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LANDS WITH WILDERNESS CHARACTERISTICS, RESOURCE MANAGEMENT PLAN CONSTRAINTS, AND LAND EXCHANGES: CROSS-JURISDICTIONAL MANAGEMENT AND IMPACTS ON UNCONVENTIONAL FUEL DEVELOPMENT IN UTAH'S UINTA BASIN

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Lands with Wilderness Characteristics, Resource Management Plan Constraints, and Land Exchanges: Cross-Jurisdictional Management and Impacts on Unconventional Fuel Development in Utah's Uinta Basin

Topical Report

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Abstract

Utah is rich in oil shale and oil sands resources. Chief among the challenges facing prospective unconventional fuel developers is the ability to access these resources. Access is heavily dependent upon land ownership and applicable management requirements. Understanding constraints on resource access and the prospect of consolidating resource holdings across a fragmented management landscape is critical to understanding the role Utah's unconventional fuel resources may play in our nation's energy policy. This Topical Report explains the historic roots of the "crazy quilt" of western land ownership, how current controversies over management of federal public land with wilderness character could impact access to unconventional fuels resources, and how land exchanges could improve management efficiency.

Upon admission to the Union, the State of Utah received the right to title to more than one-ninth of all land within the newly formed state. This land is held in trust to support public schools and institutions, and is managed to generate revenue for trust beneficiaries. State trust lands are scattered across the state in mostly discontinuous 640-acre parcels, many of which are surrounded by federal land and too small to develop on their own. Where state trust lands are developable but surrounded by federal land, federal land management objectives can complicate state trust land development. The difficulty generating revenue from state trust lands can frustrate state and local government officials as well as citizens advocating for economic development. Likewise, the prospect of industrial development of inholdings within prized conservation landscapes creates management challenges for federal agencies.

One major tension involves whether certain federal public lands possess wilderness character, and if so, whether management of those lands should emphasize wilderness values over other uses. On December 22, 2010, Secretary of the Interior Ken Salazar issued Secretarial Order 3310, *Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management*. Supporters argue that the Order merely provides guidance regarding implementation of existing legal obligations without creating new rights or duties. Opponents describe Order 3310 as subverting congressional authority to designate Wilderness Areas and as closing millions of acres of public lands to energy development and commodity production. While opponents succeeded in temporarily defunding the Order's implementation and forcing the Bureau of Land Management (BLM) to adopt a more collaborative approach, the fundamental questions remain: Which federal public lands possess wilderness characteristics and how should those lands be managed? The closely related question is: How might management of such resources impact unconventional fuel development within Utah?

These questions remain pressing independent of the Order because the BLM, which manages the majority of federal land in Utah, is statutorily obligated to maintain an up-to-date inventory of federal public lands and the resources they contain, including lands with wilderness characteristics. The BLM is also legally obligated to develop and periodically update land use plans, relying on information obtained in its public lands inventory. The BLM cannot sidestep these hard choices, and failure to consider wilderness characteristics during the planning process will derail the planning effort.

Based on an analysis of the most recent inventory data, lands with wilderness characteristics — whether already subject to mandatory protection under the Wilderness Act, subject to discretionary protections as part of BLM Resource Management Plan revisions, or potentially subject to new protections under Order 3310 — are unlikely to profoundly impact oil shale development within Utah's Uinta Basin. Lands with wilderness characteristics are likely to

have a greater impact on oil sands resources, particularly those resources found in the southern part of the state. Management requirements independent of lands with wilderness characteristics far overshadow the challenges posed by wilderness issues.

Wilderness character issues aside, a need to improve management integration remains. In researching past efforts to manage across the fragmented landscape we found that unilateral actions have been deeply divisive and engendered distrust among those impacted by the action. This distrust can linger for decades. Collaborative efforts, whether intended to protect lands, foster development, or do both, can represent an attractive alternative to unilateral action. Such collaborative efforts are more likely to succeed when they respond to strong incentives to act, evidence widespread involvement and support, and benefit from a committed champion. Projects are all but certain to fail where participants overreach or one of these elements is missing.

For more than three decades, the state and federal government have cooperatively pursued land exchanges in order to "block up" isolated state trust lands and eliminate inholdings. These efforts can advance both conservation and development objectives, and are generally conducted in conjunction with efforts to protect extraordinary federal lands. Congress recognized the value of such exchanges and, as part of the Energy Policy Act of 2005, directed the Department of the Interior to pursue land exchanges as a means of facilitating environmentally responsible oil shale and oil sands recovery.

But land exchanges are not without their challenges. Federal law requires equalizing the value of the lands and resources to be exchanged, and various means of equalizing value have been attempted. More flexible approaches have a higher likelihood of success, but are often criticized as resulting in an economic windfall for one party. Today challenges associated with appraisal and valuation stand as the most significant obstacles in the way of large-scale exchanges. Greater reliance on revenue sharing provisions that prevent an economic windfall to one party and avoid challenges inherent in valuing oil shale and oil sands resources may mark a promising path forward. The success or failure of these efforts could profoundly impact both the prospect of unconventional fuel development and wilderness character protection.

Executive Summary

Utah is rich in oil shale and oil sands resources. Prospective developers face numerous challenges, not the least of which is obtaining access to these resources. Access is heavily dependent upon land and resources ownership, as well as the management requirements under which the land and resource owners and managers operate. Understanding the fragmented nature of resource ownership, competing management objectives, the implications for access, and the prospect of consolidating resource holdings in order to improve access is central to understanding the role Utah's unconventional fuel resources may play in our nation's energy policy. This Topical Report explains how the "crazy quilt" of western land ownership came to be, how current controversies over management of federal public land with wilderness character could impact access to unconventional fuels resources, and how land exchanges could improve management efficiency.

Federal, state, tribal, and private entities all share jurisdiction over pieces of a broad landscape, but they rarely share the same objectives or procedural requirements. Fragmented land ownership and competing management objectives can lead to profound challenges. These challenges are especially evident in Utah where, upon admission to the Union, the state received the right to title to more than one-ninth of all land within its boundaries. This land was granted to the state in support of schools and other state institutions, and lands are managed to generate revenue for trust beneficiaries. These state trust lands are scattered across the landscape in often discontinuous, 640-acre blocks that are interspersed with private and federal lands. Many parcels of state trust lands are completely surrounded by federal lands.

While trust lands were granted to the state in anticipation that the lands would be sold or developed to fund public schools and institutions, adjacent land uses can make sale or development exceedingly difficult. Tensions arise from the conflict between generating revenue from these lands and the prospect of impairing surrounding lands such as National Parks, Wilderness Areas, and National Monuments that are managed for conservation purposes. Development of state trust land inholdings within such protected areas could compromise the integrity of the surrounding area. Even where state trust lands are developable, their smaller size and scattered locations can complicate or increase the cost of development.

These challenges are particularly important for prospective oil shale and oil sands developers who can lease state trust lands, but who may depend upon access across a surrounding landscape made up largely of federal land. Smaller state trust land tract size and limited access to adjacent federal lands may preclude access to enough contiguous land to ensure profitable or efficient development. Where developable land can be secured, scattered development may result in a more extensive impact on the landscape and wildlife habitat fragmentation than would occur with coordinated and consolidated development. Both industry and environmentalists therefore stand to benefit from improved management collaboration, as collaboration could improve access and help protect sensitive resources. Collaboration, however, must overcome entrenched animosities that polarize diverse stakeholders.

For more than three decades, Utah has been home to sustained battles over whether certain federal public lands possess wilderness characteristics, and if so, whether wilderness characteristics should be protected at the expense of other uses. At the heart of these controversies are federal public lands managed by the BLM. The BLM's existing obligations include the statutory mandate to maintain an up-to-date inventory of federal public lands and the resources they contain, including wilderness characteristics. The BLM is also obligated to develop and periodically update land use plans, relying on information obtained in its public

lands inventory. Federal courts have held that managing federal public lands to preserve wilderness characteristics is consistent with the BLM's multiple use mandate provided that a suite of uses remain available across the broader BLM managed landscape. Federal courts have also held that the BLM cannot sidestep tough and controversial choices, and failure to consider wilderness characteristics as part of the planning process will derail planning efforts.

On December 22, 2010, Secretary of the Interior Ken Salazar issued Secretarial Order 3310, *Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management*, rekindling a simmering controversy over public land management. Opponents described Order 3310 as an attempt to subvert legislative requirements for Wilderness Area designation, and as closing millions of acres of public lands to much-needed energy development and commodity production. While federal land management in general and conservation designations in particular can profoundly impact state and local interests, the stated objections to the Order appear overstated. Order 3310 provides guidance regarding implementation of existing obligations but does not create new land protections. Still, opponents succeeded in defunding the Order's implementation, forcing the Department of the Interior to adopt a more collaborative approach to managing lands with wilderness characteristics.

The Department of the Interior, through the BLM, remains obligated and committed to determining which federal public lands possess wilderness characteristics, and protecting such lands where appropriate. In short, the questions at the root of the dispute remain: When do federal public lands possess wilderness characteristics, and how should these lands be managed? These questions are answered through a careful review of federal public land law. The closely related question is how might management of lands with wilderness characteristics impact unconventional fuel development within Utah?

Lands with wilderness character — whether currently subject to mandatory protection under the Wilderness Act, subject to discretionary protections as part of BLM Resource Management Plan revisions, or subject to protections under Order 3310 — are unlikely to profoundly impact oil shale development within the Uinta Basin. Less than 300 acres of the approximately 539,000 acres of federally managed oil shale lands within Utah are currently managed as Wilderness Study Areas, and Resource Management Plan revisions completed during 2008 elected to manage only about two percent of land overlaying Utah's oil shale resources for wilderness character. Even if all federal lands found to possess wilderness character were managed to emphasize those values and exclude all oil shale development — a scenario far more restrictive than that envisioned by Order 3310 — roughly ninety-three percent of the oil shale found within Utah would be unaffected by that action.

Lands with wilderness character are likely to have a greater impact on oil sands resources, particularly in the southern part of the state. Federally designated Special Tar Sands Areas within Utah's Uintah, Duchesne, and Carbon counties are largely free of wilderness quality lands and therefore largely unaffected by Order 3310. Southern Utah retains more pristine land and Special Tar Sands Areas in southern Utah could therefore experience greater disruption to energy development from management of lands with wilderness character. Large portions of the Tar Sands Triangle and Circle Cliffs areas are within National Parks, National Monuments, and existing Wilderness Study Areas where development is already precluded. While further emphasis on management of lands with wilderness character would incrementally increase constraints on development within these areas, the prospect of development within these areas was already limited by existing land management designations.

Management requirements independent of wilderness character overshadow the challenges posed by wilderness issues. BLM Resource Management Plans include management stipulations addressing more than eighty separate resources, and their combined effect is to severely restrict commodity production on some federal public lands. As with wilderness character, these constraints are more restrictive in southern Utah.

The bitterness over management of lands with wilderness character is but a symptom of a larger problem. With roughly two-thirds of the land in Utah under federal ownership or control, Utah's elected officials and citizens have legitimate concerns over the impact caused by federal land management. Arguments over management of lands with wilderness character will continue, and will continue to impact planning for conventional and unconventional energy development. Understanding the issues that impact access to unconventional fuel resources, the extent of the impact, and potential means of conflict resolution are central to evaluating the role these resources may play in national energy planning efforts.

For more than thirty years, the State of Utah and the federal government have pursued land exchanges in order to address land fragmentation, inholdings within protected lands, and "block up" isolated state sections. These exchange efforts are often undertaken in conjunction with efforts to protect extraordinary landscapes. Protective designations often come first and have been the product of both unilateral executive action, such as creation of the Grand Staircase-Escalante National Monument, and congressional action like the recent Washington County lands bill. The best example of this synergy is the 1998 exchange of almost 400,000 acres of state trust lands within the Grand Staircase-Escalante National Monument and other federal reserves for financial consideration and less sensitive federal lands. This exchange allowed for coordinated management of Monument resources by a single federal agency while allowing the state to pursue development of more environmentally suitable lands.

