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Bureau of Land Management (BLM) Lands and National Forests

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Ross W. Gorte and Carol Hardy Vincent, Coordinators
Resources, Science, and Industry Division

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SUMMARY

In the second session, Congress continues to confront an array of issues related to the public lands managed by the Bureau of Land Management (BLM) and the national forests managed by the U.S. Forest Service (FS). The Administration continues to address public lands and national forests through budgetary, regulatory, and other actions. Several key issues of ongoing congressional and administrative interest are covered in this report.

Wildfire Protection. The Administration proposed a Healthy Forests Initiative to protect communities from wildfires by reducing fuels. Congress enacted the Healthy Forests Restoration Act of 2003 (P.L. 108-148) with many of the proposals in the President's initiative and other provisions. Other aspects of fire protection are being pursued through proposed and final regulations.

Energy Resources. Congressional and administrative interest in access to federal lands for energy and mineral development is reflected in major energy policy legislation — H.R. 6 and S. 2095. Both S. 2095 and the conference agreement on H.R. 6 would eliminate the 160-acre limit on coal leases and authorize demonstration technologies for unproven, unconventional reserves, but not open ANWR to oil and gas leasing. The conference agreement passed the House but remains pending in the Senate, and S. 2095 is on the Senate calendar.

Roadless Areas of the National Forest System. The Clinton Administration issued rules that limit road construction and timber cutting in 58.5 million acres of roadless areas in the National Forest System. A court has enjoined implementation of the Clinton rules. The Bush Administration proposed minor changes to the rules on July 15, 2003, and is considering other changes. On December 30, the Bush Administration issued a new rule exempting the Tongass NF in Alaska from the roadless rule.

R.S. 2477 Rights of Way. Revised Statute (R.S.) 2477 granted rights of way for the construction of highways across unreserved federal lands, but the extent of valid rights of way is not clear in some states. Congress prohibited regulations "pertaining to" R.S. 2477 from becoming effective. The Bush Administration recently finalized regulations on "disclaimers of interest" for clearing title to R.S. 2477 highway easements, and executed an agreement with Utah to acknowledge and disclaim R.S. 2477 rights of way in that state. Whether these regulations "pertain to" R.S. 2477 is controversial.

National Monuments and the Antiquities Act. The Antiquities Act of 1906 authorizes the President to establish national monuments on federal lands. The 108th Congress is considering limiting the President's authority and amending certain monuments. The Bush Administration is developing management plans for many monuments.

Other Issues. Other federal lands issues of interest to the 108th Congress include wilderness, hardrock mining and millsites, grazing management, forest planning, land acquisition, and outsourcing federal jobs.

MOST RECENT DEVELOPMENTS

- On May 10, 2004, the Forest Service and Department of the Interior canceled the contract for 33 large airtankers due to concerns about their airworthiness.
- An alternative Senate version of comprehensive energy legislation that contains provisions affecting federal lands, S. 2095, was placed on the Senate calendar on February 23, 2004. The conference report on H.R. 6, with similar federal lands provisions, remains pending in the Senate.
- On December 30, 2003, the Bush Administration issued a new rule temporarily exempting the Tongass NF in Alaska from the roadless rule, pending completion of an Alaska-wide rule.
- On April 9, 2003, the Administration executed a Memorandum of Understanding with the State of Utah to acknowledge and disclaim R.S. 2477 rights-of-way in that state. The first application for a disclaimer (filed in regard to a Utah road) was identified on February 9, 2004 (69 *Federal Register* 6000).
- On April 19, 2004, the Federal District Court in Salt Lake City upheld the designation of the Grand Staircase-Escalante National Monument in Utah (2004 WL 965922 (D. Ut. 2004)).

BACKGROUND AND ANALYSIS

The Bureau of Land Management (BLM) in DOI and the Forest Service (FS) in the U.S. Department of Agriculture manage 454 million acres of land, two-thirds of the land owned by the federal government and one-fifth of the total U.S. land area. Of that amount, the BLM manages 261.5 million acres of land, predominantly in the West. These lands are defined by the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. §§1701, *et seq.*) as "public lands." The FS administers 192.5 million acres of federal land, also concentrated in the West.

The BLM and FS have similar management responsibilities for their lands, and many key issues affect both agencies' lands. However, each agency has unique emphases and functions. For instance, most BLM lands are rangelands, and the BLM administers mineral development on all federal lands. Most federal forests are managed by the FS, and only the FS has a cooperative program to assist nonfederal landowners. Moreover, development of the two agencies has differed, and historically they have focused on different issues.

History of the Bureau of Land Management

For the BLM, many of the issues traditionally center on the agency's responsibilities for land disposal, range management (particularly grazing), and minerals development. These three key functions were assumed by the BLM when it was created in 1946, by the merger of the General Land Office (itself created in 1812) and the U.S. Grazing Service (created in 1934). The General Land Office had helped convey land to settlers and issued leases and administered mining claims on the public lands, among other functions. The U.S. Grazing

Service had been established to manage the public lands best suited for livestock grazing. The Taylor Grazing Act of 1934 (TGA, 43 U.S.C. §§315, *et seq*.) was the principal statute governing the public lands in the early years of the U.S. Grazing Service, and remains a key statute governing the use of federal rangelands for private livestock grazing. Enacted to remedy the deteriorating condition of public rangelands, the Act provides for the management of public lands "pending [their] final disposal." This language expresses the view that federal lands might be transferred to other ownership.

