey:

The Wyoming County Commissioners (hereinafter WCCA) submits the following comments on the draft Manuals that are said to implement the Wild Lands Policy. While the Bureau of Land Management (BLM) notice does not specifically invite public comment or prescribe a deadline, the WCCA believes that public comment is legally required. In addition, BLM is legally required to coordinate with the local governments in both the development and implementation. The WCCA hopes that instead of implementing the Secretarial Order and the Manuals, the BLM will proceed to honor its coordination mandate and withdraw both Manuals in order to reassess the Wild Lands Policy and the adverse impacts on rural communities throughout the West.

The WCCA is a nonprofit organization formed to strengthen the role and communicate the needs of county government. The WCCA members include county commissioners from all twenty three (23) counties in Wyoming. The use of public lands is an extremely important issue to Wyoming counties.

1. **SUMMARY OF COMMENTS**

- The Secretary lacks the legal authority to create Wild Lands, because Congress reserved the creation of wilderness to itself and the Wild Lands Policy contradicts the statutory mandates found in the Federal Land Policy and Management Act (FLPMA).

- The Wild Lands are the same as wilderness study areas (WSAs), only the name is changed. Any authority to create new WSAs expired October 21, 1993.

- The Wild Lands Policy contradicts the commitments made to the State of Utah, the U.S. Congress and the public by the Secretary to honor the Settlement Agreement that he made to Senator Bennett in his letter of May 20, 2009. (Answering Yes to the question from Senator Bennett "Do you agree that currently the Department has no authority to establish new WSAs (Post-603 WSAs) under any provision of law, such as the Wilderness Act of [sic] Section 202 of FLPMA?" The Secretary also stated BLM had no authority to impose nonimpairment management on non-WSA lands. The adoption of the Wild Lands Policy also makes a mockery of the Secretary's pledge to collaborate and cooperate on public land controversies with the Utah Governor and the Utah local governments in the summer of 2010.

- The Wild Lands Policy violates the Settlement Agreement between the State of Utah, School and Institutional Trust Lands Administration (SITLA) and the Utah Association of Counties (UAC) and the Department of the Interior signed in 2003. The repudiation occurred without the apparent

approval of the Department of Justice and without the courtesy of notifying the State of Utah, other than a phone call a few minutes before a press conference.

- Even assuming that the Interior Secretary had the authority to adopt the Wild Lands Policy, BLM has failed to follow following rulemaking procedures that are mandated by FLPMA.

- The Wild Lands Policy will have significant environmental impacts, including increased risk of catastrophic wildfire, which will destroy wildlife habitat, increase soil erosion, increase noxious weed infestations and air pollution. BLM WSA policies also demonstrate that there will be the diminished ability to treat noxious weeds, gather wild horses, and to build range improvements to enhance vegetation and rangeland resources. Ironically, the Wild Lands Policy will deal the hardest blow to the 'fast track' clean energy projects that will suffer delays and additional costs due to the need for a wilderness inventory and evaluation, and assuming the affected area is deemed to have wilderness character, the additional measures to avoid impairment or the decision process to proceed regardless of the wilderness character finding.

2. NO DIFFERENCE BETWEEN WSAS AND WILD LANDS

Interior is calling the newly-inventoried lands "Lands with Wilderness Characteristics (LWCs)"" that will be managed as "Wild Lands." The only difference between WSAs or wilderness and Wild Lands is the name. Interior admits the lack of difference where the DOI Q&A published on December 23, 2010, referred to the Wild Lands Manuals as 'new wilderness guidance. ("Why is it necessary for the BLM to issue ***new wilderness guidance***?") (emphasis added).

Elsewhere BLM states that the Wild Lands Policy this does not create new WSAs. [Wild Lands Inventory and Planning Guidance Questions and Answers, p.2] Its own statements are contradicted by the Manuals, where BLM employs the same criteria as it used to identify WSAs in 1978. DM6300-1.13 ¶¶A. B. The Manuals also provide that BLM will manage the Wild Lands under the same legal criteria as it currently manages the WSAs. DM6300-1.13.B.(2); DM6300-2.06 ('The BLM shall protect LWCs when undertaking land use planning and when making project-level decisions by avoiding impairment of their wilderness characteristics"); *Id*. .22, .24. There is no substantive difference between Wild Lands and WSAs, except Interior's use of a different name.