More recently, collaborative processes that combine both approaches have met with success and been held out as models for future action. The Washington County Growth and Conservation Act, which protects sensitive lands while allocating other lands for development, exemplifies this approach. Other efforts such as the Utah Recreational Land Exchange Act, which involves unconventional fuel bearing lands, have stalled because of inadequate funding to appraise the parcels proposed for exchange.

The potential for land exchanges to address scattered ownership of oil shale and oil sands resources was specifically addressed as part of the Energy Policy Act of 2005, which directed the Secretary of the Interior to "consider the use of land exchanges where appropriate and feasible to consolidate land ownership and mineral interests into manageable areas." The Act further directed the Secretary to "give priority to land exchanges" within the Uinta Basin. These encouragements not withstanding, federal law dictates that exchanges must be in the public interest and not produce a financial windfall for either party. Prior land exchanges provide important lessons regarding achievement of these goals.

In reviewing past efforts to protect federal public lands, and the lessons they contain for unconventional fuel developers, we found that unilateral actions such as presidential designation of National Monuments succeed in protecting resources. But unilateral actions, like designating the Grand Staircase-Escalante National Monument, are deeply divisive and can engender distrust within communities impacted by the decision. Unilateral actions are also likely to spawn intense negative reactions that can last for decades and color future management efforts. Likewise, inflexible or inflammatory state legislation that ignores federal agencies' legal mandates can complicate or preclude meaningful cooperation.

In contrast to unilateral actions, collaborative projects involve broader stakeholder involvement, address a wider range of interests, and can reduce project opposition. A successful collaborative effort requires strong incentives to act, broad involvement and support, and a powerful and committed champion. Federal-state land management proposals within Utah have met with success when they share these three factors. With the Cedar Mountain Wilderness Area, the prospect of a high-level nuclear waste repository provided the galvanizing force needed to support designation, simultaneously protecting lands and blocking the rail transportation routes needed for the waste repository. With the Washington County Growth and Conservation Act, rapid growth coupled with limited available land and concern over impacts to protected species combined to bring diverse stakeholders to the table. In both cases inaction was unacceptable. Both examples also benefited from broad support and a strong champion.

Projects fail where one of these elements is missing or where participants overreach. The Red Rocks Wilderness Bill has been stalled in Congress for more than two decades because the legislation lacks adequate state and local support. While initially well supported, the 1980's Project Bold proposed to exchange more land than the combined land area of Rhode Island, Connecticut, and the District of Columbia. Too many interests were implicated, competing objectives could not be reconciled, the effort took too long, and political support evaporated when the main project champion left office.

Support and trust are closely related, and controversy surrounding the means of fairly equalizing values across exchanged lands is at least partly responsible for the demise of several land exchange proposals. Congress is frequently involved on larger projects because it is not feasible to value and exchange hundreds of parcels that will be put to different uses and that include mineral resources that are subject to market fluctuations. In the face of such challenges, Congress can adopt more flexible approaches to valuation that are unavailable through existing statutory processes. However, while congressional involvement in valuation proved common during the 1980s and '90s, it generated distrust of what some perceive to be legislative shortcuts, and the sour taste from exchanges perceived as unfair often lasts longer than the memory of success. Because valuation can be subjective, strong opposition is sure to follow where parties question the process or feel that one party is receiving a windfall. Successful legislative exchange efforts must therefore be transparent and broadly supported.

The pending Utah Recreational Land Exchange Act appears to mark a turn away from flexible valuation processes and a return to more formal valuation. Formal appraisals, however, do not appear to be working because of fluctuating resource values, divergent visions of the highest and best use, and the expense of appraisals. The difficulty effectuating this exchange may cause the pendulum to swing back towards greater legislative involvement in future land exchanges. Alternatively, future exchanges may attempt to incorporate revenue sharing provisions, effectively sidestepping the need to meticulously value mineral resources. The ability to consummate major land exchanges may in turn impact the ability to develop unconventional fuel resources in the most efficient and environmentally responsible manner possible.

The prospect for increased management coordination or "rationalizing" of land ownership patterns should be of great interest to not only prospective oil shale and oil sands producers, but to those evaluating the role unconventional fuels can play in national energy plans. While we take no position regarding the appropriate balance between commodity production and resource protection, we believe that an improved understanding of the nature of the issues and the likelihood of successful efforts to rationalize ownership provides tangible

benefits. The success or failure of future land exchange efforts could directly impact access to and development of significant oil shale and oil sands resources.

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ACEC	Area of Critical Environmental Concern
APA	Administrative Procedures Act
BLM	Bureau of Land Management
CSU	Conditional Surface Use
DIGIT Lab	University of Utah Digitally Integrated Geographic Information Technology Lab
DOI	Department of the Interior
EIS	Environmental Impact Statement
FLPMA	Federal Land Policy and Management Act
GIS	Geographic Information Systems
GPT	Gallons per Ton
GSENM	Grand Staircase-Escalante National Monument
ICSE	University of Utah Institute for Clean and Secure Energy
IM	Instruction Memorandum
IRA	Inventoried Roadless Area
MGPA	Most Geologically Prospective Area
NEPA	National Environmental Policy Act
NPS	National Park Service
NSO	No Surface Occupancy
OHV	Off Highway Vehicle
PILT	Payments in Lieu of Taxes
RACR	Roadless Area Conservation Rule
RD&D	Research, Development, and Demonstration
RMP	Resource Management Plan
ROD	Record of Decision
SITLA	Utah School and Institutional Trust Lands Administration
STSA	Special Tar Sands Area
SUWA	Southern Utah Wilderness Alliance
TWS	The Wilderness Society
URLEA	Utah Recreational Land Exchange Act
WIA	Wilderness Inventory Area
WSA	Wilderness Study Area
WSLCA	Western States Land Commissioners Association

Glossary of Key Terms

Area of Critical Environmental Concern (ACEC): Federal public lands where special management attention is required to: (1) protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources, or other natural systems or processes, or (2) protect life and safety from natural hazards. ACECs are designated as part of the BLM planning process, and designations as well as management requirements are subject to revision through Resource Management Plan amendments. The BLM does not specifically structure ACECs to protect wilderness characteristics, nor does ACEC designation necessarily imply the presence of wilderness characteristics.

Natural Area: Non-WSA Lands with Wilderness Characteristics that are subject to management requirements reflected in a BLM Resource Management Plan and intended to emphasize and protect the wilderness character of the area. A wider range of actions and activities may be allowed in Natural Areas than can occur in congressionally designated Wilderness or Wilderness Study Areas. Natural Area are designated as part of the BLM planning process, and designations as well as management requirements are subject to revision through Resource Management Plan amendments. The term Natural Area is used in six Resource Management Plans covering parts of Utah and is largely synonymous with Wild Lands.

Non-WSA Lands with Wilderness Characteristics: Federal public land that has been determined by the BLM to possess wilderness character as set forth in section 2(c) of the Wilderness Act. This is an inventory-level classification and these lands may or may not be subject to special management measures protecting wilderness character.

Wild Lands: A designation resulting from a BLM land use planning decision to protect Non-WSA Lands with Wilderness Characteristics. Designations as well as management requirements are subject to revision through Resource Management Plan amendments. A wider range of actions and activities may be allowed in Wild Lands than can occur in Wilderness or WSAs. Wild Land designations and associated management requirements can be modified or rescinded through the BLM land use planning process. *See* Natural Area.

Wilderness: A congressionally designated area of undeveloped federal land retaining its primeval character and influence, without permanent improvements or human habitation, that is protected and managed to preserve its natural conditions as described in the Wilderness Act. When capitalized, the term Wilderness is used in reference to Wilderness Act requirements or designations; when not capitalized, wilderness refers more generally to physical conditions or characteristics.

Wilderness Character(istics): The terms wilderness character and wilderness characteristics are used interchangeably in this Report to refer to the combination of characteristics or attributes contained in the definition of Wilderness that is set forth in the Wilderness Act. Attributes include the area's size, its apparent naturalness, and outstanding opportunities for solitude or a primitive and unconfined type of recreation. Attributes may also include supplemental ecological, geological, or other features of scientific, educational, scenic, or historical value values. Areas identified as possessing wilderness characteristics by the BLM are believed to possess all of the attributes of Wilderness set forth in section 2(c) of the Wilderness Act unless noted otherwise. The existence of wilderness character or wilderness characteristics does not bestow automatic protections. An area with wilderness character or

wilderness characteristics may or may not be managed as a Natural Area or Wild Lands because of competing considerations affecting the suitability or non-suitability of protection.[1]

Wilderness Inventory Area (WIA): Areas identified by the BLM as part of its efforts to comprehensively inventory federal public lands satisfying the definition of Wilderness contained in the Wilderness Act. These efforts were concluded in 1999 and are inventory level determinations that do not bestow automatic protection. Management decisions for Wilderness Inventory Area are contained in applicable BLM Resource Management Plans.

Wilderness Study Area (WSA): Areas satisfying the definition of Wilderness contained in the Wilderness Act identified and designated through the inventory and study processes authorized by Section 603 of FLPMA, and, prior to 2003, through the planning process authorized by Section 202 of FLPMA. Wilderness Study Areas are subject to a statutory non-impairment mandate.

[1] One reviewer identified the lack of distinction between wilderness character and wilderness characteristics as a potential concern. The concern appears to be two-fold: First, that an area may possess some wilderness characteristics without possessing all the characteristics contained in the Wilderness Act's definition of Wilderness. Second, that the term wilderness character may be interpreted as an including an implicit conclusion that the area is suitable for congressional designation as Wilderness. After careful consideration of the manner in which courts and agencies use these terms, the authors concluded that the terms wilderness character and wilderness characteristics can be used interchangeably and that both terms imply the existence of all elements contained in the Wilderness Act's definition of Wilderness. We interpret the term wilderness character as not implying that an area is suitable for Wilderness designation, only that it possesses the requisite characteristics for designation, though valid existing rights or other considerations may counsel against designation.

2012 Federal Leasing Revision Addendum

On February 3, 2012, after completion of the analysis contained in this report, the Department of the Interior (DOI) released a Draft Programmatic Environmental Impact Statement (2012 Draft PEIS) addressing access to oil shale and oil sands resources found on federal public lands. The 2012 Draft PEIS evaluates potential revisions to the DOI's 2008 decision to open certain federal public lands to application for commercial oil shale and oil sands leasing. The 2012 Draft PEIS was prepared in accordance with a settlement resolving legal challenges to the DOI's 2008 leasing decisions. As required by the settlement, the 2012 Draft PEIS evaluates a range of alternatives that reflect options for managing sensitive resources. Areas of Critical Environmental Concern (ACECs), sage grouse habitat, and Non-WSA Lands with Wilderness Characteristics are the most significant of these resources. Under the settlement agreement, the DOI must issue a final decision regarding access to oil shale and oil sands resources on federal lands no later than December 31, 2012. This deadline is contingent upon adequate appropriation and staffing, compliance with applicable laws and regulations, and resolution of all potential protests to the Final PEIS and Record of Decision.

The Preferred Alternative in the 2012 Draft PEIS, if carried forward as the DOI's final decision, could significantly impact prospective unconventional fuel developers within Utah. Under the Preferred Alternative, the BLM would not entertain applications to lease or develop oil shale or oil sands resources located on BLM-managed lands inventoried as possessing wilderness characteristics, core or priority sage grouse habitat, ACECs, or on other areas with potential development conflicts that were identified as part of the 2008 decision. Within Utah, the Preferred Alternative would reduce federal public lands available for commercial oil shale development from 670,558 to 252,181 acres (a 62% reduction). The Preferred Alternative would reduce federal public lands available for commercial oil sands development from 430,686 to 229,000 acres (a 47% reduction). Furthermore, rather than obtain commercial oil shale leases as contemplated under the 2008 decision, prospective developers would need to first obtain a Research, Development, and Demonstration (RD&D) lease and establish the commercial viability of their operations before converting RD&D leases to commercial oil shale leases.