Congress frequently has debated how best to manage federal lands, and whether to retain or dispose of the remaining public lands. In 1976, Congress enacted FLPMA, sometimes called BLM's Organic Act because it consolidated and articulated the agency's responsibilities, although it left the TGA in place. Among other provisions, the law establishes management of the public lands based on the principles of multiple use and sustained yield; provides that the federal government receive fair market value for the use of public lands and resources; and establishes a general national policy that the public lands be retained in federal ownership (as opposed to managed until their "final disposal.") This retention policy contributed to the "Sagebrush Rebellion" of the late 1970s and early 1980s, which was an effort among some Westerners seeking to reduce the federal presence in their states by transferring federal land to state or private ownership. Land ownership, as well as conflicts over land use and management, continue to be among the key issues for BLM lands.

History of the Forest Service

The FS was created in 1905, when forest lands reserved by the President (beginning in 1891) were transferred from the Department of the Interior into the existing USDA Bureau of Forestry (initially an agency for private forestry assistance and forestry research). Management direction for the national forests, first enacted in 1897 and expanded in 1960, identifies the purposes for which the lands controlled by the Forest Service are to be managed, allows protection of areas as wilderness, and directs "harmonious and coordinated management" to provide sustained yields of resources.

Many issues concerning national forest management and use have focused on the appropriate level and location of timber harvesting. Major conflicts over clearcutting began in the 1960s, and litigation in the early 1970s successfully challenged FS clearcutting in West Virginia and elsewhere. In part to address these issues, Congress enacted the National Forest Management Act of 1976 (NFMA; P.L. 94-588) to revise timber sale authorities and to elaborate on considerations and requirements in land and resource management plans. This NFMA planning has been widely criticized as expensive, time-consuming, and ineffective for making decisions and informing the public. (See **Other Issues** below.)

Wilderness protection also has been a continuing issue for the FS since 1964 because agency recommendations are pending. Pressure to protect these and other areas contributed to the Clinton Administration's decision to protect roadless areas not designated as wilderness. (For wilderness issues, see **Other Issues** below, and CRS Report RL31447, *Wilderness: Overview and Statistics*, by Ross W. Gorte.)

Scope of Issue Brief

Many issues affecting BLM and FS lands are similar, and the missions of the agencies are nearly identical. By law, the BLM and FS lands are to be administered for multiple uses, although slightly different uses are specified for each agency. In practice, the land uses considered by the agencies include recreation, range, timber, minerals, watershed, wildlife and fish, and conservation. BLM and FS lands also are required to be managed for sustained yield — i.e., for providing in perpetuity a high level of resource outputs, without impairing the land's productivity. Further, many issues, programs, and policies affect both agencies. For these reasons, BLM and FS lands often are discussed together, as in this report.

This brief focuses on several issues affecting BLM and FS lands that are of interest to the 108th Congress. While in some cases the issues discussed here are relevant to other federal lands and agencies, this brief does not comprehensively cover issues primarily affecting other federal lands, such as the National Park System (managed by the National Park Service, DOI) or the National Wildlife Refuge System (managed by the Fish and Wildlife Service, DOI). For background on federal land management generally, see CRS Report RL30867, *Federal Land Management Agencies: Background on Land and Resource Management*, coordinated by Carol Hardy Vincent. Information on FY2005 appropriations for the BLM and FS (and other agencies and programs funded by the FY2005 Interior and Related Agencies appropriations bill) is included in CRS Report RL32306, *Appropriations for FY2005: Interior and Related Agencies*, coordinated by Carol Hardy Vincent and Susan Boren. For information on park and recreation issues, see CRS Issue Brief IB10093, *National Park Management and Recreation*, coordinated by Carol Hardy Vincent. For information on oil and gas leasing in the Arctic National Wildlife Refuge (ANWR), see CRS Issue Brief IB10111, *Arctic National Wildlife Refuge (ANWR): Controversies for the 108th Congress*, by M. Lynne Corn, Bernard A. Gelb, and Pamela Baldwin. For information on other related issues, see the CRS web page at [http://www.crs.gov/].

Wildfire Protection (by Ross W. Gorte)

Background. The 2000 and 2002 fire seasons were among the worst in the past 50 years. Many argue that the threat of severe wildfires has grown, because many forests have unnaturally high fuel loads (e.g., dead trees and dense undergrowth) and increasing numbers of structures are in and near the forests (i.e., the *wildland-urban interface*). A key focus for Congress has been addressing wildfire threats on federal lands, although threats also exist on private forest lands. Fuel treatments on federal lands have been proposed to reduce the threats from fire, including prescribed burning (setting fires under specific conditions); commercial logging followed with appropriate slash disposal; and other treatments (e.g., precommercial thinning). Proponents of fuel reduction on federal lands argue that needed treatments often are delayed by environmental studies, administrative appeals, and litigation. However, others fear that "streamlining" fuel reduction projects could increase logging on federal lands, that such projects might not receive proper environmental review, and that reducing fire risk in the interface requires landscaping to reduce fuels on the private lands and modifying structures on those lands.

Administrative Actions. In August 2002, the Bush Administration proposed a Healthy Forests Initiative to improve wildfire protection by reducing hazardous fuels. The program would have given priority to the wildland-urban interface, municipal watersheds,

and areas affected by insects and diseases. It included expedited consultations on endangered species and a collaborative process for public involvement, but would have eliminated public requests for an administrative review of project proposals, constrained judicial review, and prohibited restraining orders and injunctions. It also included stewardship (goods-for-services) contracting, essentially allowing the agencies to use timber, instead of cash, to pay contractors for land management services (e.g., thinning, noxious weed control, and road and trail maintenance). Congress enacted the Healthy Forests Restoration Act of 2003 (P.L. 108-148) with many of the proposals in the President's initiative and other provisions (described below under **Legislative Activity**).

