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Testimony of Professor Mark Squillace
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Hearing before the U.S. House of Representatives
Committee on Natural Resources
on
The Impact of the Administration's Wild Lands Order
on Jobs and Economic Growth

1 March 2011

Mr. Doc Hastings
Chair, Committee on Natural Resources
United States House of Representatives
1324 Longworth House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

My name is Mark Squillace. I am a professor of law and the Director of the Natural Resources Law Center at the University of Colorado Law School. I am pleased to appear today before the House Committee on Natural Resources to offer my support for Secretarial Order No. 3310, signed by Secretary of the Interior Ken Salazar, which addresses the issue of protecting the wilderness characteristics of lands managed by the Bureau of Land Management. Before getting to the merits of the Order itself, let me briefly review the legal context in which this Order was issued.

Section 201(a) of the Federal Land Policy and Management Act requires the Secretary of the Interior to "prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values…." The Secretary is required to use this inventory in the development and revision of the land use plans that are required by Section 202 of FLPMA. A separate requirement in FLPMA – Section 603 – required the Secretary to identify roadless areas of at least 5,000 acres with wilderness characteristics, and to report to the President by October 21, 1991, on the suitability of such areas for wilderness. Pending congressional

action on these lands, the Secretary must manage them so as not to impair their suitability for wilderness.

At the heart of this controversy is a question about whether Congress intended this 15-year review to be static or whether the Secretary should revise this report as new or better information became available, or alternatively, whether the Secretary should simply identify other areas with wilderness characteristics in accordance with the multiple use and land-use planning provisions of FLPMA. The language of FLPMA plainly suggests that Congress intended an ongoing, dynamic process where new information would be used to correct erroneous findings from the initial inventory. In particular, the inventory requirement of Section 201 is supposed to be "maintain[ed] on a continuing basis" and to be "kept current." Furthermore, while FLPMA imposes a general mandate to manage public lands "under principles of multiple use and sustained yield," FLPMA, Section 302(a), it defines "multiple use" explicitly to recognize that some lands should be managed "for less than all of the resources." FLPMA, Section 103(c).

Given this language it is not surprising that successive Presidents from Carter to Reagan to George H.W. Bush to Clinton all recognized a continuing responsibility under Section 202 of FLPMA to identify and set aside new areas with wilderness characteristics that might have been missed during the initial Section 603 inventory. (See, for example, the attached *Memorandum from the Associate Solicitor for Energy and Minerals to the Bob Burford, the Director of the Bureau of Land Management* during the Reagan Administration.) More than 100 additional wilderness study areas, beyond those designated under Section 603, have been set aside under Section 202. This policy is not only consistent with the letter and spirit of the law; it also makes good practical sense. Our BLM public lands encompass 240 million acres of land. No effort to catalog and identify roadless areas from among all of these lands could possibly be perfect or complete. When Congress required the Secretary of the Interior to identify and protect areas with wilderness characteristics it surely did not intend that such areas should be sacrificed simply because they might have been inadvertently or mistakenly missed during the initial inventory.

In 2003, however, in response to a lawsuit filed by the State of Utah, the Department of the Interior abandoned its longstanding interpretation of FLPMA and entered a private settlement disavowing its authority to designate new wilderness study areas beyond those included in the recommendations submitted to Congress in 1993. This private, out-of-court settlement agreement is neither enforceable nor binding on the current Administration. Nonetheless, in May, 2009, the Interior Department sent a letter to former Utah Senator Bennett indicating that the Department did not intend to claim the authority to designate new wilderness study areas or apply the non-impairment standard to any new areas, as previous Administrations had done under Section 202 of FLPMA.

This brings us to Secretarial Order No. 3310. Since sending the May, 2009 letter to Senator Bennett, the Department has been under substantial pressure to return to the long-

standing policy that successive Administrations had followed until the George W. Bush Administration entered the private, out-of-court settlement in 2003. That pressure included a letter sent to Secretary Salazar by 55 law professors from around the country, including me.