The DOI's Preferred Alternative would preclude development of all Non-WSA Lands inventoried as possessing wilderness characteristics, including those lands inventoried as possessing wilderness characteristics but where the BLM previously determined that management emphasizing wilderness characteristics was not appropriate. The Preferred Alternative's approach to managing Non-WSA Lands with Wilderness Characteristics is captured in ICSE's most restrictive assumptions regarding future management actions. An assessment of this scenario is reflected in section 3 of this report. ICSE's less restrictive scenario, under which the BLM would manage only those lands with wilderness characteristics that were previously determined to be suitable for protective management remains valuable because protection of only those areas previously determined to be suitable for wilderness characteristic management (Natural Areas) is within the range of alternatives analyzed in the 2012 Draft PEIS and could be carried forward as part of the DOI's final decision.

The prospect of more stringent protections for sage grouse habitat and the potential impact on oil shale and oil sands development was identified and discussed in ICSE's TOPICAL REPORT: LAND AND RESOURCE MANAGEMENT ISSUES RELEVANT TO DEPLOYING IN-SITU THERMAL TECHNOLOGIES. As noted in our current report, protection of a suite of environmental values that extend beyond wilderness characteristics, including values such as sage grouse habitat and

ACECs, overshadow wilderness-related challenges involving access to the unconventional fuel resources found within Utah.

Notably, the DOI's decision will not directly impact the ability to access or develop non-federal lands. As ICSE has noted in this and other reports, non-federal entities control significant oil shale and oil sands resources. If the DOI adopts the 2012 Draft PEIS's Preferred Alternative as its final decision, the amount of non-federal lands with oil shale and oil sands resources within Utah that would be available for development will far outnumber the amount of comparable federal land. While access to federal lands containing these unconventional fuel resources remains highly desirable, the inability to access federal public lands may move development activity onto state or private land. If this occurs, the federal government may have less influence over the manner in which an unconventional fuel industry develops. Development of scattered non-federal parcels could necessitate additional road, pipeline, and utility infrastructure that could indirectly increase both the cumulative footprint of development and its landscape fragmenting effect. Regardless of land ownership, the development potential of oil shale and oil sands resources is hindered by the prospect of developing co-located natural gas resources.

Finally, the 2012 Draft PEIS reflects the DOI's continued willingness to pursue land exchanges as a means of facilitating appropriate oil shale and oil sands development. Therefore, evolving DOI policy could serve as a driver for land exchange and consolidation efforts, as contemplated in the Energy Policy Act of 2005. Past land exchange and ownership consolidation effort contain important lessons for future efforts to exchange or consolidate lands, and are discussed in section 5 of this report.

1. Introduction

Utah is rich in oil shale and oil sands resources,[1] development of which could have significant economic and environmental impacts. This Topical Report addresses two potentially significant barriers to development, as well as the fragmented landscape within which these resources are found and the lessons learned from prior efforts to consolidate management across this landscape.

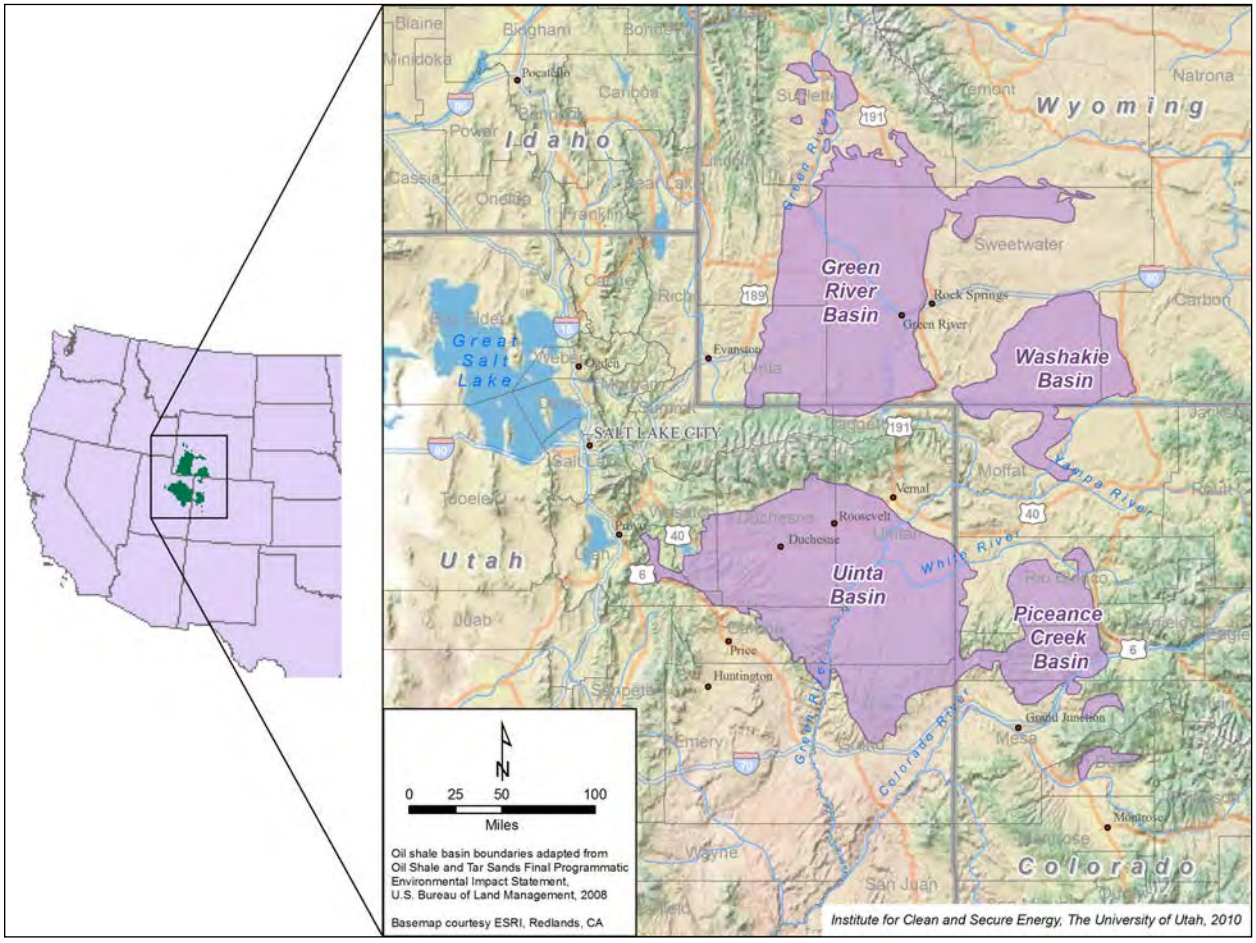
Section 1 provides an overview of the unconventional fuel resources at issue, as well as the fragmented landscape within which these resources are found. Section 2 discusses the Bureau of Land Management's (BLM's) obligation to inventory for and manage federal public lands with wilderness characteristics. How the BLM fulfills these obligations has been the subject of significant controversy, in part because of potential impacts on energy development. Section 3 brings objective facts to bear on this debate, mapping areas with wilderness character and quantifying their potential impact on oil shale and oil sands development. Section 4 looks at broader surface use stipulations contained in BLM Resource Management Plans (RMPs). These stipulations, and their likely impact on oil shale and oil sands production, are also mapped and quantified. Section 5 moves beyond problem definition to review past efforts to protect sensitive landscapes and to reduce resource ownership and jurisdictional fragmentation. We conclude with a discussion of our observations and recommendations.

While we take no position regarding the appropriate balance between resource protection and commodity production, we believe that an improved understanding of the issues and past efforts to improve management conditions will prove useful in evaluating unconventional fuel resources' prospects for development and place in our national energy strategy.

1.1. Utah's Unconventional Fuel Resources and Constraints on Development

The Green River Formation, which covers portions of Colorado, Utah, and Wyoming, contains the world's largest known oil shale deposits.[2] See Figure 1. Widely cited estimates of the Green River Formation's in-place resources range from 1.5 to 1.8 trillion barrels of oil equivalent.[3] Potentially recoverable oil shale resources are estimated at between 500 billion and 1.1 trillion barrels of oil equivalent.[4] At a mid-range estimate of 800 billion barrels of oil equivalent, the Green River formation contains more than three times Saudi Arabia's proven oil reserves.[5] To put the volume of potential supplies in perspective, the Prudhoe Bay Oil Field contains 13.5 billion barrels of oil and the mean estimate of recoverable oil from the coastal plains of the Arctic National Wildlife Refuge is 10.4 billion barrels.[6] Applying the 800 billion barrels of oil equivalent assumption, potentially recoverable oil shale contains more than thirty-three times the recoverable oil contained in the Prudhoe Bay Oil Field and the coastal plains of the Arctic National Wildlife Refuge combined. Current U.S. demand for petroleum products is about 20 million barrels per day. Therefore, 800 billion barrels of shale oil could, in theory, meet all domestic oil demand for more than 100 years, at the current rate of consumption.[7]

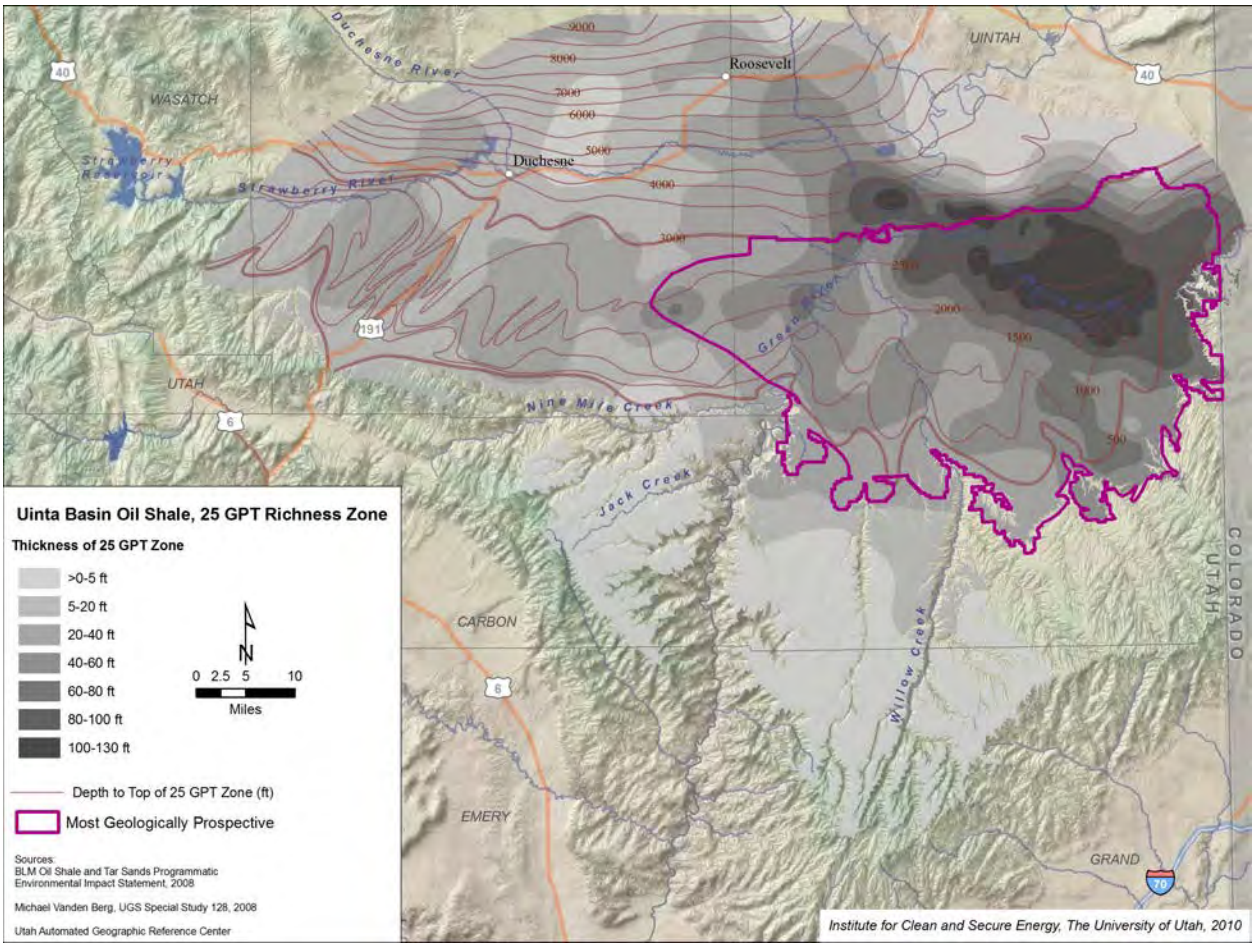
Figure 1 - Oil Shale Location Map



Recent estimates put Utah's total oil shale resources at approximately 1.32 trillion barrels,[8] though much of this is likely undevelopable due to physical or economic constraints. Resources that are potentially appropriate for commercial production were estimated at 147.4 billion barrels of oil equivalent,[9] as shown in Figure 2. These estimates do not reflect legal or policy constraints on development.