3. WILD LANDS POLICY FAILS TO ADDRESS OR RESOLVE DIFFICULT LEGAL ISSUES THAT SUPPORT THE CONCLUSION THAT SECRETARIAL ORDER 3310 AND THE RESPECTIVE DRAFT MANUALS ARE WITHOUT LEGAL AUTHORITY

a. No Legal Authority to Implement Secretarial Order 3310

Only Section 603 of FLPMA authorizes BLM to manage lands so as to not impair their wilderness character and that nonimpairment standard was and is reserved for WSAs. *Tri-County Cattleman's Association Idaho Cattlemen's Association*, 60 IBLA 305, 314 (1981). There is no other statutory authority and FLPMA, elsewhere, states that all other public lands are to be managed so as to not unduly and unnecessarily degrade the resources. 43 U.S.C. §1732(b) [nondegradation standard].

Given the lack of authority, the Secretarial Order 3310 is a usurpation of authority that Congress expressly reserved to itself in FLPMA and in the 1964 Wilderness Act to designate wilderness. It also directly conflicts with the management standard for public lands established in FLPMA.

BLM proposes to adopt the Wild Lands Policy and implement it through two Manuals, based on its discretion in FLPMA. We assume that BLM is relying on its authority in Sections 202 and 302 of FLPMA. Those provisions do not support BLM's claimed authority to create new WSAs under the guise of Wild Lands or to manage them as if they were designated WSAs for nonimpairment of the wilderness character.

Section 202 of FLPMA provides for the development and revision of land use plans. 43 U.S.C. §1712. Land use planning must have coordination with state and local governments, public involvement, and be consistent with FLPMA. 43 U.S.C. §1712(a). The criteria for developing and revising land use plans, includes (1) using and observing the principles of multiple use and sustained yield set forth in FLPMA and other applicable laws, 43 U.S.C. §1712(c)(1); (2) interdisciplinary approach, §1712(c)(2); (3) priority to designate ACECs, §1712(c)(3), and (4) "to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located;"§1712(c)(9). FLPMA further states: "Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act." *Id*.

Unlike the definition of multiple use for National Forests, 16 U.S.C. §529, FLPMA does not include wilderness as one of the statutory multiple uses. 43 U.S.C. §1702(c). Wilderness has its own definition, which is limited to Section 603. ("(i) The term 'wilderness' as used in section 1782 of this title shall have the same meaning as it does in section 1131(c) of Title 16." §1702(i). A word search of FLPMA shows that the term 'wilderness' is found only in the definition section, 43 U.S.C. §§1702(i) and the wilderness review provisions of Section 603, 43 U.S.C. §1782; 43 C.F.R. § 1601.0-5(i).

When BLM developed the rules governing land use plans, it originally defined a resource management plan as including "the initial determination of whether a wilderness study area shall be recommended to the President for recommendation to the Congress as suitable or unsuitable as an addition to the National Wilderness Preservation System." 43 Fed. Reg. 58764, 58768-69 (1978) *draft* 43 C.F.R. §1601.0-5(p)(2). The definition of a resource management plan was revised to delete reference to wilderness study area recommendations. 44 Fed. Reg. 46386 (1979). Thus, BLM has no regulations such as in the land use planning chapter authorizing establishment of wilderness type areas or authorizing nonimpairment management for such lands other than designated WSAs.

b. **Conflicts with the Settlement Agreement between the Department of the Interior and the State of Utah, SITLA and UAC**

In 2003, the United States and the State of Utah resolved litigation that was filed in 1996 to challenge the wilderness reinventory of certain public lands that were determined to lack wilderness character in BLM's initial wilderness evaluation and redetermination of WSAs between the years of 1980 and 1985.