Under this new Secretarial Order, the BLM is required to identify lands with wilderness characteristics that are outside of those areas previously designated under Section 603 of FLPMA. The Order then requires the BLM to protect these areas from impairment unless the BLM determines that impairment of these lands is appropriate, documents the reasons for these decisions, and takes measures to minimize the impacts to wilderness characteristics. If the BLM determines that protecting the wilderness characteristics of these lands is appropriate then it will designate these lands as "wild lands."

Secretarial Order No. 3310 is simply and unequivocally a good government measure. Lands with wilderness characteristics are a diminishing resource. Their destruction is irrevocable and it would be irresponsible for the BLM to allow their destruction either because it was ignorant of their wilderness characteristics or because it had failed to make a considered judgment regarding the relative value of other uses. That is all that this new Secretarial Order requires.

As our population grows, the wild lands that remain a part of our public lands grow ever more precious. Future generations will rightly praise us for those wild lands that we have chosen to protect. I am skeptical that they will be so grateful for a decision to open these lands for private mineral development that primarily benefits a few members of the present generation. For all of these reasons, I am pleased to endorse Secretarial Order No. 3310, and I urge this Committee to recognize that it is well grounded in the law, and worthy of their support.

Sincerely,

Mark Squillace

Attachments:
1. *Law Teacher's Letter to Secretary Salazar, September 30, 2009.*
2. *Memorandum from the Associate Solicitor for Energy and Minerals to Bob Burford, Director of the Bureau of Land Management.*

September 30, 2009

The Honorable Ken Salazar
Secretary of the Interior
1849 C Street, NW
Washington, DC 20240

Re: Authority of the Department of the Interior to Designate and Manage Wilderness Study Areas and Other Potential Wilderness Areas

Dear Secretary Salazar:

We, 55 teachers of natural resources law and related subjects at law schools across the United States, write to express our deep concern about legal positions stated in an attachment to a May 20, 2009, letter from Christopher J. Mansour, Director of your Office of Congressional and Legislative Affairs, to Utah Senator Robert F. Bennett of the Committee on Energy and Natural Resources. That attachment sets forth, on your behalf, answers to questions posed in an April 30, 2009, letter from Senator Bennett to you. The attachment states that the Department of the Interior is without authority either (a) to designate any new Wilderness Study Areas (WSAs) after October 21, 1993, or (b) to manage any areas that are not designated as WSAs under the same "non-impairment" standard under which WSAs are managed.

We believe that these positions are contrary to legal precedent and to the Federal Land Policy and Management Act (FLPMA), are contrary to past administrations' interpretation and application of FLPMA, unnecessarily hinder the Department's ability to manage lands with wilderness characteristics, and could result in the irreversible degradation of some areas that would otherwise be excellent and worthy additions to the National Wilderness Preservation System. We therefore urge you to reconsider these positions.

Background

Section 201(a) FLPMA, 43 U.S.C. §1711(a), requires the Secretary of the Interior to

> prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values), giving priority to areas of critical environmental concern. This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resources and other values.

Section 202(c)(4) of FLPMA, 43 U.S.C. § 1712(c)(4), requires the Secretary to rely on the inventory in the development and revision of land use plans.

The inventory prepared and maintained pursuant to section 201(a) is also the basis for the wilderness review required by section 603 of FLPMA, 43 U.S.C. § 1782. Section 603(a), 43 U.S.C. § 1782(a) required the Secretary, by October 21, 1991, to review roadless areas larger than five thousand acres identified by the inventory as having wilderness characteristics and to report to the President his recommendations as to the suitability or unsuitability of each such area for preservation as wilderness. Section 603(b), 43 U.S.C. § 1782(b), required the President, within two years thereafter, to advise Congress of his recommendations with respect to the designation as wilderness of each area identified in the Secretary's review. Section 603(c), 43 U.S.C. § 1782(c), requires the Secretary to manage such areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness" unless and until Congress directs otherwise.