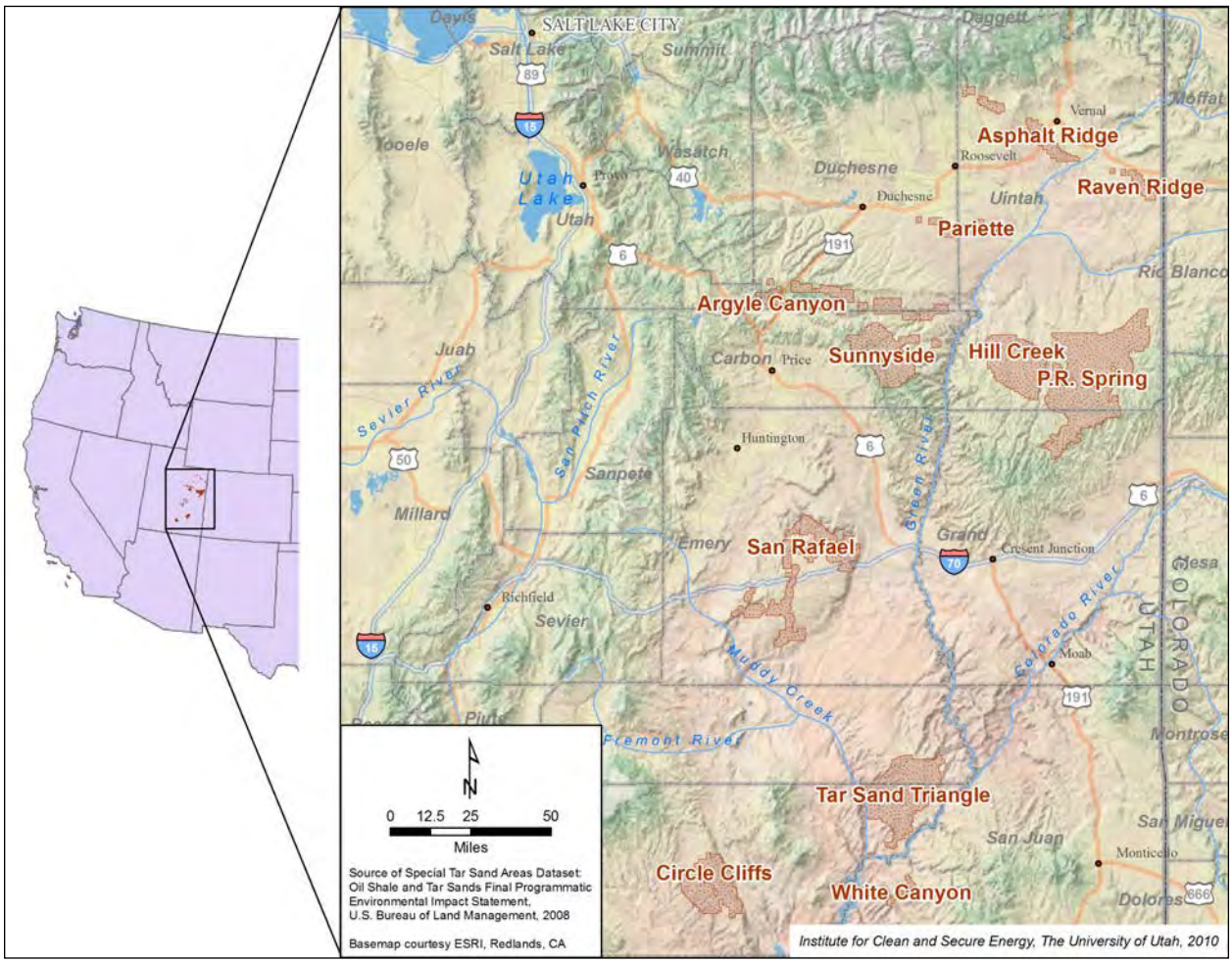
Utah is the only state with significant oil sands resources. Estimates put Utah's proven oil sands resources at over 11.5 billion barrels, plus an additional 20.7 billion unproven barrels.[10] As with oil shale, these estimates do not reflect legal or policy constraints on development, and commercially viable oil sands have not been quantified due to uncertainty regarding resource attributes and development requirements. While resources developable under current fiscal and land management constraints are undoubtedly less than total proven or unproven reserves, proven reserves are volumetrically on par with the oil reserves underneath the coastal plains of the Arctic National Wildlife Refuge. Oil sands resources within Utah are shown in Figure 3.

Figure 2 - Oil Shale Resources Within the Uinta Basin



The majority of oil shale and oil sands resources are found beneath federal lands. Most of these lands are managed by the BLM, which operates under a multiple use, sustained yield mandate.[11] In managing federal public lands that are subject to the multiple use mandate, the BLM must consider a range of resource values and competing uses, including but not limited to energy production and management of lands with wilderness character. Whether lands possess wilderness character is, in itself, a contentious question. Where wilderness character does exist, the BLM must weigh protecting that character against other competing uses, such as energy development, that may be incompatible with wilderness character protection. This balancing has proven to be extremely controversial, and nowhere is that controversy more intense than in Utah. Recent federal initiatives have attempted to clarify how the BLM should determine whether wilderness character exist, when federal public lands should be managed to protect wilderness character, and when protection should be foregone in favor of commodity production or other uses incompatible with protection.

Figure 3 - Special Tar Sands Areas



With roughly two-thirds of the land in Utah under federal ownership or control, the balance struck between commodity production and resource conservation is of great import to Utah residents. While receiving a disproportionate share of media attention, lands with wilderness character and the potentially unique management they require are but one of more than eighty resource values considered in recent BLM RMP revisions. The second major barrier to unconventional fuel development considered in this report involves conditions placed on oil and gas leasing. These conditions are typically the most restrictive requirement affecting oil or natural gas development on federal land, and therefore are a convenient surrogate for the numerous individual resource considerations. While discussed as oil and gas leasing conditions or stipulations, their impact is much broader. "These conditions apply not only to oil and gas leasing, but also apply, where appropriate, to all other surface disturbing activities associated with land-use authorizations, permits, and leases, including other mineral resources."[12]

These two issues apply only to federal public lands, which, within Utah, account for approximately forty-nine percent of the oil shale bearing lands and fifty-seven percent of the oil sands bearing lands.[13] Federal lands are interspersed with tribal lands, private lands, and state trust lands. The ability to manage across this fragmented landscape could prove important to the feasibility of oil shale and oil sands development.

1.2. The Fragmented Landscape

> *The rights, interests, and liabilities created over the past two hundred years are established, and modern systems must recognize them . . . . [Many] modern problems in public land law grow directly out of that historical legacy. These stem largely from the patchwork, haphazard character of federal disposal policies, and the sometimes dizzying patterns of land ownership that have resulted.*[14]

Prospective unconventional energy developers face a host of challenges, not the least of which involves securing access to energy resources. While the State of Utah promotes oil shale and oil sands development on much of its land,[15] state sections are often too small and isolated to support commercial-scale development. Even where available, state trust lands may be complicated by management requirements applicable to surrounding federal lands. More expansive federal lands are often the subject of protracted disputes over protection of sensitive resources or subject to more protective management, precluding coordinated resource development. The current management landscape is shown in Figure 4.

Navigating this fragmented landscape and its disparate regulatory paradigms demands hard work and dedication. "Too often in Utah, the debate about how we manage our public lands comes down to butting heads rather than cool-headed dialogue."[16] But cool-headed dialogue must occur if access and management certainty is to improve, and improve it must for an environmentally and economically sustainable unconventional fuel industry to develop. Evaluating the path forward requires an understanding of how current challenges arose. A central question is why western land ownership is so fragmented. The short answer is that the federal government acquired what is now the "west" through conquest or purchase; treaties were signed, federal territories were established, and territories eventually became the states that we know today. See Figure 5. Railroads, miners, settlers, and these newly founded states were then granted lands in order to support settlement, development, or essential government programs.

Many of today's most challenging problems in public land law "result form the collision of ancient and modern law and policy."[17] Some "century-old statutes, enacted with a view of the future that did not always prove out, continue to pose legal problems in modern public land management."[18] These statutes and the institutions they have spawned are, in the words of Charles Wilkinson, the "Lords of Yesterday."[19] Public land disposal laws, such as the General Mining Law of 1872,[20] Homestead Act,[21] Desert Lands Act,[22] Kinkaid Act,[23] and Stock-Raising Homestead Act,[24] allowed corporations and individuals to obtain title to federal public lands, usually by doing little more than staking and developing a claim. Under these laws and other land grants, the federal government conveyed vast tracts of federal public lands within Utah to corporations and private individuals: approximately 3,610,000 acres (5,640 square miles) to homesteaders;[25] roughly 2,230,000 acres (3,480 square miles) to railroads;[26] and about 1,200,000 acres (1,880 square miles) to mineral claimants.[27] Lands that were not granted away remain in federal ownership.