In February 2004, the Administration issued guidelines for implementing activities under the Healthy Forests Initiative and P.L. 108-148. The guidelines are: USDA Forest Service and U.S. Dept. of the Interior, BLM, *Healthy Forests Initiative and Healthy Forests Restoration Act Interim Field Guide*, FS-799 (Washington, DC: February 2004), available at [http://www.fs.fed.us/projects/hfi/field-guide], visited on March 11, 2004.

Before wildfire protection legislation was enacted, the Administration made several regulatory changes to facilitate fuel reduction. These changes are unaffected by P.L. 108-148. First, two new categories of actions can be excluded from NEPA analysis and documentation: fuel reduction and post-fire rehabilitation activities (68 *Fed. Reg.* 33814, June 5, 2003). These categorical exclusions cannot be used in certain areas or under certain circumstances, but may be used for timber sales if fuel reduction is the primary purpose.

Second, the administrative review processes also were revised (68 *Fed. Reg.* 33582, June 4, 2003, for the FS; 68 *Fed. Reg.* 33794, June 5, 2003, for the BLM). The revisions sought to clarify that some emergency actions may be implemented immediately and others after complying with publication requirements, and to expand emergencies to include those "that would result in substantial loss of economic value to the Government if implementation of the proposed action were delayed."

The Administration also proposed regulatory changes that could affect fuel reduction, public involvement, and environmental impacts. New regulations were proposed for FS forest planning (67 *Fed. Reg.* 72770, Dec. 6, 2002; see **Other Issues** below)[1], and new categorical exclusions were finalized for hazardous fuel reduction projects (68 *Fed. Reg.* 33814, June 5, 2003) and for small timber harvesting projects (68 *Fed. Reg.* 44598, July 29, 2003). The total impact of the regulatory changes is greater discretion for FS action without environmental studies and with fewer opportunities for the public to comment on or to request administrative review of those actions.

On May 10, 2004, the Administration terminated the contract for 33 large firefighting airtankers because of concerns over their airworthiness. This followed an April 23, 2004 *Safety Recommendation* from the National Transportation Safety Board (NTSB) to the Secretaries of Agriculture and the Interior and the Administrator of the Federal Aviation Administration concerning the history of accidents and maintenance problems for these

[1] See CRS congressional memorandum, *Analysis and Critique of the Forest Service Planning Regulations Proposed on December 6, 2002*, by Pamela Baldwin (January 3, 2003), 21 p.

aircraft. The NTSB recommendations were supported in a May 5, 2004 letter to the FS Chief and BLM Director by the Co-Chairs of the Blue Ribbon Panel on Federal Aerial Firefighting.

Legislative Activity. H.R. 1904, the Healthy Forests Restoration Act of 2003, was signed into law (P.L. 108-148) on December 3, 2003. Title I of the law addresses hazardous fuel reduction on federal lands. Priority is directed to protecting "at-risk communities" and municipal watersheds. Title I authorizes a new, alternative process for reducing fuels on up to 20 million acres of national forests or BLM lands in certain areas: in or near the wildland-urban interface and municipal water supply systems, certain endangered species habitats, and areas affected by wind or ice storms or by insect or disease epidemics that threaten ecological health or natural resources. Authorized projects must be consistent with land management plans. They generally are to focus on small trees, thinning, fuel breaks, and prescribed burning while retaining large trees and maintaining old growth stands, but are prohibited on certain lands, such as wilderness areas. The law authorizes $760 million annually for authorized projects and for any other fuel reduction activities, including grants to states.

For authorized projects, the FS or BLM must prepare NEPA documents, but the agencies are allowed to analyze a limited number of alternatives. The public can be involved through scoping, collaboration, and multiparty monitoring of project impacts; the public also must be given a chance to comment on proposed projects. For its projects, the FS is to develop a new pre-decisional review process to supplant the existing administrative appeals process, and administrative reviews must be "exhausted" before litigation is allowed. Lawsuits against either agency's projects must be filed in the district court for the area where the project is proposed, and courts are encouraged to review cases expeditiously. Preliminary injunctions are limited to 60 days, but can be renewed, and courts are directed to balance short- and long-term impacts of action and of inaction.

P.L. 108-148 also contains five other titles that indirectly relate to wildfire protection. Title II expands biomass research, authorizes a new biomass rural revitalization program, and authorizes grants for biomass use. Title III establishes a watershed forestry assistance program with cost-sharing assistance to landowners and financial and technical assistance to states and tribal governments to protect water quality through forestry practices. Title IV authorizes data collection on forest-damaging insects and "applied silvicultural assessments" (treatments for research purposes) of up to 1,000 acres each (250,000 acres total) that are categorically excluded from NEPA, but with peer review and public notice and comment on each project. Title V authorizes a program of 10-year agreements or 30-year or long-term (up to 99-year) easements to pay willing private landowners to protect or restore their lands as habitat for endangered species. Finally, Title VI authorizes an "early warning system" for environmental threats primarily to eastern U.S. forests.

On May 13, 2004, the House Resources Subcommittee on Forests and Forest Health held a hearing on firefighting preparedness, emphasizing the Administration's recent decision to cancel the contract for 33 firefighting airtankers.

Congress also continues to address wildfire protection through appropriations. For FY2005, the Administration is requesting $2,438.2 million for wildland fire management accounts. This is $292.4 million below FY2004 appropriations and $726.9 million below FY2003 (both including emergency supplemental funding). (For more information, see CRS

Report RL31806, *Interior Appropriations for FY2004: Interior and Related Agencies*, coordinated by Carol Hardy Vincent and Susan Boren.)