Throughout that litigation, BLM maintained that the 1996 Utah wilderness reinventory was limited to gathering data for only the State of Utah due to unusual controversy regarding the original wilderness inventory done in the 1980s. *State of Utah v. Babbitt*, 137 F. 3d 1193, 1199 (10th Cir. 1998). At that time and hence, BLM has admitted that the Utah wilderness inventory and study authority expired in October of 1993 with the final deadline to submit public land wilderness recommendations to the Congress. *State of Utah v. Babbitt*, 137 F. 3d at 1206 n.17 (referring to letter written by former Interior Secretary Babbitt "'I also agree with you that FLPMA's section 603 no longer provides authority to inventory BLM land in Utah for wilderness values.").

The litigation was resolved in 2003 with a Settlement Agreement that was based on facts developed in the case showing that BLM had managed the new inventory areas as if they were WSAs, thereby harming the local economies and state revenues. The Settlement Agreement was challenged by the numerous environmental organizations and affirmed by the Utah District Court and the Tenth Circuit Court of Appeals. *State of Utah v. Norton*, no. 96-365B (D. Utah 2006), *aff'd* 535 F.3d 1184 (10th Cir. 2008).

The Utah Settlement Agreement provides that "Defendants [DOI] will not establish, manage or otherwise treat public lands, other than section 603 WSAs and Congressionally designated wilderness, as WSAs or as wilderness pursuant to the Section 202 process absent congressional authorization."" ¶5, *Utah v. Norton*, Settlement Agreement Sept. 2005. This provision was based on the plain language of both the Wilderness Act that only Congress can designate wilderness, 16 U.S.C. §1131(c), and the provision providing for a 15-year wilderness study and nonimpairment management in FLPMA, 43 U.S.C. §1782.

c. **Other Conflicts with *Utah v. Norton* Settlement Agreement**

The first paragraph of the Settlement Agreement provides:

> 1. The authority of Defendants to conduct wilderness reviews, including the establishment of new WSAs, expired no later than October 21, 1993, with submission of the wilderness suitability recommendations to Congress pursuant to Section 603. ***As a result, Defendants are without authority to establish Post-603 WSAs,*** recognizing that nothing herein shall be construed to diminish the Secretary's authority under FLPMA to:
>
> a. manage a tract of land that has been dedicated to a specific use according to any other provision of law (Section 302(a)),
>
> b. utilize the criteria in Section 202(c) to develop and revise land use plans, including giving priority to the designation and protection of areas of critical environmental concern (Section 202(c)(3)), or
>
> c. take any action necessary, by regulation or otherwise, to prevent unnecessary or undue degradation of public lands (Section 302(b)).

Secretarial Order 3310 relies on FLPMA, while excluding Section 603, without identifying which section of FLPMA authorizes the creation of new wilderness areas under the new name of Wild Lands. But as noted above in the subparagraphs a through c, FLPMA does not in fact authorize Wild Lands. They are

not ACECs and are not identified in accordance with the procedures and criteria for ACECs. 43 C.F.R. §1610.7-2.

The Wild Lands are to be managed to not impair wilderness characteristics, *e.g.* DM6300-1.13.B. (2); DM6300-2.06. All public lands that are not WSAs are to be managed to avoid unnecessary or undue degradation. 43 U.S.C. §1732(b). Finally, no other law authorizes the Secretary to create Wild Lands. Perhaps due to the lack of authority, Secretarial Order 3310 does not cite to a specific law.

Paragraph 2 of the Settlement Agreement also provides

> The 1999 Utah Wilderness Inventory shall not be used to create additional WSAs or manage public lands as if they are or may become WSAs, and the inventory information will be evaluated for its validity and utility at such time as changes are made to the appropriate land use plan.

The Wild Lands designation appears to apply to the Utah wilderness reinventory areas and any other area currently pending before Congress, because they are citizen proposed wilderness. DM6300-2.04.C. The Manuals do not address what BLM should do in Utah, where BLM analyzed all of the citizen proposed wilderness in a supplemental EIS.

Paragraph 5 of the Utah Settlement Agreement states that "Defendants will not establish, manage or otherwise treat public lands, other than Section 603 WSAs and Congressionally designated wilderness, as WSAs or as wilderness pursuant to the Section 202 process absent congressional authorization."