Figure 4 - Surface Ownership Within Utah

Source: Utah Automated Geographic Reference Center

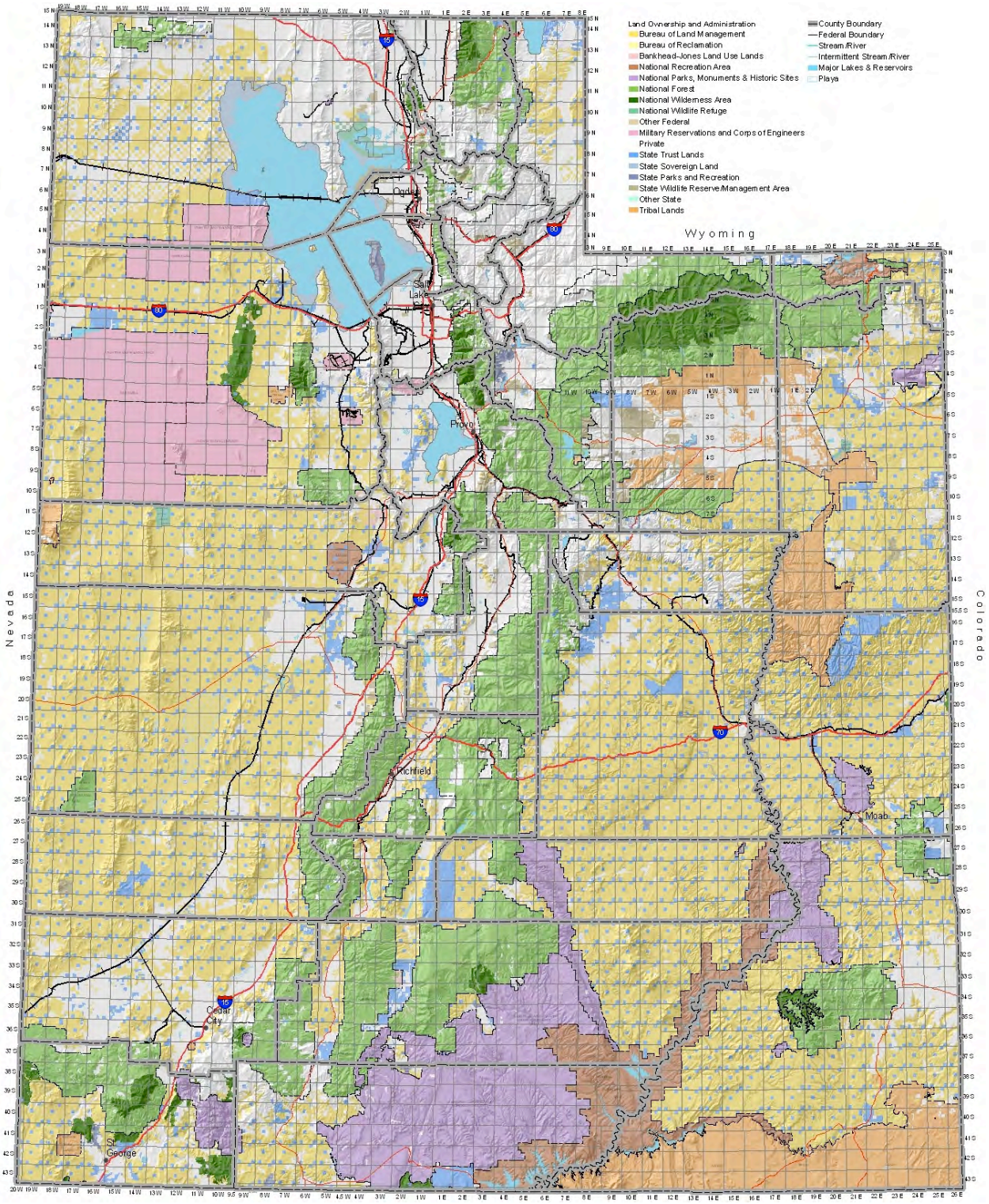
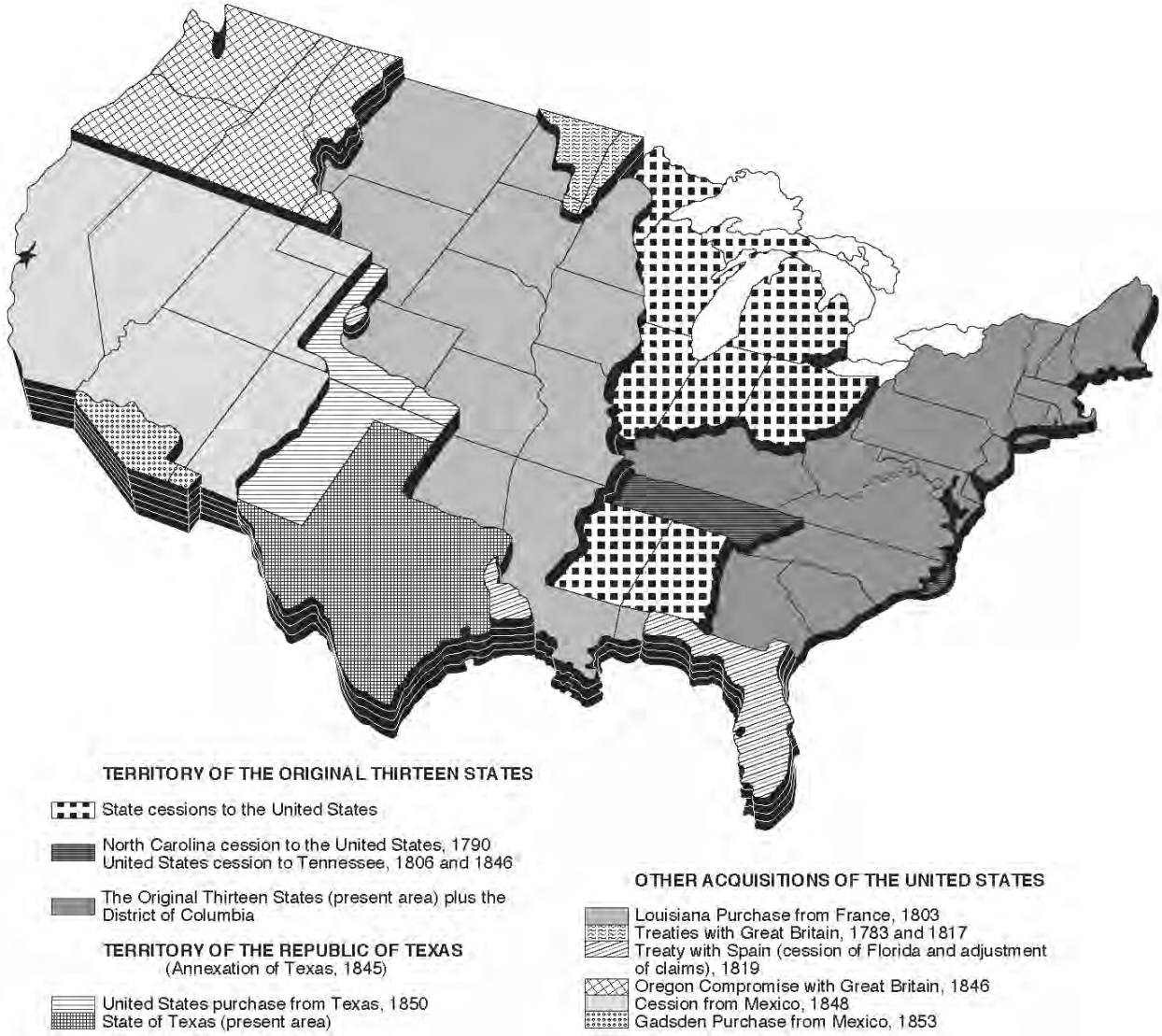


Figure 5 - U.S. Land Acquisition
Source: U.S. Department of the Interior



The federal government also granted extensive lands to the State of Utah. In 1894, Congress enacted the Utah Enabling Act,[28] setting forth the conditions upon which the Utah Territory could obtain statehood. Recognizing the cost of establishing and operating public institutions, the United States agreed to grant the newly created state, upon entry into the Union, the right to title to four sections of land in every township (approximately 5,844,000 acres or roughly 9,130 square miles).[29] Lands were granted in support of public schools and institutions.[30]

Under the public land survey system, pubic lands are surveyed into townships, each of which normally contains thirty-six sections; each section is normally one square-mile in size (640 acres). The State of Utah received sections 2, 16, 32, and 36, which are non-contiguous. See Figure 6. The State of Utah also received title to approximately 1,570,000 acres (2,450 square miles) of additional land that were subject to state selection.[31] In total, the United States granted the State of Utah title to approximately 7,500,000 acres (approximately 11,720 square

miles), or 13.8 percent of the land within the state.[32] Despite these extensive grants, almost two-thirds of the land within Utah remains under federal ownership and control.[33]

Figure 6- Section Numbers Under the Public Land Survey System
Source: Institute for Clean and Secure Energy

6	5	4	3	2	1
7	8	9	10	11	12
18	17	16	15	14	13
19	20	21	22	23	24
30	29	28	27	26	25
31	32	33	34	35	36

Lands granted to the state were scattered across the landscape to ensure a representative sample of Utah's resources were available to support state institutions, and to create an incentive to develop all parts of the state. As of the early 1980s, over eighty-five percent of Utah's trust lands existed in isolated 640 acre sections, and nearly 500,000 acres (780 square miles) reflected inholdings within National Forests, National Parks, military lands, and Indian reservations.[34] Grants to homesteaders, railroads, and miners were likewise scattered across the state, further fragmenting the landscape.

Some of the lands promised to the state under the Enabling Act were homesteaded or dedicated to other purposes before they were surveyed and conveyed to the state. Where this occurred, the state was allowed to select equivalent "in lieu" lands. Selection of in lieu lands proved to be highly controversial. The Enabling Act allowed the state to claim "other lands equivalent thereto" in lieu of state sections reserved or disposed of before lands were surveyed and conveyed to the state.[35] The Enabling Act "neither expressly includes mineral lands nor expressly excludes them,"[36] and whether states could select mineral lands in lieu of non-mineral lands became an issue. Over time, federal policy evolved from exclusion of mineral lands from selection,[37] to eventual inclusion of mineral lands for in lieu selection, provided that the lands being replaced were also mineral in character.[38]

On September 10, 1965, the State of Utah filed to select 157,255.90 acres of in lieu land. All parcels were located in Uintah County and contained oil shale resources.[39] The state's request sat dormant for nearly a decade before the Secretary of the Interior informed Utah that he would not approve the conveyance because it involved lands of "grossly disparate values."[40] The Secretary based his refusal on a provision in the Taylor Grazing Act allowing him to exempt lands deemed "more valuable or suitable for any other use" from selection or disposal.[41]

Utah challenged the Secretary's decision, prevailing before the Federal District Court and the Court of Appeals, both of which concluded that the exchange should occur under an equal exchange basis and that the Taylor Grazing Act's "value-for-value exchange criteria" did not apply.[42] The U.S. Supreme Court reversed in a five to four opinion, concluding that the lower courts misconstrued the Taylor Grazing Act, which expressed the intent of Congress that indemnity selection should make states whole for the lands lost without enriching them with

resources out of proportion with those being replaced.[43] The Secretary's decision to deny indemnification, the fifteen-year legal battle, and the Supreme Court's decision set the backdrop against which subsequent land management efforts play out.

As time passed, federal policy shifted from disposal and towards retention of public land. Lands were reserved as homelands for American Indians, dedicated for reservoir sites and to protect federal interests in valuable minerals, Forest Reserves were created and later became National Forests, and extraordinary sites were set aside as National Parks, National Monuments, and Wilderness Areas. During the 1970s, the enactment of federal statutes protecting air, water, and species marked a clear departure from the development-dominated policies of the past. This departure is also reflected in statutes such as the Federal Land Policy and Management Act (FLPMA), which mandates multiple use management, and the National Environmental Policy Act (NEPA) which seeks to foster a rigorous decision making process and public involvement.