Energy Resources (by Marc Humphries)

Background. A controversial issue is whether to increase access to federal lands for energy and mineral development. The BLM administers the Mineral Leasing Act of 1920 which governs the leasing of *onshore* oil and gas, coal, and several other minerals on the federal lands. A BLM study (December 1, 2000) determined that of the roughly 700 million acres of federal minerals, underlying federal as well as other lands, (1) about 165 million acres (24%) have been withdrawn from mineral entry, leasing, and sale, subject to valid existing rights, and (2) mineral development on another 182 million acres (26%) is subject to the approval of the surface management agency, and must not be in conflict with land designations and plans.

The oil and gas industry contends that entry into areas that are off-limits to development, particularly in the Rocky Mountain region, is necessary to ensure future domestic oil and gas supplies. Opponents to opening these areas maintain that there are environmental risks, restricted lands are environmentally sensitive or unique, and that the United States could meet its energy needs with energy conservation and increased exploration elsewhere. (For more information, see CRS Report RL32315, *Oil and Gas Exploration and Development on Public Lands*, by Marc Humphries.)

Administrative Actions. A concern for the Administration is how to best increase U.S. domestic oil and gas supplies. Proposals from the National Energy Policy Development (NEPD) Group, led by Vice President Cheney, recommended that the President direct the Secretary of the Interior to identify and eliminate impediments to oil and gas exploration and development on federal land. On April 14, 2003, the BLM announced new management strategies intended to remove impediments, and streamline the permitting process, for oil and gas leasing on federal lands. Features of this new strategy include the use of multiple applications for a permit package when appropriate and use of a geographic area development plan for the NEPA analysis and permitting process.

The Administration is examining land status and reviewing public land withdrawals. The BLM, USGS, and Department of Energy (DOE) continue to assess the oil and gas reserves and resources on federal lands. Several federal agencies issued (January 2003) an assessment entitled *Scientific Inventory of Onshore Federal Lands' Oil and Gas Resources and Reserves and the Extent and Nature of Restrictions or Impediments to their Development.* Some assert that the report shows that more federal lands currently are available for energy development than generally had been realized.

The Bush Administration also is reviving the 20-year-old Clean Coal Technologies program under its Clean Coal Power Initiative (CCPI) and is seeking $2 billion over 10 years (FY2002–FY2011). Congress has funded the CCPI at $146 million in FY2002 and $150 million in FY2003. For FY2004, Congress enacted $178.8 million for the CCPI including funds for the FutureGen project, a 10-year, $1 billion Bush Administration initiative designed to establish the feasibility of producing electricity and hydrogen from a coal-fired plant yielding no emissions. For FY2005, the combined CCPI and FutureGen request is $287 million. Supporters note that coal resources could be more widely used if the

environmental restrictions could be reduced. Opponents contend that new technology will not make coal environmentally acceptable at a competitive cost.

Legislative Activity. Passing comprehensive energy legislation continues to be a priority for the second session. The conference report on a comprehensive energy bill, H.R. 6, passed the House during the first session and remains pending in the Senate. Further Senate action on H.R. 6 may occur in the second session.

In earlier action, the House passed the energy bill (H.R. 6) on April 11, 2003. Beginning in May 2003, the Senate debated its new version (S. 14) of energy legislation. However, after contentious debate over high-priority issues, the Senate opted to pass its previously-passed version — H.R. 4 from the 107th Congress — as an amendment to H.R. 6. A conference agreement on the House- and Senate-passed versions was reached. The House approved the conference report (H.Rept. 108-375) on November 18, 2003. During Senate consideration of the conference report on November 21, 2003, the Senate failed to invoke cloture (57-40) to end debate. The Majority Leader subsequently entered a motion to reconsider the cloture vote on the pending conference report, and the Senate may resume debate on the bill. A more recent Senate energy bill (S. 2095) was introduced and placed on the Senate legislative calendar (February 23, 2004) where it awaits possible floor action.

Federal lands could be affected by various provisions of the energy legislation. Both S. 2095, and the conference agreement on H.R. 6, would end the 160-acre limit on coal lease modifications and would initiate demonstration technologies for oil and gas recovery in unproven, unconventional reservoirs on public and private lands. They also would alter the siting and administration of rights of way on federal lands, and would require the Secretary of the Interior to evaluate the oil and gas leasing and permitting process, with particular emphasis on permitting time frames. Other bills have also been introduced to alter the leasing process for coal (H.R. 794) and for geothermal energy (H.R. 2772).

Whether to open the Arctic National Wildlife Refuge (ANWR) to oil and gas development has been one of the most contentious issues in the energy debate. A provision to open ANWR was in the House-passed version of the energy bill, but was not in the Senate-passed version. Opening ANWR to oil and gas exploration or drilling was not included in the conference agreement on H.R. 6 or contained in S. 2095. (See CRS Issue Brief IB10111, *Arctic National Wildlife Refuge: Controversies for the 108th Congress*, by M. Lynne Corn, Bernard A. Gelb, and Pamela Baldwin.)

Roadless Areas of the National Forest System (by Pamela Baldwin)

Background. In its final months, the Clinton Administration issued several new rules affecting the roadless areas of the National Forest System (NFS), including new rules and policies on roadless areas, NFS roads (66 *Federal Register* 3,219, Jan. 12, 2001), and the FS planning process. Although the Bush Administration proposed new rules for the forest planning process (see **Other Issues** below), congressional and public attention has focused on roadless areas, and that issue is discussed here. (For more information, see CRS Report RL30647, *The National Forest System Roadless Areas Initiative*, by Pamela Baldwin.)