In effect, section 603 set a deadline for the Secretary to take a snapshot of the section 201 inventory and to ensure that the wilderness characteristics of areas identified in that snapshot were protected so as not to limit Congress' future options for legislative wilderness designations. Nothing in section 603, however, suggests that the inventory itself was to be frozen in time. Specifically, nothing in section 603 contravenes section 201(a)'s mandate that the Secretary "maintain [the inventory] on a continuing basis" and that "[t]his inventory shall be kept current . . . ."

Areas identified in the section 201 inventory as having wilderness characteristics have become known as "wilderness study areas" (WSAs). "Wilderness study area" is not a statutory term, but rather is defined in the BLM's Manual as "a roadless area or island that has been inventoried and found to have wilderness characteristics as described in Section 603 of FLPMA and Section 2(c) of the Wilderness Act of 1964." BLM Manual H-8550-1, Interim Management Policy for Lands Under Wilderness Review, Glossary, page 5. The Manual states the BLM's policy "to continue resource uses on lands designated as WSAs in a manner that does not impair the area's suitability for preservation as wilderness." BLM Manual 8550.06.A. The Manual also includes a Handbook with detailed guidance for implementing that policy. BLM Manual H-8550-1.

Given the enormous extent of the lands inventoried pursuant to section 201 (over 200 million acres), it was inevitable that the inventory was imperfect and that the resultant snapshot under section 603 missed some areas that were subsequently identified as having wilderness characteristics. *See, e.g., Utah Wilderness Ass'n*, 72 IBLA 125 (1983) (setting aside, as inadequately supported, BLM determinations that twenty-one units, totaling over 800,000 acres, lacked wilderness characteristics). Fortunately, Congress' mandates to maintain the inventory on a continuing basis and keep it current (section 201(a)), and to "maintain, and, when appropriate, revise" land use plans that rely on the inventory (section 202(a), 43 U.S.C. § 1712(a)) have

provided the mechanism for ensuring that Congress' options with regard to the preservation of such areas as wilderness are kept open. The Carter administration, which came into office just three months after the passage of FLPMA, and all succeeding administrations – Democratic and Republican alike – until 2003 recognized that the BLM's continuing land use planning authority under section 202 includes the authority to designate WSAs and to protect those WSAs from development pending decisions by Congress whether or not to legislatively protect them as wilderness. See John D. Leshy, *Contemporary Politics of Wilderness Preservation*, 25 J. Land Resources & Envtl. L. 1, 10 – 11. *See also* U.S. GENERAL ACCOUNTING OFFICE, FEDERAL LAND MANAGEMENT: STATUS AND USES OF WILDERNESS STUDY AREAS 3 (GAO/RCED 93-151) (1993) ("Under section 202(c) of the act, the Secretary of the Interior may identify candidate wilderness areas through its land use planning process; . . . . As required by FLPMA, BLM's studies and recommendations for section 603 and 202 study areas have been sent to the President and he has sent these recommendations to the Congress.") Such "section 202 WSAs" include areas smaller than section 603's 5,000-acre threshold as well as additional areas identified when updates to the section 201 inventory reveal lands with wilderness characteristics that were not included in the section 603 review. By 1993, the BLM had already identified 97 such section 202 WSAs as well as 51 other WSAs that had been identified in the section 603 review but, after further study in the section 202 land use planning process, were expanded. *Id.* at 16.

In 1995, just two years after the end of the statutorily-mandated wilderness review period under section 603, the BLM issued guidance in its Manual reaffirming that WSAs include not only those lands identified in the section 603 review but also "WSAs identified through the land-use planning process in Section 202 of FLPMA." BLM Manual 8550.02.A(3).[1] The Manual provides that both categories of WSAs are to be managed so as not to impair their suitability for preservation as wilderness.