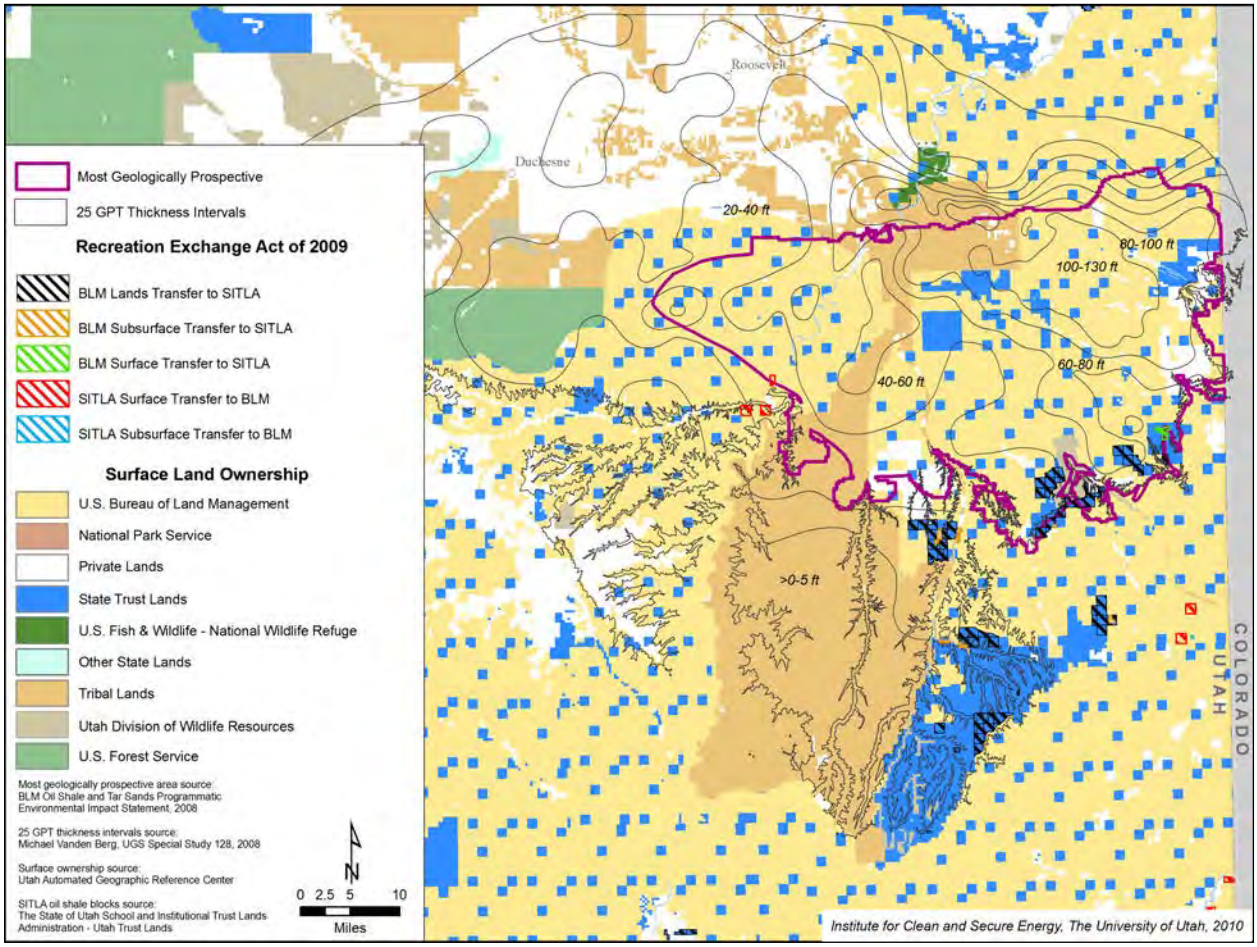
These evolving federal land management policies directly impact rural westerners, reflecting changes that make traditional uses such as ranching and mining more difficult. The Sagebrush Rebellion of the 1970s and '80s is but one example of the backlash that sometimes occurred. Despite the challenges, public land management must continue to evolve to reflect modern values and physical realities. While expansive grants of federal land made sense when the United States was home to 38 million people,[44] the wisdom of the policies embodied in these disposal laws is less evident in an increasingly urban nation now home to almost 310 million people.[45]

Laws disposing of federal lands and resources, created in an era when the federal government was land-rich but cash poor,[46] set a course for western public land management that is often difficult to reconcile with evolving social priorities. As Professor Charles Wilkinson notes, much of the tension can be traced to a belief in manifest destiny and reconstruction era laws that ushered in westward expansion and dramatic economic growth.[47] Professor Wilkinson refers to these reconstruction-era laws as the "Lords of Yesterday." Their imprint remains evident today, and the path they charted for a youthful nation is sometimes fraught with tension because of evolving realities and changing national priorities.

> [Today, t]he land ownership map of the West in many places resembles a crazy quilt, without reason or coherent pattern. Where the effects of the fragmenting grants to miners, railroads, and states are pronounced, often no single owner (states, private entities, or the Federal government) owns enough contiguous land to allow effective management of land holdings. Land exchanges and cooperative efforts have accomplished some consolidation, but fragmented ownership patterns generate a plethora of disputes over access and similar problems.[48]

Mapping conventions dictate that state trust lands are shown in blue and the prevalence of blue state sections found on land ownership mapping is sometimes referred to as the "blue rash."[49] See Figure 7, which shows the blue rash and current land ownership in Uintah County, Utah, as it affects access to oil shale resources.

Figure 7- Surface Ownership Within the Uinta Basin



While the reality of life in the west has changed, laws that embody largely unrestricted access to federal public lands cannot be swept aside without regard for the human cost of changing policy imperatives. The challenge faced by policy makers and land managers is how to strike an increasingly delicate balance between resource protection and commodity production. "The question is not whether human-centered economic and social concerns are part of the policy question, but how they are to be reconciled with competing ecological questions. Does — or should — one trump the other?"[50] These questions loom large in Utah, where the School and Institutional Trust Lands Administration (SITLA) manages over 1 million acres of trust lands in areas proposed by environmentalists for Wilderness designation.[51] SITLA's lands also include approximately 190,000 acres located in existing BLM Wilderness Study Areas (WSAs) that are managed for wilderness values until released by Congress.[52] SITLA inholdings are likewise found in BLM managed Wilderness in western and southwest Utah, and in several National Conservation Areas in Washington County.[53] SITLA operates under a statutory mandate to maximize income for trust beneficiaries while preserving trust assets for future beneficiaries,[54] which is at odds with Wilderness type protections.

Similar tensions existed in the Pacific Northwest when forest practices laws intended to fuel development and westward expansion came into conflict with laws protecting endangered species. Communities developed upon the promise of low-cost federal timber, becoming dependent on public lands access. More than a century later, when species protection laws

forced drastic reductions in allowable timber harvest levels, unemployment skyrocketed, with devastating impacts on local communities. The Pacific Northwest timber crisis stands as a harbinger of the conflicts created when legitimate competing interests are ignored and dominant purpose management is pursued beyond its limits. These types of conflict are likely to increase as demand for resources, both extractive and aesthetic, continues to grow. It is particularly difficult to come together to chart a common path forward in a highly polarized and partisan era.[55]

Despite these challenges, a path forward is needed. Development on federal land is at least temporarily foreclosed by litigation,[56] and at 640 acres, many of Utah's trust land parcels remain too small to develop on their own. Scattered and unconsolidated state trust lands complicates access and increases the cost of development. Scattered development could also result in redundant roads and infrastructure, resulting in unnecessary environmental impacts and wildlife habitat fragmentation.[57] The inability to generate revenue in support of state institutions from these lands — the purpose for which they were granted to the state — creates lingering tensions. Similarly, the possibility that state inholding development could compromise management objectives for surrounding federal lands concerns federal land managers. With this in mind, over the next twenty-five years, the BLM intends to "rationalize and consolidate its fragmented landholdings."[58]

The BLM's goals are not new. Over the years, the state and federal government have attempted to use land exchanges to cut the Gordian knot of fragmented ownership. Land exchanges follow one of two paths: Under FLPMA, exchanges must satisfy detailed procedural requirements to assure they are in the public interest and involve lands of equal value.[59] FLPMA exchanges must also comply with NEPA, which usually involves completion of an Environmental Impact Statement (EIS).[60] Taking the second path and including public interest determinations, equal value determinations, or NEPA adequacy language in federal legislation authorizing or approving exchanges can sidestep these requirements.[61]

Protection of wilderness values and sensitive landscape has been a major driver for land exchanges, with exchanges frequently removing state trust land inholdings from areas previously dedicated to conservation. The permanent dedication to conservation purposes follows two primary paths: Under the Wilderness Act, Congress can enact legislation designating areas as part of the National Wilderness Preservation System, where they are managed to remain "unimpaired for future use as wilderness . . . ."[62] Under the Antiquities Act, the President may, "in his discretion, declare by public proclamation . . . objects of historic or scientific interest that are situated upon . . . [federal lands] to be national monuments . . . ."[63]

In enacting the Energy Policy Act of 2005, the DOI was directed to consider utilizing land exchanges, where appropriate and feasible, to facilitate efficient resource recovery.[64] In furtherance of this charge, the DOI was directed to give priority to implementing land exchanges that would improve the development prospects of the Piceance Creek, Uinta, and Washakie basins.[65] While facilitating development was clearly important, it was not valued above all other land uses, and requirements to complete public interest determinations and equalize the value of parcels exchanged remain in force.[66] An understanding of past land exchange efforts and the lessons they contain remains important in assessing future access to oil shale and oil sands resources.

2. Wilderness and Wild Lands

On December 22, 2010, Secretary of the Interior Ken Salazar issued Secretarial Order 3310, *Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management*.[67] Order 3310 clarifies how the BLM is to do what it has been doing for years — determine whether wilderness characteristics exist on federal public lands and make management decisions affecting these resources. The Order intends to ensure uniform implementation of existing legal obligations, reaffirming the BLM's obligation to inventory lands under its jurisdiction for wilderness characteristics. The Order also offers direction regarding how to conduct these inventories, when to protect wilderness character, and when to allow activities that will result in the loss of wilderness character. The Order also creates a rebuttable presumption in favor of protecting wilderness characteristics "unless the BLM determines that impairment of wilderness characteristics is appropriate and consistent with applicable requirements of law and other resource management considerations."[68]

The negative reaction to Order 3310 was forceful and immediate, including angry comments,[69] litigation,[70] and federal legislation to limit the Order's impact.[71] The response was not surprising, first because of the presumption in favor of protection, second, because the Secretary did not announce his intention to provide policy direction or seek input from the states or rural communities impacted by the Order, and third because many perceive the Order as harmful to economic development.

While Congress prohibited the expenditure of federal funds on Order implementation during fiscal years 2011 and 2012,[72] the Order remains in place. While the Secretary has endeavored to clarify the DOI's intentions, these often-legalistic explanations do not evidence a substantive change in policy direction. Rather, they reaffirm the administration's obligations and commitment to management of lands with wilderness characteristics.

The Order and the reaction to it are best examined in the context of broader federal wilderness management efforts. The Wilderness Act of 1964, FLPMA, and efforts to implement the two statutes' requirements provide the context within which Order 3310 can be assessed, and are discussed in the subsections that follow.

2.1. The Wilderness Act

Congress enacted the Wilderness Act in 1964 "[i]n order to assure that an increasing population, accompanied by expanding settlement and growing mechanization, does not occupy and modify all areas within the United States and its possessions, leaving no lands designated for preservation and protection in their natural condition."[73] At the heart of disputes over wilderness are the term's competing meanings. "Wilderness" is both a familiar concept subject to everyday usage, and a legal definition with important implications. Attempting to reconcile common but subjective understandings of "wilderness" with a detailed statutory definition is central to the conflict. Under the former, wilderness exists in the eye of the beholder and is obvious to the observer. Under the Wilderness Act, "wilderness" takes on a precise legal meaning:

> [A]n area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has

> at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.[74]

Initially, the Act incorporated specified National Forest System lands into the Wilderness Preservation System and required the Secretary of Agriculture[75] to review other National Forest System lands for inclusion into the Wilderness Preservation System.[76] The Secretary of the Interior was also required to review national wildlife refuges and components of the National Park System (including National Monuments) for possible inclusion into the Wilderness Preservation System.[77] While federal agencies were charged with determining which areas were suitable for wilderness designation, final designation requires congressional action.[78]

Once incorporated into the National Wilderness Preservation System, areas "shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness."[79] In order to preserve wilderness character, the Act specifically prohibits permanent or temporary roads, the use of motorized vehicles or equipment, commercial enterprises, and structures or other installations within designated Wilderness Areas.[80] Exemptions are allowed for valid existing rights and as necessary to meet minimum requirements for the administration of the area as wilderness.[81]

The Wilderness Act recognizes that the long history of federal grants of land to states, railroads, and settlers has resulted in state and privately owned lands that are completely surrounded by areas that may be designated as wilderness. Where state or private inholdings exist, the Act requires that the owner of such inholdings "be given such rights as may be necessary to assure adequate access."[82] The owners of valid mining claims or occupancies are likewise guaranteed reasonable rights of ingress and egress "by means which have been or are being customarily enjoyed with respect to other such areas similarly situated."[83] In the alternative, state or privately owned inholdings can "be exchanged for federally owned land in the same State of approximately equal value."[84]

2.2. FLPMA and BLM Managed Wilderness

The Wilderness Act did not direct the DOI to evaluate BLM administered lands for inclusion into the Wilderness Preservation System. BLM managed lands were not considered for inclusion until FLPMA's enactment more than a decade later. FLPMA's wilderness obligations are discussed after first being put into the context of FLPMA's other obligations.