Administrative Actions. The Clinton Administration established a new approach to the management of the approximately 58.5 million acres of NFS inventoried roadless areas

by providing national guidance limiting roads and timber cutting in those areas. The Administration asserted that the change would limit the litigation and delays that occurred when decisions were made at the level of each national forest. The Clinton roadless rule (66 *Federal Register* 3,244, Jan. 12, 2001) would have prohibited road construction and timber cutting in the inventoried roadless areas, with several exceptions, e.g. roads for access to inholdings or for public health and safety purposes, and timber cutting for fire control.

On May 10, 2001, the Federal District Court for Idaho enjoined implementation of the roadless rule, citing its "irreparable harm" to federal forests and their neighbors (Kootenai Tribe of Idaho v. Veneman, 142 F.Supp. 2d 1231 (Id. D.C. 2001)). On December 12, 2002, the Ninth Circuit reversed the decision. However, on July 14, 2003, the Federal District Court for Wyoming again enjoined implementation of the rule, in a decision that purported to apply nationally.

The Bush Administration is assessing whether to keep the Clinton roadless rule and sought public comment on whether and how to change the rule. On June 9, 2003, the Secretary of Agriculture announced that the Department would retain the roadless rule, but was considering allowing governors to request exceptions for certain activities. The Administration proposed a rule to exclude the Tongass National Forest from roadless area protection (published July 15, 2003). On December 30, 2003, the Administration finalized a rule for the Tongass temporarily exempting the Forest from the roadless rule, until an Alaska-wide rule can be completed (68 *Federal Register* 75136). The Bush Administration has not finalized any roadless area regulations, and how the Administration will proceed in light of the July 14 injunction is still uncertain.

Until new regulations are finalized, the FS is managing roadless areas in accordance with a series of directives constituting interim guidance. That guidance places most decisions with the Regional Forester, and some with the Chief of the Forest Service, until each forest plan is amended or revised to address roadless area protection. This approach reverses the Clinton rule by returning decisions on roads and timber activities in roadless areas to the individual forest planning level. The FS also has made several changes to its NEPA compliance requirements that could allow some activities in roadless areas without environmental studies, public notice and comment, or appeals.

Legislative Activity. Congress is considering legislation on forest management in general and roadless areas in particular. H.R. 2369 would require that roadless areas be managed in accordance with the original roadless rule, and S. 1200 would enact most of the content of the roadless rule. S. 1938 would protect roadless and other areas more stringently than the Clinton roadless rule would have. No action has occurred on these bills. A House floor amendment to the FY2004 Interior appropriations bill (H.R. 2691), to prohibit funding for proposing, finalizing, or implementing changes to the Clinton roadless rule, was rejected.

R.S. 2477: Rights of Way Across Public Lands (by Pamela Baldwin)

Background. In 1866, in an act that became Revised Statute (R.S.) 2477, Congress granted rights of way across unreserved public lands "for the construction of highways." This grant was repealed in 1976, but existing rights were protected. What constitutes construction of highways and whether a qualifying right of way existed by the time of repeal in 1976 can be contentious. These issues are important because possible rights of way may

affect the management of federal lands, perhaps degrading their wilderness suitability while increasing access for recreation and other uses. Section 108 of the FY1997 Interior Appropriations Act (P.L. 104-208) states that final regulations "pertaining to" R.S. 2477 rights of way cannot take effect unless expressly authorized by an Act of Congress.

Administrative Actions. On January 6, 2003 (68 *Federal Register* 494), the BLM finalized changes to its regulations at 43 CFR Part 1864 under which the agency issues "disclaimers of interest," a procedure that can help clear title to property or interests in property with respect to possible interests of the United States. This procedure will be used to acknowledge R.S. 2477 rights of way. Interior Secretary Norton and the State of Utah executed a Memorandum of Understanding on April 9, 2003, under which the DOI will acknowledge and disclaim R.S. 2477 rights of way in Utah. Other states also have requested MOUs. The MOU does not clarify what criteria will be used to validate right of way claims. Critics assert that the disclaimer regulations "pertain to" R.S. 2477 rights of way and are unlawful under §108 of P.L. 104-208. The General Accounting Office has concluded that the Utah MOU itself was an unlawful regulation pertaining to R.S. 2477. The first notice of an application for a disclaimer (filed in re. a Utah road) was published on February 9, 2004 (69 *Federal Register* 6000). Comments received indicate that the road in question might have been federally constructed.

Legislative Activity. H.R. 1639 would establish a process for resolving R.S. 2477 claims and would define certain terms critical to evaluating the validity of such claims. The House approved an amendment to the FY2004 Interior appropriations bill, H.R. 2691, that prohibits implementation of the amendments to the disclaimer regulations in certain federal conservation areas, but this language was eliminated in conference.

National Monuments and the Antiquities Act (by Carol Hardy Vincent)

Background. Presidential establishment of national monuments under the Antiquities Act of 1906 (16 U.S.C. §§431, *et seq*.) sometimes has been contentious. The President may proclaim national monuments on federal lands containing "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest." The President is to reserve "the smallest area compatible with the proper care and management" of the protected objects. Congress expressly prohibited the President from proclaiming new national monuments in Wyoming (1950), and many assert that 1980 legislation did the same for Alaska.

President Clinton's establishment or enlargement of 22 monuments, primarily during his last year in office (2000), set off renewed controversy regarding presidential authority to proclaim monuments. The 108th Congress is focusing on land uses within monuments; the inclusion of non-federal lands in monument boundaries; and whether the President should be required to seek congressional, state, or public input or environmental reviews. (For more information on monument issues, see CRS Report RS20902, *National Monument Issues*, by Carol Hardy Vincent.)