In 2001, the BLM issued its Handbook on Wilderness Inventory and Study Procedures, which again reaffirmed the BLM's authority to designate new WSAs as part of its land use planning under section 202 and to manage them under the non-impairment standard. The Handbook instructed State BLM Directors to, among other things, "determine whether an inventory area should be designated as a WSA under the land use planning provisions of Section 202 of the FLPMA" and to "[p]rotect areas designated as Section 202 WSAs under the provisions of H-8550-1, Interim Management Policy for Lands Under Wilderness Review." BLM Manual H-6310-1, Wilderness Inventory and Study Procedures 2 – 3 (2001).

[1] The Manual also identifies a third category of WSAs not relevant here, namely, those specifically established by Congress.

Until 2003, the BLM continued to use its inventory and land use planning authority to identify additional areas with wilderness characteristics that had been omitted from the section 603 review. Over 50,000 acres of land that were placed in section 202 WSAs during this period have been legislatively designated as wilderness by Congress, whereas only about 2,000 acres of such WSAs have been released from WSA status by Congress. There remain over 100 Section 202 WSAs, comprising approximately 270,000 acres in nine western states, awaiting congressional action. These parcels vary in size from as few as ten acres to almost 30,000 acres. Of these areas, about 35, totaling approximately 43,000 acres, have been recommended by the BLM as being suitable for future designation by Congress as wilderness.

The 2003 Reversal

In 2003, in response to a lawsuit filed by the State of Utah, the Interior Department abruptly reversed the legal interpretation that had been followed by all previous administrations and which had led to the designation and protection of over 100 WSAs under the land-use planning authority of section 202 of FLPMA. On April 11, 2003, the Department filed a stipulation in the United States District Court for the District of Utah. In the stipulation, the Department disavowed any authority to designate any new WSAs after the submission of the wilderness suitability recommendations to Congress pursuant to FLPMA section 603, which had been required to occur by October 21, 1993. The stipulation also stated that the Department "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." *See Utah v. U.S. Dep't of the Interior*, 535 F.3d 1184, 1190.

The district court initially approved the stipulation as a consent decree. After the Southern Utah Wilderness Alliance and nine other conservation organizations (collectively, SUWA) intervened in the lawsuit and objected, the district court vacated the consent decree. The State of Utah and the Interior Department then refiled the stipulation in the form of a private settlement which, they claimed, did not require court approval. The district court then granted their joint motion to dismiss the original lawsuit, but allowed SUWA to file cross-claims challenging the settlement. Ultimately, the district court dismissed the cross-claims on standing and ripeness grounds.

SUWA appealed to the Court of Appeals for the Tenth Circuit, arguing that the settlement was unlawful, that SUWA had standing to challenge it, and that the case was ripe for judicial review. Twenty professors of natural resources law from law schools across the United States, including many of the signatories of this letter, filed a brief of *amici curiae* in support of SUWA's argument that the settlement was unlawful. The Tenth Circuit, however, affirmed the

district court's dismissal of SUWA's claims on ripeness grounds and therefore did not reach the merits of the legality of the settlement. *Id.* at 1198.

The May 20 Answers to Senator Bennett's Questions

The 2003 agreement between the Department of the Interior and the State of Utah is an unpublished and unenforceable out-of-court settlement, whose legal effect was nothing more than to terminate the litigation that it purported to settle. It did not bind the new administration brought in by the 2008 election, and the new administration is free to adopt the same interpretation of FLPMA that was followed by all previous administrations from the passage of FLPMA in 1976 until 2003, namely, that the BLM has continuing authority under section 202 of FLPMA to designate WSAs and to manage them so as not to impair their suitability for preservation by Congress as wilderness.