Congress enacted FLPMA in 1976, consolidating federal public land management policy into a single "organic act" directing BLM's management of public lands. More than 3,000 public land laws remained on the books at the time of FLPMA's passage. "These laws represented and effectuated Congressional policies needed when they were passed. Many of them are still viable and applicable today [1976] under present conditions. However, in many instances they are absolute and, in total, do not add up to a coherent expression of Congressional policies adequate for today's national goals."[85] Furthermore, as Congress noted, the Executive Branch "has tended to fill in missing gaps in the law, not always in a manner consistent with a system balanced in the best interests of all the people. A major weakness which has arisen under these circumstances is instability of national policies."[86]

Congress, in enacting FLPMA, revoked many of these 3,000-plus public land laws, providing overarching direction that public lands be managed for the "multiple use of resources

on a sustained-yield basis."[87] The multiple use and sustained yield mandate did not entirely eliminate earlier laws authorizing disposal of federal public lands, but marked a shift towards retaining public lands in federal ownership unless "disposal of a particular parcel will serve the national interest."[88] The proper multiple use mix is achieved by comprehensive land use planning, coordinated with state and local planning.[89] Planning decisions must incorporate public involvement, and decisions regarding the management and disposal of public lands must comport with land use plans.[90]

2.2.1. FLPMA § 201

The key to satisfying FLPMA's multiple use sustained yield mandate is a comprehensive understanding of the resources under BLM control and the systematic planning for their development or protection. In declaring national public lands policy, Congress concluded that national interests are best realized if the public lands and their resources are systematically inventoried and their use is projected through planning coordinated with other federal and state land managers.[91] In furtherance of this conclusion, section 201(a) of FLPMA states that:

> The Secretary [of the Interior] shall 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.[92] This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values. *The preparation and maintenance of such inventory shall not, of itself, change or prevent change of management or use of public lands*.[93]

Section 201 is the prerequisite to planning — determining what values and resources exist — and requires the continued maintenance of that inventory to ensure that BLM acts based on the best information available. Maintaining an up-to-date inventory also provides the BLM with a basis from which to evaluate the effects of its management actions.

2.2.2. FLPMA § 202

Section 202(a) of FLPMA builds on the inventory, requiring that the Secretary of the Interior "develop, maintain, and when appropriate, revise land use plans which provide by tracts or areas for the use of the pubic lands."[94] Plans must incorporate public input and are required "regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses."[95] Subparagraph (c) lists several factors that must be addressed in developing and revising land use plans. Specifically, the Secretary must:

> (1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;
>
> (2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
>
> (3) give priority to the designation and protection of areas of critical environmental concern;
>
> (4) rely, to the extent it is available, on the inventory of the public land, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means . . . and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits; and . . .

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located . . . .[96]

FLMPA explicitly states that decisions contained in land management plans, "including but not limited to exclusion (that is, total elimination) of one or more of the principal or major uses made by a management decision shall remain subject to reconsideration, modification, and termination . . . ."[97]

2.2.3. FLPMA § 302

Section 302 of FLPMA directs the Secretary of the Interior to "manage the public lands under the principles of multiple use and sustained yield, in accordance with the land use plans . . . except that where a tract of such public land has been dedicated to specific uses according to any other provision of law it shall be managed in accordance with such law."[98] "In managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."[99] The careful balancing inherent in section 302's multiple use sustained yield mandates is reflected in both the definition of terms and in the congressional declaration of policy.

'[M]ultiple 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 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 nonrenewable 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.[100]

As the Federal District Court for the Utah District explained:

If all the competing demands reflected in FLPMA were focused on one particular piece of public land, in many instances only one set of demands could be satisfied. A parcel of land cannot both be preserved in its natural character and mined. Thus, it would be impossible for BLM to carry out the purposes of the Act

> if each particular management decision were evaluated separately. It is only by looking at the overall use of the public lands that one can accurately assess whether or not BLM is carrying out the broad purposes of the statute.[101]

Accordingly, portions of the public lands can be dedicated to certain uses and affect the exclusion of other uses provided that, when taken as a whole, the public lands provide the diverse range of services set forth in the multiple use sustained yield mandate.[102] Sustained yield is defined as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use."[103]

Congress also explicitly stated that public lands be managed to protect "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values," and that certain public lands should be preserved "in their natural condition," thereby providing "food and habitat for fish and wildlife and domestic animals" as well as "outdoor recreation and human occupancy and use."[104]

This mandate is balanced against congressional direction that "the public lands be managed in a manner which recognizes the Nation's need for domestic sources of minerals, food, timber, and fiber from the public lands . . . ."[105] Finding the balance reflected in the multiple use mandate has been challenging, as the appropriate balance is open to subjective interpretations. As one public lands scholar explains: "'Multiple use' is a highly contested concept that sometimes appears to have as many unique meanings as the number of people involved in public land disputes."[106] While courts are deferential to land management agency efforts to achieve multiple use objectives,[107] the intensity of opposing opinions can lead to protracted disputes. The time and effort spent litigating the issue can represent a significant cost even if courts are likely to uphold agency determinations. In the words of former Secretary of the Interior Bruce Babbitt:

> The concept of multiple use hasn't been a very good guide for resources on BLM lands, because multiple use doesn't answer the question, 'Well, what do you do when my use conflicts with your use?' You can't take an acre of land and have a sawmill, a cattle ranch, a strip mine, a [National Conservation Area], a National Monument.[108]

2.2.4. FLPMA § 603

FLPMA section 603[109] contains the statute's only direct reference to the BLM's obligation to manage for wilderness values within the continental United States.[110] Section 603 sets forth a three-step process. Areas with wilderness characteristics are not protected automatically; mineral values present in such areas must be surveyed and recommendations must be submitted to Congress.[111] The Secretary of the Interior begins by reviewing roadless areas greater than 5,000 acres in size that were identified during the section 201 inventory process as containing wilderness character, and "from time to time," recommends to the President the suitability of such areas for preservation under the Wilderness Act.[112] The first round of recommendations was due to the President no later than October 21, 1991.[113]

Under subsection (b), the President is directed to take the second step in the process and recommend to Congress areas that should be managed as Wilderness.[114] The third and final step occurs when Congress acts upon the President's recommendation, either designating wilderness or releasing areas from interim protection and returning them to multiple use

management. Subsection (c) sets forth a non-impairment requirement for areas identified as possessing wilderness character and submitted to Congress for possible inclusion in the Wilderness Preservation System.[115] Areas identified as having wilderness character and recommended to the President are known as "Wilderness Study Areas" or WSAs.[116] The BLM manages more than 545 WSAs containing nearly 12.7 million acres located in the western states and Alaska.[117]

2.2.5. Utah Law Regarding Federal Public Land Management

State agencies within Utah are also subject to statutory limits on their discretion in addressing federal public land management conflicts. The Utah Code requires promotion of certain "principles when preparing any policies, plans, programs, processes, or desired outcomes relating to federal lands and natural resources on federal lands."[118] Among these principles is a statement that "managing public lands for 'wilderness characteristics' circumvents the statutory wilderness process and is inconsistent with the multiple-use and sustained-yield management standard that applies to all Bureau of Land Management and U.S. Forest Service lands that are not wilderness areas or wilderness study areas."[119] The Utah Code includes similar provisions regarding other controversial issues such as grazing management, Wild and Scenic River designation, and management of Areas of Critical Environmental Concern.[120] While the state legislature cannot dictate federal land management policy, these statutory provisions limit the state's ability to compromise without violating state law and subjecting potential compromises to outside legal challenge.

However, the Utah Code also provides that "[d]ifferences of opinion between the state's plans and policies on use of the subject lands and any proposed decision concerning the subject lands pursuant to federal planning or other federal decision making processes should be mutually resolved between the authorized federal official . . . and the governor of Utah."[121]

While this provision clarifies the Governor's authority to depart from state policy when negotiating with the federal government, such actions involve political risks. The Governor and the Legislature must work together on a number of issues, and the potential to damage their relationship, thereby compromising the ability to conduct broader aspects of the state's business, must temper calls for Gubernatorial action that cause conflict between two branches of state government.

At a broader level, at least one member of Utah's congressional delegation has vowed to withhold support for any further Wilderness designation within Utah unless the designation proposal is first considered and approved by the Utah legislature. "I believe the Utah legislature must first consider and approve wilderness designations before any final determination is made at the federal level."[122] While Senator Lee's statement does not preclude either a county lands bill or bilateral exchange coupled with Wilderness designation (both models are discussed later in this report), the conditions the state legislature chooses to impose upon a Wilderness could be problematic.

Mike Noel, an influential state representative, recently drafted a list of recommended conditions for supporting future Wilderness designations. The three-page list includes, among other conditions:

- Wilderness designations would be limited to no more than the acreage previously designated as WSAs under FLPMA section 603.

- After enactment of the bill at issue, no further Wilderness could be designated within the subject county.
- All WSAs not designated as Wilderness should be returned to "traditional" multiple use where they would be open to grazing at "historic levels," open to energy development, and open to "full motorized access on existing roads and trails." All non-WSA lands with wilderness characteristics would be subject to these same traditional multiple use requirements.
- All BLM and National Forest System lands not designated as Wilderness pursuant to the subject bill would be managed for traditional multiple uses that the BLM could not restrict without congressional consent.
- The state and county would receive a right-of-way grant for public use of all adequately documented roads across BLM and Forest Service land.
- The subject bill should "direct the BLM and Forest Service to designate a reasonable system of motorized routes in designated wilderness areas."
- The subject bill should "*require* mechanical vegetative treatment on wilderness designated lands to enhance water yield of those lands," categorically excluding such projects from NEPA review.
- The subject bill should allow "full motorized access" to designated wilderness in order to treat invasive species, "thin old growth alpine monoculture stands" to mitigate wildfire and insect infestation danger, and "eliminate pinion and juniper succession that diminishes grazing forage." All of these activities would be subject to a categorical exclusion from NEPA review.
- SITLA inholdings would be exchanged prior to wilderness designation.
- "For any wilderness designation of lands with energy potential, the Bill should require the land to undergo seismic testing by industry to pinpoint the locations of any oil and natural gas deposits beneath the surface."
- "The Bill should require the BLM shall allow access to and recovery of any seismically identified oil and natural gas deposits via directional drilling technology from well pads located outside the wilderness unit."
- "For any wilderness designation of lands with energy potential, the Bill should compensate by opening up other rich lands with equal or higher energy potential through roll backs of previous withdrawals and through new categorical exclusions from NEPA for energy projects elsewhere in the state (example: oil shale projects in Uintah County) or even out of state (example: roll back the threatened uranium withdrawal in the Arizona Strip which benefits the economies of Washington and Kane Counties)."
- Future National Conservation Areas could be designated subject to management requirements that are less restrictive than those applicable to wilderness.
- Bills could also be made contingent upon funding and approval for other projects.[123]

As a state representative who is heavily involved in federal public land management issues, Representative Noel's list likely reflects the views of a significant faction of state legislators. However, some of the exactions Representative Noel seeks to obtain, such as allowing motorized access and aggressive vegetative treatments, would result in conditions that are at odds with the Wilderness Act's definition of wilderness.[124] It is also questionable whether Congress or the DOI would support legislation that limits future management discretion. Therefore, significant legislative refinement to Representative Noel's list may be required.