The Wild Lands Policy directly contradicts this provision. No law has authorized the Interior Secretary to treat public lands as WSAs [Wild Lands] or as wilderness, except for the WSAs established pursuant to the Section 603 wilderness review program or the areas designated by Congress. The Secretary, nevertheless, has taken it upon himself to do so.

In Paragraph 6 of the Utah Settlement Agreement, the Secretary agreed that "Defendants will refrain from applying the IMP, H-8550-1, to BLM lands other than the WSAs established during the Wilderness Review pursuant to §603." The Wild Lands Policy Manuals specifically apply nonimpairment management to the identified Wild Lands. DM 6300-2.24. There is no question these are 'lands other than the WSAs established during the Section 603 wilderness review.'

The Interior Secretary misrepresented his commitments to the law. Notably, when the current Deputy Secretary of the Interior testified before Congress on this issue (in order to be confirmed); he assured Congress that "BLM does not have authority to apply the non-impairment standard to non-WSAs." Less than two years later, the Interior Department has adopted a "Wild Lands" policy that mandates nonimpairment management for the new Wild Lands that are not WSAs. See draft H-6300-2.24. This policy has been adopted without any stated basis for the 180-degree change in the interpretation of the law regarding the authority of the agency.

d. **Wild Lands Policy Making Wilderness Management a Priority Contradicts FLPMA**

The Wild Lands Policy establishes a presumption in favor of wilderness or Wild Lands while excluding the statutory principal or major multiple uses established in FLPMA. 43 U.S.C. §§1702(l); 1712(e). This presumption in favor of wilderness management may only be overcome by a specific evidentiary demonstration that the proposed use should proceed despite impairment of alleged wilderness. H-6300-2.24. It also makes wilderness a priority for public land management, Sec. Order 3310, §1; H-6300-2.06, again contrary to FLPMA's direction dedicating the public lands to primary uses that do not include wilderness.

FLPMA does not authorize wilderness as a priority for public land management. In fact, FLPMA does not include wilderness in its definition of multiple use. 43 U.S.C. §1702(c). FLPMA creates, however, priority multiple uses, for timber, domestic livestock grazing, mining and mineral development, outdoor recreation, fish and wildlife habitat, and rights-of-way. 43 U.S.C. §1702(l). Of these principal multiple uses, timber, post-1976 mining and mineral development, and rights-of-way are prohibited in WSAs. H-8550-1, Introduction. Fire suppression are limited due to likely impairment of wilderness character and policy favoring using fire for resource benefits. H-8550-1, ¶12 (emergency only). While the IMP permits snowmobiles and motorized vehicles on existing roads, BLM RMPs closed WSAs to motorized travel. *See e.g.* Kemmerer RMP 2-32; Rawlins RMP 2-32, 2-39. Other multiple uses are permitted only on a limited basis, i.e. grazing without increases in forage and without any new structures or range improvements. H-8550-1, ¶13 (permitting maintenance only of range improvements that existed as of October 21, 1976). The WSA management Manual also limited motorized outdoor recreation to a few specific exceptions, although it does allow bicycles, *Id.* ¶11. Thus, it is apparent that the Wild Lands Policy seeks to rewrite FLPMA without the benefit of any change in the law by Congress.

e. **Contradictions with BLM Policy**

The Wild Lands Policy requires that BLM implement "non-impairment" management for all public lands that BLM identifies as having wilderness character. H-6300-2.24. The nonimpairment standard by law applies only to congressionally designated Wilderness or WSAs, 43 U.S.C. §1782(a), H-8550 (1997). The extension of the nonimpairment management to other lands violates the FLPMA direction that all other lands be managed to avoid undue and unnecessary degradation or non-degradation standard. 43 U.S.C. §1732(b); 43 C.F.R. §3809.1(a).

