

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 & Env'tl. 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.)

Robert W. Adler
James I. Farr Chair and Professor of Law
University of Utah S.J. Quinney College of Law

Secretary Ken Salazar

Page 9

September 30, 2009

Robert T. Anderson
Associate Professor of Law
Director, Native American Law Center
University of Washington School of Law

Peter A. Appel
Associate Professor
University of Georgia
School of Law

Hope Babcock
Professor of Law
Georgetown University Law Center

Bret C. Birdsong
Professor of Law
William S. Boyd School of Law

Michael C. Blumm
Professor of Law
Lewis and Clark Law School

John E. Bonine
Professor of Law and Dean's Distinguished Faculty Fellow
University of Oregon School of Law

Barry Boyer
Professor of Law
State University of New York at Buffalo

Rebecca Bratspies
Professor
CUNY School of Law

Maxine Burkett
Associate Professor
William S. Richardson School of Law
University of Hawai'i

Alejandro E. Camacho
Associate Professor of Law
Notre Dame Law School

Secretary Ken Salazar
Page 10
September 30, 2009

Cinnamon Carlarne
Assistant Professor
University of South Carolina School of Law
School of the Earth, Ocean, and Environment

David N. Cassuto
Professor of Law
Pace Law School

Federico Cheever
Professor of Law and Associate Dean for Academic Affairs
Sturm College of Law
University of Denver

Kim Diana Connolly
Associate Professor
University of South Carolina School of Law

Barbara Cosens
Associate Professor Barbara Cosens
University of Idaho
College of Law
College of Graduate Studies, Waters of the West

Joseph W. Dellapenna
Professor of Law
Villanova University School of Law

Debra L. Donahue
Professor of Law
University of Wyoming College of Law

Holly Doremus
Professor of Law
University of California, Berkeley

David M. Driesen
University Professor
Syracuse University

Secretary Ken Salazar

Page 11

September 30, 2009

Timothy P. Duane
Associate Professor of Law, Vermont Law School
Associate Professor of Environmental Studies
University of California, Santa Cruz

Myrl L. Duncan
Professor of Law
Washburn University School of Law

Joseph Feller
Professor of Law
Arizona State University

Richard J. Finkmoore
Professor of Law
California Western School of Law

Robert L. Fischman
Professor of Law
Indiana University Maurer School of Law

Eric T. Freyfogle
Max L. Rowe Professor of Law
University of Illinois College of Law

David H. Getches
Dean and Raphael J. Moses Professor of Natural Resources Law
University of Colorado School of Law

Robert L. Glicksman
J.B. & Maurice C. Shapiro Professor of Environmental Law
The George Washington University Law School

Dale Goble
Margaret Wilson Schimke Distinguished Professor of Law
University of Idaho College of Law

Oliver A. Houck
Professor of Law
Tulane University Law School

Secretary Ken Salazar

Page 12

September 30, 2009

Steve Johnson

Associate Dean for Academic Affairs and Professor

Mercer University Law School

William S. Jordan, III

Associate Dean and C. Blake McDowell Professor of Law

University of Akron School of Law

Madeline June Kass, J.D., M.E.S.

Associate Professor of Law

Thomas Jefferson School of Law

Robert B. Keiter

Wallace Stegner Professor of Law

Distinguished University Professor

University of Utah S.J. Quinney College of Law

Amy K. Kelley

Professor of Law

Gonzaga University School of Law

Christine A. Klein

Chesterfield Smith Professor of Law

University of Florida Levin College of Law

Sarah Krakoff

Professor of Law, Associate Dean for Research

University of Colorado School of Law

Howard A. Latin

Professor of Law and Justice Francis Scholar

Rutgers University School of Law

John D. Leshy

Harry D. Sunderland Distinguished Professor of Law

University of California, Hastings College of the Law

Andrew Long

Assistant Professor

Florida Coastal School of Law

Secretary Ken Salazar
Page 13
September 30, 2009

Professor Linda A. Malone
Director, Human Security Law Program
William and Mary Law School

James R. May, B.S.M.E., CEIT, J.D., LL.M, Esq.
Professor of Law
H. Albert Young Fellow in Constitutional Law
Professor of Graduate Engineering (Adjunct)
Associate Director, Environmental Law Center
Widener University

Patrick C. McGinley
Judge Charles H. Haden II Professor of Law
College of Law
West Virginia University

Joel A. Mintz
Professor of Law
Nova Southeastern University Law Center

Timothy M. Mulvaney
Visiting Associate Professor of Law
Texas Wesleyan University School of Law

Richard L. Ottinger
Dean Emeritus
Pace Law School

Dave Owen
Associate Professor
University of Maine School of Law

Zygmunt Jan Broël Plater
Professor of Law
Boston College Law School

Judith Royster
Professor and Chapman Chair in Law
Co-Director, Native American Law Center
University of Tulsa College of Law

Secretary Ken Salazar

Page 14

September 30, 2009

Amy Sinden

Associate Professor

Temple University Beasley School of Law

Mark S. Squillace

Professor of Law and Director of the Natural Resources Law Center

University of Colorado School of Law

Annecoos Wiersema

Assistant Professor of Law

Michael E. Moritz College of Law

The Ohio State University

Charles F. Wilkinson

Distinguished University Professor

Moses Lasky Professor of Law

University of Colorado School of Law

Mary Christina Wood

Philip H. Knight Professor

University of Oregon School of Law

Sandra Zellmer

Law Alumni Professor of Natural Resources Law

University of Nebraska College of Law