However, this May the Interior Department unnecessarily and, in our opinion, imprudently, issued a written statement endorsing and adopting the same restrictions on its own authority that were expressed in the 2003 settlement. The statement was in the form of an attachment to a May 20, 2009, letter from Christopher J. Mansour, Director of your Office of Congressional and Legislative Affairs, to Utah Senator Robert F. Bennett of the Committee on Energy and Natural Resources. According to the letter, the attachment was prepared "[o]n behalf of Secretary Salazar" and contained supplemental responses to questions attached to an April 30, 2009, letter from Senator Bennett to Secretary Salazar. Among other things, the attachment

- answered "Yes" to the question "Do you agree that the Department currently has no authority to establish new WSAs (post-603 WSAs) under any provision of federal law such as the Wilderness Act [or] Section 202 of FLPMA?", and

- answered "No" to the question "Does the BLM have authority to apply the non-impairment standard, as enumerated in the Interim Management Plan [sic; should be Policy] for wilderness study areas to lands that are not designated as WSAs under section 603?"

These answers directly contradict not only the 2001 Wilderness Inventory Handbook but also the 1995 Interim Management Policy for Lands Under Wilderness Review which, as discussed above, explicitly applies the non-impairment standard to "WSAs identified through the land-use planning process in Section 202 of FLPMA." BLM Manual 8550.02.A(3). As discussed above, they also are contrary to the interpretation of FLPMA that was followed by all previous administrations from the passage of FLPMA in 1976 until 2003

The Implications of the May 20 Answers

Standing alone, the May 20 letter's disavowal of continuing authority to designate new WSAs might be viewed as merely a matter of semantics. As explained above, "Wilderness Study Area" (WSA) is a non-statutory term that is given meaning only by the BLM Manual's Interim Management Policy for Lands Under Wilderness Review, which defines it to mean an area "that has been inventoried and found to have wilderness characteristics as described in Section 603 of FLPMA and Section 2(c) of the Wilderness Act of 1964." So long as an area is managed according to the non-impairment standard, it arguably does not matter whether the area is labeled a WSA.

However, the additional statement in the May 20 letter, to the effect that the BLM lacks authority to apply the non-impairment standard to lands that are not designated as WSAs under section 603 of FLPMA, could have very serious consequences for the future of hundreds of thousands, if not millions, of acres of potential wilderness. On its face, this statement not only disavows the Department's authority to extend the non-impairment standard to lands where it is not currently being applied, but also denies the Department's authority to continue to manage nearly 300,000 acres of *existing* section 202 WSAs under the non-impairment standard. This statement throws the current and future management of these areas of potential wilderness into great doubt. While we hope that the Department did not intend to announce that these areas are now open to wilderness-impairing activities, such is the implication of the May 20 letter. The letter leaves both the public and BLM staff uncertain as to how these areas are being managed, or how they will be managed, now that the Department has stated that it lacks authority to apply the non-impairment standard that, until May 20, was applied to them.

The May 20 Letter Is Contrary to FLPMA and to Precedent

All administrations from the passage of FLPMA in 1976 until the abrupt change of course in 2003 concluded that sections 201 and 202 of FLPMA provide ample authority for the Department to designate WSAs and to manage those WSAs so as not to impair their suitability for preservation as wilderness. Section 201 requires the BLM to update and maintain its inventory of the public lands on a continuing basis and section 202 requires the BLM to rely on that inventory to develop, maintain, and, when appropriate, revise its land use plans. Such land use plans are required to follow the principle of "multiple use," and multiple use includes the preservation of some land, including potential wilderness areas, in a natural condition. *See* 43 U.S.C. §§ 1712(c)(1), 1702(c) (requiring that multiple use management take into account the needs of future generations for "natural scenic, scientific, and historical values"); *see also id.* §