BLM concluded, consistent with earlier decisions of the Interior Board of Land Appeals, that BLM does not have the authority to manage new lands based on the non-impairment standard. *See* Director's Instruction Memorandum No 2003-274 (September 2003), ("Following the expiration of the Section 603(a) process [in 1993], there is no general legal authority for the BLM to designate lands as WSAs for management pursuant to the non-impairment standard prescribed by Congress for Section 603 WSAs. FLPMA land use plans completed after April 14, 2003 will not designate any new WSAs, nor manage any additional lands under the Section 603 non-impairment standard." (emphasis and bracket added)). *See also Colorado Environmental Coalition,* 386 IBLA 386, 391-396 (2004); *Southern Utah Wilderness Alliance,* 166 IBLA 270, 290 (2005).

4. **WILD LANDS POLICY UNNECESSARY EXCEPT TO LIMIT MULTIPLE USES AND HARM ECONOMIES OF WESTERN COMMUNITIES**

FLPMA allows BLM to protect individual resources independent of the concept of wilderness. Wilderness is defined as:

> A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this chapter an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. §1131(a).

BLM has authority to protect public land resources for scenic quality, special recreation management, historical resources, ecological resources or special or unique wildlife habitat as ACECs. *See* H-1601, ¶5.f.3, p. 21 (2005). When BLM uses its authority to specifically protect certain scenic or historic resources, it achieves the specific protection without wilderness management under the nonimpairment standard. Scientific, ecological or historical resources are listed in only one category of the wilderness definition, 16 U.S.C. §1131(c)(4); 43 U.S.C. §1702(i). Elements 1 through 3 of the wilderness definition, 16 U.S.C. §1131(a) (1)-(3) are unique to the concept of wilderness. A wilderness area must be natural and without permanent structures, such as roads, transmission lines, or water reservoirs. It must feature outstanding recreation or solitude, and it must be greater than 5000 acres. Each of these elements must be met to fit the definition of wilderness.

As part of each land use plan, BLM assigns a visual resource management (VRM) class, based on the inventory and adjusted by the land use allocation. H-8410-1. BLM also designates areas for special management, H-1601-1, ¶5.f.3, p. 21, including wildlife habitat or recreation. BLM manages cultural resources pursuant to National Historic Preservation Act (NHPA), 16 U.S.C. §470, National Historic Trails Act, 16 U.S.C. §1241, and the Archaeological Resources Protection Act (ARPA), 16 U.S.C. §469, 470aa; H-8110-1, H-8130-1, H-8140-1.

For areas that are subject to irreparable harm and which have unique resource or process values, BLM can designate them as ACECs. 43 C.F.R. §1610.7-5. H-1601-1, I.A.3., V.B.5. ACECs undergo additional analysis to document their regional or national significance, the threats, and the proposed boundaries. There is also a separate 60-day comment period in the Federal Register. 43 C.F.R. §1610.7-5(b).

It is unclear what the Wild Lands Policy will add, except to remove more public land from the FLPMA's principal multiple uses, for rights-of-way and mining and mineral development, popular forms of outdoor recreation, such as snowmobiles and ATVs, and imposing additional restrictions on rangeland projects that are needed to meet rangeland health standards and to address sagebrush habitat. The Wild Lands Policy is less about protecting resources and more about stopping economic uses of the public lands.

5. AUTHORITY CITED IN SECRETARIAL ORDER 3310 DOES NOT AUTHORIZE THE SECRETARY TO EFFECT SIGNIFICANT CHANGES IN PUBLIC LAND MANAGEMENT WITHOUT RULEMAKING PROCEDURES

Secretarial Order 3310 is purportedly issued in accordance with the 'housekeeping' authority (5 U.S.C. §301), but that statute only authorizes the head of a department to issue 'regulations.' The term regulations refers to rules issued in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §551, 553-556. Secretarial Order 3310, however, does not contain direction to issue regulations. Instead, it directs BLM to issue as go final two draft Manuals, which are merely internal guidance to BLM staff. *Arizona Silica Sand Co.*, 148 IBLA 236, 243 (1999) ("The provisions of the BLM Manual do not have the force and effect of law; nevertheless, as this Board has held on numerous occasions, they are binding on BLM."); *Howard B. Keck, Jr.*, 124 IBLA 44, 55 (1992). The Manuals implementing Secretarial Order 3310 are being adopted without compliance with rulemaking procedures, because there is no notice of public comment and no compliance with other procedures that govern APA rulemaking.