To date, courts have upheld the monuments. In October 2003, the Supreme Court declined to hear two cases challenging President Clinton's designations of monuments, leaving in place lower court decisions upholding the designations. One recent case challenged the Grand Staircase-Escalante National Monument in Utah, but on April 19,

2004, the Federal District Court in Salt Lake City upheld the monument designation (2004 WL 965922 (D. Ut. 2004)).

Administrative Actions. On April 24, 2002, the Department of the Interior began developing management plans for the new DOI monuments. Some observers interpreted this as an indication that the Secretary is dropping consideration of significant reductions to monument sizes. Currently, some monuments are concluding the scoping process, formulating management options, and issuing management plans. Some issues have involved recreational uses, including off-highway vehicles, and commercial uses, including grazing and energy development.

Other Administration actions affect national monuments. First, the Bush Administration has been considering the issue of nonfederal lands within national monuments, and is reported to support the removal of private and state lands from the boundaries of national monuments. Second, Governors Island National Monument, and the rest of Governors Island, were conveyed to the Governors Island Preservation and Education Corporation of the State and City of New York for $1, despite P.L. 105-33, § 9101, which required fair market value. That value had been estimated by some at between $300 million and $500 million but by others as much less. The approximately 22 acres that comprise the national monument were reconveyed to the federal government and reestablished as a national monument to be managed by the Secretary of the Interior.

Legislative Activity. During the first session of the 108th Congress, Congress enacted legislation (P.L. 108-108) that bars FY2004 funds from being used for energy leasing activities within the boundaries of presidentially-created national monuments, as they were on January 21, 2001, except where allowed by the presidential proclamations that created the monuments. Similar provisions were enacted for FY2002 and FY2003.

A bill seeking to limit the authority of Presidents to designate national monuments has not been acted on. H.R. 2386 would amend the Antiquities Act of 1906 to make presidential designations of monuments exceeding 50,000 acres ineffective unless approved by Congress within two years. It also would establish a process for input into presidential monument designations and require monument management plans to be developed in accordance with NEPA. A bill dealing with private property within a monument's boundaries saw committee action. On November 21, 2003, the House Resources Committee reported H.R. 1629 (H.Rept. 108-392) to exclude private property from the boundaries of the Upper Missouri River Breaks National Monument.

Other Issues

Congress is evaluating several other federal lands issues that could lead to increased legislation or oversight. These include wilderness, grazing management, national forest planning, federal land acquisition, and outsourcing government jobs.

Wilderness. The Wilderness Act established the National Wilderness Preservation System in 1964 and directed that only Congress could designate areas that already are federally owned as part of the system. Wilderness designation is often controversial because various activities are not allowed in wilderness areas — commercial activities, motorized access, and roads, structures, and facilities generally are prohibited. Wilderness studies are

also controversial, because many uses are restricted in the study areas to preserve wilderness characteristics while Congress considers possible designations.

Some observers believe that the Clinton rule protecting national forest roadless areas (discussed above) was prompted by a view that Congress had lagged in designating areas which many people assert should be wilderness. Others assert that the Bush Administration — in disclaiming R.S. 2477 rights-of-way (discussed above) and settling a lawsuit by agreeing to end additional wilderness studies and study area protections of the Clinton Administration — is attempting to preclude potential wilderness area protection and open these areas to energy and mineral exploration, roads, and development, thereby making them ineligible to be added to the Wilderness System. Many bills to designate wilderness areas typically are introduced in each Congress, and to date, more than a dozen such bills have been introduced in the 108th Congress. (For more information, see CRS Report RL31447, *Wilderness: Overview and Statistics*, by Ross W. Gorte.)

Hardrock Mining and Millsites. Two recent mineral issues have been controversial. First, the Clinton Administration revised the hardrock mining regulations (43 CFR 3809), effective January 20, 2001. The changes were intended to enhance the BLM's ability to prevent "unnecessary or undue degradation" of public lands from mining operations and to make mining operators more responsible for reclaiming mined lands. The Bush Administration revised the rules on October 30, 2001 (66 *Federal Register* 54834). The final rule eliminated some of the most controversial of the Clinton Administration changes. Environmental groups challenged the Bush regulations. On November 18, 2003, District Judge Henry H. Kennedy ruled that the regulations were not illegal on their face, but they may be "unwise and unsustainable" land use policy. Also on October 30, 2001, the BLM published a proposed rule (66 *Federal Register* 54863) with many of the same changes as the final rule; according to BLM, this unusual procedure was intended to provide the stability of final rules while gathering additional public comments.

The second issues involves mining millsites. At issue is whether the General Mining Law of 1872 allows only one millsite of no more than five acres or multiple millsites (of no more than five acres each) for activities associated with each mining claim. On November 7, 1997, President Clinton's Interior Department solicitor issued a Legal Opinion that each *claim* could use no more than five acres for associated activities. Critics charged that this Opinion indirectly reformed the 1872 Mining Law, was inconsistent with agency practice, and severely restricted some modern mining operations (e.g., heap-leach mines for gold). On September 28, 2001, President Bush's Secretary of the Interior directed the BLM not to apply the 1997 Opinion to existing mining operations and the new DOI solicitor to review the Opinion. On October 7, 2003, a new Solicitor's Opinion allowed multiple millsites (of no more than five acres each) per claim if needed for development of mineral resources. On October 24, 2003, BLM issued a final rule significantly reorganizing and amending regulations on locating, filing, and maintaining mining claims and sites (68 *Federal Register* 61045), including regulations to implement the new millsite Opinion.