1701(a)(8) (declaring congressional policy to "preserve and protect certain public lands in their natural condition"), 16 U.S.C. § 529 (stating that "[t]he establishment and maintenance of areas of wilderness are consistent with" multiple use).[2] Therefore, a designation that protects the natural condition of certain public lands is well within the authority conferred by section 202. *See Sierra Club v. Watt*, 608 F. Supp. 305, 340 – 41 (E.D. Cal. 1985) (holding that, under sections 202 and 302 of FLPMA, the Secretary of the Interior "clearly had" discretion to study lands for possible wilderness designation and to protect them as WSAs in the interim, even if they did not qualify as WSAs under section 603 because they were smaller than 5,000 acres); *accord*, *Tri-County Cattlemen's Ass'n*, 60 IBLA 305, 314 (1981) ("Although an area of less than 5,000 contiguous acres would not qualify as a WSA under section 603(a), BLM is not precluded from managing such an area in a manner consistent with wilderness objectives, nor is it prohibited from recommending such an area as wilderness."); *The Wilderness Society*, 81 IBLA 181, 184 (1984); *New Mexico Natural History Institute*, 78 IBLA 133, 135 (1983).

The office of the Solicitor of the Interior in both the Reagan administration (1985) and the Clinton administration (2000) concluded that the Department has continuing authority under section 202 to designate WSAs and to manage them under the non-impairment standard. *See* Memorandum from Solicitor to Secretary Re: Jack Morrow Hills Coordinated Activity Plan (December 22, 2000) ("[T]he BLM may designate new WSAs in accordance with section 202. . . . [T]he BLM may not refuse to consider credible new information which suggests that the WSA boundaries identified in the late 1970s do not include all public lands within the planning area that have wilderness characteristics and are suitable for management as wilderness."); Memorandum from Associate Solicitor, Energy and Resources, to Director, Bureau of Land Management, Re: Wilderness Review of Lands Placed Under Bureau of Land Management Administration After October 21, 1976 (August 30, 1985) ("[T]he fact that wilderness review of certain categories of public lands is not mandated by section 603(a) does not preclude the Secretary from choosing to do so. Section 302 of FLPMA [requiring multiple use management], as underscored by section 202 of the statute, gives the Secretary that choice.")

Section 603 of FLPMA set a deadline to force BLM to act to ensure that potential wilderness areas would not be developed before Congress decided whether to extend them permanent legislative protection. But nothing in section 603 suggests that that deadline was meant to preclude protection under section 202 of areas that were missed by the initial inventory. To disallow the designation and protection of additional WSAs after the passage of the deadline

[2] 16 U.S.C. § 529 is from the Multiple Use, Sustained Yield Act (MUSYA), which applies to National Forests. However, FLPMA's definition of multiple use for the BLM (43 U.S.C. § 1702(c)) is virtually identical to MUSYA's definition for the National Forests (16 U.S.C. § 531(a)).

would turn section 603 on its head, making it a bar, rather than a spur, to protection of potential wilderness areas.

Disallowing the designation and protection of additional WSAs is also contrary to Congress' expressed intent to keep for itself the ultimate authority to decide whether an area should be preserved as wilderness. If an area is protected as a WSA, then Congress can decide whether to designate it as a wilderness or to release it from WSA status. But if an area is denied WSA protection and developed, its wilderness character may be irreversibly degraded before Congress acts.

Conclusion

We believe that the statements in the May 20, 2009, letter to Senator Bennett, to the effect that the Department lacks authority under section 202 of FLPMA to designate Wilderness Study Areas and to manage them under the non-impairment standard, are incorrect. We are also concerned that the Department has, in the private settlement of a lawsuit, reversed a longstanding interpretation of an important statutory provision, and then confirmed that reversal in a letter. We believe that the adoption of such a new, and controversial, legal interpretation should be undertaken in a more considered, public, and transparent process. Finally, we fear that this interpretation of FLPMA could result in the needless loss of worthy additions to the National Wilderness Preservation System, including numerous areas that have already been designated as section 202 WSAs by previous administrations. On its face, the May 20 letter seems to require the immediate lifting of the non-impairment standard from these existing section 202 WSAs, a result that we hope you did not intend. We therefore urge you to reconsider the positions stated in the May 20 letter and to conclude, as did every previous administration from 1976 to 2003, that section 202 of FLPMA provides the Department with ample authority to designate new WSAs and to manage them so as not to impair their suitability for future preservation by Congress as wilderness.