The Draft Manuals were not issued by way of a proper APA process, in violation of FLPMA, with proper notice and comment. 43 U.S.C. §1740, 1712(a). FLPMA provides that its provisions shall be implemented through rulemaking. 43 U.S.C. §1740 ("The Secretary, with respect to the public lands, shall promulgate rules and regulations to carry out the purposes of this Act and of other laws applicable to the public lands.").
The Order purports to implement the Secretary's authority under FLPMA, with the exception of Section 603, 43 U.S.C. §1782. It would appear that Secretarial Order 3310's reliance on Manuals is a deliberate effort to avoid complying with the law.

Rulemaking procedures would also require review by the Office of Management and Budget, review by the Small Business Administration to evaluate the impacts on small businesses and rural local governments, 5 U.S.C. §§601-611, compliance with the Paperwork Reduction Act, 44 U.S.C. §3501, as well as notice and public comment. 5 U.S.C. §552.

6. SIGNIFICANT IMPACTS ON THE HUMAN ENVIRONMENT IGNORED

Secretarial Order 3310 also significantly affects the human environment under the National Environmental Policy Act (NEPA), which requires that the Secretary prepare an environmental impact statement (EIS), including an analysis of the economic impacts of the action, before undertaking the action. 42 U.S.C. §4332(2) (C); 40 C.F.R. §1508.27; H-1790-1, ¶3.2.1.

The BLM draft Wild Lands Manuals provide that all public land projects must be delayed for an inventory and study of wilderness character on the affected public lands. H-6300-1. Thus, current energy projects, including 'clean energy projects' must be halted or delayed until the inventory and study are

completed. It is likely that transmission lines and wind turbines will impair wilderness character, thus conflicting with the Wild Lands Policy. If these projects are to go forward, BLM must decide to impair the alleged wilderness characteristics. H-6300-2, ¶.24. The additional time for a wilderness inventory and study with public comment will add years to the approval process for these supposedly 'fast track' projects. The clean energy industry is already suffering due to project delays, government delays in distribution of funds and loans, and reallocation of funds to other programs. [WSJ Dec. 22, 2010 editorial regarding need for additional tax incentives to maintain wind and solar energy industry which has lost jobs]. The Wild Lands Policy will add to delays and cost, thus making 'clean energy' even more expensive than it already is.

Clean energy projects will adversely affect the alleged wilderness characteristics. BLM must decide whether to deny the project, revise it to reduce the impacts, or to allow it even though it will impair wilderness character. Wind energy will require permanent installation of turbines and transmission lines, both of which are inconsistent with nonimpairment. Moreover, wind turbines kill birds and permanently alter the visual resources. This is equally true for solar projects that require permanent installations on large areas of land.

The additional transmission lines necessary for wind and solar energy are also permanent structures that change the views. They must be located outside of existing natural gas pipeline rights-of-way for safety reasons and thus require separate environmental review.
Requiring these projects to bury transmission lines across thousands of miles would also impair the economics of clean energy that currently relies on tax incentives and government funding.

The Order will have additional environmental impacts. Wild horse management would be restricted. H-8550-1, III.E (limiting gathers to fixed wing or helicopters). Fire management will also be impaired due to policies that restrict fire suppression in WSAs to emergencies and other policies that favor wildfire in wilderness. Post-burn areas typically are infested with noxious weeds. Sage brush habitat lost to wildfire could take more than 50 to 60 years to recover due to soils and arid climates typical of Wyoming public lands.

NEPA requires that BLM assess the environmental impacts as well as the impacts on the western communities.

7. CONCLUSION

The Wyoming County Commissioners Association members urge the Secretary and BLM to withdraw the misguided and unlawful order. It will have significant adverse environmental and economic impacts in the rural western states. The rush to implement the order regardless of the impacts is both misguided and poor public policy. The harm to western communities is out of proportion to any benefits.

Sincerely,
/s/
Joel Bousman
WCCA President, Commissioner Sublette County, Wyoming

xc: Mr. Don Simpson, Director Wyoming Bureau of Land Management