Grazing Management. BLM published proposed changes to its grazing regulations (43 CFR Part 4100) on December 8, 2003, and on January 2, 2004 issued a draft environmental impact statement (DEIS) analyzing the potential impact of the proposed changes and of alternative actions. Past efforts at grazing reform were highly controversial. BLM asserts that regulatory changes are needed to comply with court decisions, increase

flexibility of managers and permittees, improve administrative procedures and business practices, and promote conservation. Among the proposed changes are: (1) allowing title to range improvements to be shared by the BLM and permittees, (2) allowing permittees to acquire water rights for grazing if consistent with state law, (3) changing the definition of "grazing preference" to include an amount of forage, (4) eliminating conservation use grazing permits, (5) extending the time to remedy rangeland health problems, and (6) reducing occasions where BLM is required to consult with the public. Due to negative public comments, the regulatory proposal did not include authorizing the agency to establish reserve common allotments for permittees to use while their normal allotments undergo rest or range improvements. Further, BLM did not address some controversial issues, such as revising the grazing fee. BLM currently is examining public comment received on the proposal and DEIS during a period ending March 2, 2004.

BLM is considering related grazing policy changes with a goal of providing more flexibility to managers and increasing innovative partnerships. Changes under consideration relate to establishing reserve common allotments, voluntary restructuring of allotments, acquiring conservation easements, and creating conservation partnerships. Currently, BLM is reviewing the advice and recommendations of its Resource Advisory Councils (RACs). Final grazing policy changes will be developed when the rulemaking process is "substantially completed," according to BLM. (For more information, see CRS Report RL32244, *Grazing Regulations and Policies: Changes by the Bureau of Land Management*, by Carol Hardy Vincent.)

Outsourcing. The Bush Administration is considering privatizing numerous and diverse government jobs in agencies including the Forest Service and BLM under its "competitive sourcing" initiative. The Administration's goal is to save money through competition between government and private businesses, particularly in areas where private business might provide better commercial services, e.g., law enforcement and maintenance. The plan is controversial, with concerns as to whether it would save the government money, whether the private sector could provide the same quality of service, or whether it is being used to accomplish policy objectives by outsourcing particular functions. The FY2004 Interior and Related Agencies Appropriations Act (P.L. 108-108) placed spending limits on agency outsourcing studies during FY2004, required agencies to report annually to Congress on outsourcing, and required agencies to specify in their annual budget requests the level of funding sought for outsourcing studies. P.L. 108-7, providing consolidated appropriations for FY2003, limited the use of quotas in agencies' outsourcing efforts. Authorizing committees and Appropriations subcommittees continue to evaluate the outsourcing initiative. (For more information, see CRS Report RL32306, *Appropriations for FY2005: Interior and Related Agencies*, coordinated by Carol Hardy Vincent and Susan Boren.)

National Forest Planning. Another issue is land management planning for the national forests. This is largely an administrative issue, with new Forest Service planning regulations promulgated by the Clinton Administration on November 9, 2000, effective on that date but never implemented. Further, new regulations were proposed by the Bush Administration on December 6, 2002, but have not been finalized. The Clinton regulations established ecological sustainability as the priority for managing national forests, and were meant to be implemented over several years. The Bush proposal responded to concerns about the feasibility of the Clinton regulations with revisions seeking to simplify planning and to lead to decisions made closer to the users, but without ecological sustainability as the

main priority and with other changes involving public participation in and review of agency decisions that drew criticism from many environmentalists.

Federal Land Acquisition. Federal land acquisition is a perennial focus of Congress and the public. The principal source of land acquisition funding for BLM and the Forest Service (and the Park Service and Fish and Wildlife Service) is the Land and Water Conservation Fund (LWCF). The fund is authorized at $900 million annually, but only the amount that is appropriated is available to the federal agencies. Most of the appropriations are identified for specific units of public land. Legislation has been introduced in the past three Congresses to appropriate the full authorized level and, in some of those bills, to make it mandatory spending, removing that discretion from the appropriators.

On March 31, 2004, Representative George Miller introduced H.R. 4100, the latest iteration of the CARA proposals (Conservation and Reinvestment Act) that have been introduced and considered in the three previous Congresses. This bill has many similarities with the earlier versions. It would dedicate $3.125 billion annually from federal offshore oil and gas revenues to numerous purposes, including offsetting the coastal effects of offshore oil and gas development activities; fully funding the Land and Water Conservation Fund; and funding several other wildlife, park, and historic preservation programs. It would sunset at the end of FY2024.

Funding for federal land acquisition using the LWCF has declined each of the past two years, from $429 million in FY2002 to $313 million in FY2003 and to $165 million in FY2004. Possible explanations include the change from a federal budget surplus to a deficit, different spending priorities since 9/11, and concern by some about the extent of federal land ownership. The Administration's request for federal land acquisition for FY2005 is $220 million. (For more information, see CRS Report RS21503, *Land and Water Conservation Fund: Current Status and Issues*, by Jeffrey A. Zinn.)

LEGISLATION

Wildfire Protection.[2]

H.R. 1904 (McInnis); P.L. 108-148

The Healthy Forests Restoration Act of 2003 authorizes expedited planning and review procedures for fuel reduction projects on federal lands, grants for fuel reduction-biomass utilization, watershed forestry assistance, assessment and treatment of insect infestations, and a federal payments for a private forests reserve system. December 3, 2003, enacted into law (P.L. 108-148).

Energy Resources.