Sincerely,

(Institutions are listed for identification only. The opinions expressed herein are those of the authors and not necessarily those of the institutions with which the authors are affiliated.)

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United States Department of the Interior

OFFICE OF THE SOLICITOR
WASHINGTON, D.C. 20240

AUG 30 1985

BLM.ER.0291

Memorandum

To: Director, Bureau of Land Management

Through: Assistant Secretary, Land and Minerals Management

From: Associate Solicitor, Energy and Resources

Subject: Wilderness Review of Lands Placed Under Bureau of Land Management Administration After October 21, 1976

By memorandum dated July 17, 1985, you asked us whether the Secretary of the Interior may study for possible preservation as wilderness (1) lands acquired by the United States and administered by the Bureau of Land Management after October 21, 1976 or (2) land restored to public land status after the same date. October 21, 1976, is the day Congress enacted the Federal Land Policy and Management Act. We conclude that the Secretary has this authority.

Discussion

1. The Extent of Mandatory Wilderness Review

Section 603(a) of the Federal Land Policy and Management Act, 43 U.S.C. § 1782(a)(1982)(FLPMA), states that "the Secretary shall review [for possible preservation as wilderness] those roadless areas of five thousand acres or more. . . of the public lands, identified during the inventory required by section 201(a) of this Act as having wilderness characteristics. . . ." The provision removes any discretion from the Secretary when he has identified in the inventory public lands having wilderness characteristics. They must be reviewed for possible wilderness preservation.

The mandate found in section 603(a) is limited, however. The public lands subject to the provision are those "identified during the inventory required by section 201(a) of the Act as having wilderness characteristics." The predicate of the

inventory, practically speaking, renders section 603(a)'s mandate inapplicable to lands not included in the inventory but subsequently acquired or restored, regardless of whether they have wilderness characteristics.[1] As we stated in 1982:

> [T]he specific directive of 603 is for a one-time review of lands with wilderness characteristics based on the initial inventory of lands conducted by BLM. The Secretary is not required to conduct a wilderness review of restored (or otherwise acquired) lands that come under BLM management after the date of the Act.

Memorandum from Associate Solicitor, Energy and Resources to Director, Bureau of Land Management, "Wilderness Review of Lands Placed Under BLM Administration after October 21, 1976," at 4 (March 16, 1982). Our opinion remains unchanged: the Secretary is under no mandatory duty to review public lands acquired after the inventory for possible wilderness preservation.

2. Secretary's Discretion to Review After-Acquired Public Lands for Wilderness Preservation

Despite the absence of a mandate to review after-acquired public lands for possible wilderness preservation, the Secretary nonetheless enjoys discretion to do so. The discretion is conferred primarily by section 302 of FLPMA, and buttressed by section 202 of that Act.

Section 302(a) of FLPMA directs the Secretary to "manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him. . . ." 43 U.S.C. § 1732(a)(1982). The governing principle of multiple use is defined by the statute broadly:

> The term "multiple use" means the management of the public lands and their various resource values so that they are utilized in the combination that will *best meet the present and future needs of the American people*; making the *most judicious use* of the land for *some or all* of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments

[1] As a practical matter, BLM did not conduct an inventory of all public lands on October 21, 1976. This occurred between 1976 and 1978. BLM may have included some lands acquired or restored to public lands status after FLPMA's enactment in its wilderness inventory. These are properly subject to wilderness review since they would meet all the criteria of section 603(a) which speaks of "inventory" and not the date of FLPMA's enactment. What we are addressing here are essentially those lands acquired or restored after the wilderness inventory. We will use the term "after-acquired public lands" for these lands.

> in use to conform to changing needs and conditions; the use of some land for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

Section 103(c), FLPMA; 43 U.S.C. § 1702(c)(1982)(emphasis added). As the emphasized language discloses, multiple use management envisions instances when the Secretary will manage public lands for a dominant use, such as wilderness. While reviewing public lands for possible wilderness preservation and managing them accordingly is use of the land for less than all its resources, the statute expressly permits this.