H.R. 6 (Tauzin)

Omnibus energy legislation. Federal lands could be affected by provisions including those ending the 160-acre limit on coal lease modifications and leading to demonstration technologies for oil and gas recovery in unproven, unconventional reservoirs on public and

[2] This section does not include alternatives considered prior to the enactment of H.R. 1904.

private lands. November 18, 2003, conference report (H.Rept. 108-375) agreed to in the House (246-180). November 21, 2003, Senate failed to invoke cloture (57-40) on the conference report.

H.R. 794 (Cubin)

The Coal Leasing Act Amendments of 2003 amend the Mineral Leasing Act of 1920 to repeal the 160-acre limit on coal leases, modify plan requirements and advance royalty payments, and require periodic assessment of coal resources under public lands. Introduced February 13, 2003; referred to Committee on Resources.

H.R. 2772 (Gibbons)

Amends the Geothermal Steam Act of 1970 in many ways, to alter the leasing process and the collection and disposition of royalties, and to require a periodic assessment of geothermal steam energy potential under federal lands. Introduced July 17, 2003; referred to Committee on Resources. July 22, 2003, Subcommittee hearings held.

H.R. 3698 (M. Udall)

The Western Waters and Surface Owners Protection Act enhances protection of water quality and surface landowner rights in federal oil and gas development. Introduced December 8, 2003; referred to Committee on Resources and Committee on Transportation and Infrastructure.

H.R. 4017 (M. Udall)

The Western Waters and Farm Lands Protection Act enhances protection of water quality and surface landowner rights in federal oil and gas development. Introduced March 23, 2004; referred to Committee on Resources and Committee on Transportation and Infrastructure.

S. 14 (Domenici)

Omnibus energy legislation. Federal lands could be affected by provisions ending the 160-acre limit on coal lease modifications and requiring further analyses of resource assessments, land withdrawals, and impediments to oil and gas development on public lands. July 31, 2003, Senate returned S. 14 to the calendar, and passed H.R. 4 from the 107th Congress in lieu, as an amendment in the nature of a substitute to H.R. 6.

S. 2095 (Domenici)

Omnibus energy legislation. Federal lands could be affected by provisions including those ending the 160-acre limit on coal lease modifications and leading to demonstration technologies for oil and gas recovery in unproven, unconventional reservoirs on public and private lands. February 23, 2004, placed on the Senate legislative calendar.

Roadless Areas.

H.R. 2369 (Inslee)

The National Forest Roadless Area Conservation Act requires that roadless areas be managed in accordance with the original roadless rule. Introduced June 5, 2003; referred to Committee on Agriculture and Committee on Resources.

S. 1200 (Cantwell)

The Roadless Area Conservation Act of 2003 enacts most of the content of the Clinton Administration roadless rule. Introduced June 5, 2003; referred to Committee on Energy and Natural Resources.

S. 1938 (Corzine)

Seeks to protect ancient forests and roadless, watershed, and special areas. Introduced November 24, 2003; referred to Committee on Energy and Natural Resources.

R.S. 2477: Rights-of-Way.

H.R. 1639 (Udall, M.)

The R.S. 2477 Rights-of-Way Act of 2003 establishes a process for resolving R.S. 2477 claims and defines certain terms critical to evaluating the validity of such claims. Introduced April 3, 2003; referred to Committee on Resources.

National Monuments and the Antiquities Act.

H.R. 1629 (Rehberg)

Provides that the Upper Missouri River Breaks National Monument does not include private property within its boundaries. November 21, 2003, placed on House calendar.

H.R. 2386 (Simpson)

Amends the Antiquities Act of 1906 making presidential designations of monuments exceeding 50,000 acres ineffective unless approved by Congress within two years, establishing a process for public input in presidential monument designations, and requiring monument management plans to be developed in accordance with the National Environmental Policy Act of 1969. Introduced June 5, 2003; referred to Committee on Resources.

FOR ADDITIONAL READING

CRS Report RL32306. *Appropriations for FY2005: Interior and Related Agencies*, by Carol Hardy Vincent and Susan Boren, Co-coordinators.

CRS Issue Brief IB10111. *Arctic National Wildlife Refuge (ANWR): Controversies for the 108th Congress*, by M. Lynne Corn, Bernard A. Gelb, and Pamela Baldwin.

CRS Issue Brief IB10116. *Energy Policy: The Continuing Debate*, by Robert L. Bamberger.

CRS Report RL30867. *Federal Land Management Agencies: Background on Land and Resource Management*, by Carol Hardy Vincent, Coordinator.

CRS Report RS21402. *Federal Lands, "Disclaimers of Interest," and RS2477*, by Pamela Baldwin.

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

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

CRS Report RL32142. *Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest*, by Pamela Baldwin.

CRS Report RS21503. *Land and Water Conservation Fund: Current Status and Issues*, by Jeffrey A. Zinn.

CRS Issue Brief IB89130. *Mining on Federal Lands*, by Marc Humphries.

CRS Report RL30647. *The National Forest System Roadless Areas Initiative*, by Pamela Baldwin.

CRS Report RS20902. *National Monument Issues*, by Carol Hardy Vincent.

CRS Issue Brief IB10093. *National Park Management and Recreation*, by Carol Hardy Vincent, Coordinator.

CRS Report RL32315. *Oil and Gas Exploration and Development on Public Lands*, by Marc Humphries.

CRS Report RL32078. *Omnibus Energy Legislation: Comparison of Major Provisions in House- and Senate-Passed Versions of H.R. 6, Plus S. 14*, by Mark Holt (Coordinator).

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

CRS Report RS21544. *Wildfire Protection Funding*, by Ross W. Gorte.

CRS Issue Brief IB10124. *Wildfire Protection in the 108th Congress*, by Ross W. Gorte.