Reinforcing the Secretary's authority to not only review, but to preserve public lands' wilderness characteristics are other provisions of FLPMA. Section 302(b) directs the Secretary to "take any action necessary to prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(b)(1982). Moreover, the land use planning provisions of section 202 of FLPMA underline the Secretary's broad authority to manage public lands for any number of uses, including wilderness. 43 U.S.C. § 1712(c)(1),(4) and (7)(1982). Additionally, reviewing public lands for wilderness preservation and protecting those values, as a mode of multiple use management, is consistent with Congress' declared policy in passing FLPMA. Specifically, section 102(a) of FLPMA declares, as a matter of national policy, that the Secretary shall "preserve and protect certain public lands in their natural condition." 43 U.S.C. § 1701(a)(8)(1982).

The one court to consider the question also agrees that FLPMA's provisions governing multiple use and land use planning afford the Secretary discretion to review and manage for possible wilderness preservation public lands falling outside section 603(a)'s scope. Specifically, in Sierra Club v. Watt, ___ F. Supp. ___, No. S-83-035 LKK, (E.D. Cal. 1985), the district court held that sections 302 and 202 plainly gave the Secretary a choice whether to review for wilderness preservation roadless areas under 5,000 acres. Slip opinion at 8 n.7, 84 and 86-87. The holding's significance is that section 603(a) of FLPMA only mandated wilderness review of roadless areas over 5,000 acres.

Indeed, the court characterized the Secretary's authority under FLPMA to engage in wilderness review of public lands not only as discretionary, but also broad. Id. at 84 and 86-87.

As the Sierra Club v. Watt decision instructs, the fact that wilderness review of certain categories of public lands is not mandated by section 603(a) does not preclude the Secretary from choosing to do so. Section 302 of FLPMA, as underscored by section 202 of the statute, gives the Secretary that choice.

3. Coordination with Existing Wilderness Review

Your memorandum also advanced the proposition that where after-acquired public lands adjoin or are intermingled with an area under wilderness review pursuant to section 603(a) of FLPMA, the after-acquired lands can be reviewed for wilderness preservation under that authority. The proposition closely parallels the discredited view that the Secretary could under section 603(a) review for wilderness preservation public lands possessing wilderness characteristics only by virtue of their contiguity to other wilderness. See Don Coops, et al., 61 IBLA 300 (1982). More important, the proposition and the bootstrap inherent in it are unnecessary. Sections 302 and 202 of FLPMA provide the Secretary authority to review after-acquired public lands for possible wilderness preservation. Equally important, how the Secretary chooses to conduct wilderness review of adjoining or intermingled after-acquired public lands is one committed to his discretion. The Secretary may consolidate the wilderness review of those tracts with on-going efforts under section 603(a) of FLPMA. We note that if a consolidated effort found an entire area unsuitable for wilderness preservation, the Secretary may be faced with releasing the consolidated tracts from further wilderness review differently. Departmental policy requires the Secretary to submit to the President and Congress all recommendations arising from his wilderness review under section 603(a) of FLPMA. A similar policy constraint does not exist for areas found unsuitable through wilderness review under sections 302 and 202 of FLPMA. The Secretary could release these areas from further wilderness review without presidential or congressional action.

Conclusion

The Secretary may, if he chooses, review for possible preservation as wilderness lands acquired and administered by the Bureau of Land Management or restored to public land status after FLPMA became law.

Please do not hesitate to contact either Paul Smyth (343-4036) or Allan Brock (343-4325), if you have any questions about this memorandum.

sgd.

Keith E. Eastin
Associate Solicitor
Energy and Resources

cc: Docket DER/RF DER/Land Use DER/ABrock DER/PSmyth
bcc: BLM (200), (310), (340) and (342)