2.3. Utah Wilderness Inventories

Efforts to inventory lands with wilderness characteristics within Utah have taken a long and tortured route.[125] In response to FLPMA, the BLM completed its first round of wilderness reviews for Utah in 1979.[126] The initial inventory identified approximately 5.4 million acres of public land for intensive inventories.[127] After conducting intensive inventories, the BLM concluded that roughly 2.5 million acres should be managed as WSAs.[128] This conclusion proved controversial, and after resolution of multiple administrative appeals, several WSAs were expanded and additional WSAs were identified, resulting in a total of eighty-seven WSAs containing just under 3.3 million acres.[129] Secretary of the Interior Manuel Lujan recommended to the President that approximately 1.9 million of these acres were suitable for wilderness designation, and this recommendation was forwarded to Congress on June 22, 1992.[130] Congress has yet to act on the wilderness recommendations, and the 3.3 million acres of WSAs continue to be managed "in a manner so as not to impair the suitability of such areas for preservation as wilderness."[131]

Many were unhappy with the wilderness inventory process. Some contended that the inventory "locked up" too much public land; others argued that the inventory was flawed, and with almost 23 million acres within Utah under BLM management,[132] protecting just 14 percent of that land for wilderness character fell short of BLM's statutory mandate. The Utah Wilderness Coalition conducted its own inventory, and in 1989, released *Wilderness at the Edge: A Citizen Proposal to Protect Utah's Canyons and Deserts*, calling for protection of 5.7 million acres.[133] In the late 1990s, the Utah Wilderness Coalition conducted its second inventory of BLM lands. "With more time and resources at their disposal the second time around, conservationists identified an additional 3.4 million acres of wilderness-quality lands and added them to the proposal."[134]

In 1989, Utah Rep. Wayne Owens first introduced a version of the Utah Wilderness Coalition's citizens' proposal into Congress as the Utah BLM Wilderness Act of 1989, proposing designation of slightly less than 5.0 million acres.[135] New York Representative Maurice Hinchey assumed sponsorship of the bill in 1993[136] and Senator Richard Durbin of Illinois introduced the first corresponding bill into the U.S. Senate in 1997.[137] Representative Hinchey and Senator Durbin reintroduced an expanded bill into Congress in 1999.[138] The proposal has grown over the years and the most recent version of the Red Rock Wilderness Bill would protect over 9.4 million acres of Utah land as wilderness,[139] including existing WSAs.

Not all Utah wilderness proposals have been so expansive. Utah Representatives Jim Hansen and Enid Greene sponsored competing legislation in 1995, proposing to designate 2.1 million acres of wilderness in Utah.[140] Utah's Senators Orrin Hatch and Robert Bennett introduced companion legislation in the Senate.[141]

None of the various bills garnered sufficient congressional support, and within Utah, statewide BLM wilderness designation did not occur.[142] Former Secretary of the Interior Bruce

Babbitt observed that: "an important reason for this stalemate is that the various interests involved are so far apart on the threshold, fundamental issue of how much BLM land has wilderness characteristics . . . ."[143] In 1996, the BLM began a second round of Utah wilderness inventories to resolve these factual questions, focusing on those lands that had been deemed to lack wilderness character during the earlier section 603 inventory.[144] Completed in 1999, BLM's reinventory evaluated 3.1 million acres of public lands outside of previously identified WSAs, determining that 2.6 million of these 3.1 million acres possessed wilderness character.[145] The 1999 reinventory, including revisions, was an inventory only and the areas identified (commonly known as Wilderness Inventory Areas or WIAs) were not proposed for wilderness designation and are subject to no mandatory protection under either FLPMA or the Wilderness Act.[146] WIA areas are, however, commonly included in the Red Rock Wilderness Bill and may be subject to protective management requirements contained in BLM RMPs.

2.4. Litigation and Settlement

In October of 1996, angered at the BLM's decision to reinventory public lands within Utah for wilderness characteristics, the State of Utah, SITLA, and the Utah Association of Counties sued the DOI. The plaintiffs contended, among other things, that the BLM lacked authority to conduct the reinventory,[147] and that implementation of the latest round of protections would "limit the management of an estimated 442,910 acres of Utah school trust lands."[148] Specifically, the plaintiffs contended that the BLM was unlawfully creating and protecting "de facto" wilderness, and in so doing, usurping a function expressly reserved to Congress.[149] The Plaintiffs also contended that the "BLM's authority to establish WSAs is limited to Section 603 of FLPMA and that authority expired on October 21, 1991."[150] A coalition of environmental organizations intervened to argue in favor of protecting lands with wilderness character.

The plaintiffs initially obtained a federal district court order enjoining the BLM from proceeding with its inventory.[151] Without ruling on the merits of the argument, the Tenth Circuit Court of Appeals vacated the injunction and ordered the lower court to dismiss six of the seven claims, holding that the plaintiffs lacked standing to pursue an appeal because they "failed to identify a concrete, actual or imminent injury-in-fact which is fairly traceable to the 1996 inventory and likely to be redressed by a favorable decision."[152] The court, however, concluded that plaintiffs' allegations that the BLM was imposing *de facto* wilderness management could proceed and remanded the issue to the District Court for further proceedings.[153]

On remand, the parties agreed to settle the lawsuit.[154] Because of its importance, the *Utah v. Norton* Settlement is quoted at length:

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

2. The 1999 Utah Wilderness Inventory shall not be used to create additional WSAs or manage pubic lands as if they are or may become WSAs, and the inventory information will be evaluated for its validity and utility at such time as changes are made to the appropriate land use plan. Nothing in this Agreement precludes acceptance of information or data from any person or entity providing recommendations and other information regarding resource values on public lands as set forth in FLPMA Section 102(d).

3. Accordingly, Defendants will rescind the new Wilderness Handbook entitled 'Wilderness Inventory and Study Procedures, H-6310-1' and the following direction, decisions, policies and bulletins: Information Bulletin 2001-42 and amendments, Information Bulletin 2001-43, Instruction Memorandum 2001-75, and Instruction Memorandum UT 2001-92.

4. The affected information bulletins, instruction memorandums, and handbooks have been issued as guidance and policies that bind only BLM and, as a result, the change contemplated in this Agreement need not follow the Administrative Procedures Act rulemaking procedures or other public notice and comment procedures.

5. Defendants will not establish, manage or otherwise treat, other than Section 603 WSAs and Congressionally designates wilderness, as WSAs or wilderness pursuant to the Section 202 process absent congressional authorization . . . . However, nothing herein is intended to diminish BLM's authority under FLPMA to prepare and maintain on a continuing basis as inventory of all public lands and their resources and other values, as described in FLPMA Section 201. These resources and other values include, but are not limited to the characteristics that are associated with the concept of wilderness . . . .

7. Defendants are not precluded from managing public lands consistent with the law, nor are they precluded from managing public lands in the lawful exercise of discretion. Furthermore, Defendants may prepare directives, guidance and policies consistent with the Secretary's authority to develop and revise land use plans utilizing the criteria in FLPMA section 202(c), which includes relying to the extent it is available on the inventory of public lands, their resources, and other values pursuant to Section 202(c)(4) . . . .[155]

The environmental intervenors were not party to the *Utah v. Norton* Settlement and moved to vacate the Settlement and bar its implementation.[156] The district court concluded that the environmental intervenors failed to show that they had been harmed by the Settlement and therefore lacked standing to maintain a challenge.[157] According to the district court, the BLM had not yet taken a final agency action with respect to the Settlement and the issues raised in the challenge were not ripe for review even if the intervenors had standing.[158] According to the court, the relief sought "may ultimately come through political processes, but the federal courts do not play a role in such processes."[159] With these claims unripe for litigation, the court lacked jurisdiction to consider the matter. Despite these limitations, the district court proceeded to offer its opinion as to the merits of the environmental intervenors claims in case "a higher court disagree[s] with this Court's jurisdictional holding."[160]

On the issues most relevant today, the district court disagreed with the intervenors' assertion that the Settlement, by prohibiting future wilderness reviews under section 603,

precluded the BLM from preparing and maintaining an inventory of public lands under section 201. The court reasoned that "section 603 does not give the BLM power to inventory land of any type; rather, section 603 instructs the BLM merely to *review* certain areas identified during the section 201 inventory and assess those areas' wilderness suitability."[161] The Settlement reflects the parties' intent that section 201 inventories continue,[162] and "does not preclude the BLM from taking an inventory of its wilderness-type lands for purposes other than section 603 wilderness reviews, such as evaluating lands for wilderness characteristics under section 202. Thus section 201 remains fully intact even after the Settlement's elimination of future 603 wilderness reviews."[163]

The environmental intervenors next contended that the Settlement conflicted with FLPMA by precluding the BLM from establishing or managing WSAs under section 202. While the court concluded that the broad authority conveyed by section 202 does not include authority to designate or manage WSAs under section 603's non-impairment standard,[164] the BLM, according to the court, retains broad authority to reach the same ends.

> [The BLM possesses] extensive authority to protect and preserve the natural values of land. Both Utah and the BLM acknowledge that the BLM has the discretion to manage lands in a manner that is similar to the non-impairment standard by emphasizing protection of wilderness characteristics as a priority over other potential uses . . . . Although FLMPA limits the BLM's authority to designate and manage lands as WSAs, it provides expansive authority to protect and preserve lands in other ways . . . . The only real difference between managing land under section 202 to protect wilderness character and managing land as a WSA to do the same thing — and this distinction is at the crux of this lawsuit — is that a WSA, once established, cannot be revised; it becomes in effect de facto wilderness until Congress acts, whereas under section 202, the land will be subject to possible changes in management plans.[165]

The district court's opinion was appealed to the Tenth Circuit Court of Appeals, which affirmed the district court's jurisdictional ruling. In affirming the lower court, the Tenth Circuit declined to rule on the merits of the challenge, concluding instead that the Settlement's legality depended heavily on the matter in which the BLM chooses to implement it. Challenges therefore remained unripe until the BLM acted to implement the Settlement.[166] While the district court's substantive conclusions are therefore without binding legal effect, they remain important as the most detailed judicial comments on the Settlement.

A recent appellate opinion sheds additional light on the BLM's authority to manage public lands to protect wilderness characteristics. In a 2010 opinion, the Oregon Natural Desert Association sued the BLM over the BLM's refusal to address Non-WSA Lands with Wilderness Characteristics during the RMP revision process.[167] The BLM defended, in part, by contending that only FLPMA section 603 required it "to conduct inventories of, or otherwise specially consider, 'wilderness characteristics' in land use planning," and that its authority to conduct wilderness review under FLPMA section 603 had expired.[168] The Ninth Circuit Court of Appeals found the argument unavailing, holding that "Wilderness values are among the resources which the BLM can manage under [FLPMA sections 202 and 302]."[169]

> [A]lthough [section 603] provides a mechanism by which the BLM may submit lands to Congress for legislation preserving them, the BLM's authority to identify lands with 'wilderness characteristics' is not limited to the [section 603] process. Rather, as [section 603] makes clear, it is the [section 201(a)] general resource

> inventory process, which catalogues 'all public lands and their resource and other values,' that is to identify lands 'as having wilderness characteristics described in the Wilderness Act.' . . . The BLM's land use plans, which provide for the management of these resources and values, are, again, to 'rely, to the extent it is available, on the inventory of the public lands, their resources, and other values.'[170]

The court then proceeded to call the *Utah v. Norton* Settlement into question,[171] noting that: "The Attorney General lacks the power 'to agree to settlement terms that would violate the civil laws governing the agency,' so the Utah Settlement is only valid if it comports with the FLPMA, NEPA, and other relevant law."[172] As the court noted, the Settlement's validity is presently before the Tenth Circuit Court of Appeals.[173]

Regardless of whether Order 3310 is intended to overturn the Settlement, commentators suggest that the Settlement was never intended to bind future administrations. Each administration may develop their own public lands policy for conservation and development of natural resources and Judge Benson, who presided over litigation leading to the Settlement, indicated that he never intended the Settlement terms to legally bind future administrations.[174] "It was very clear that the Norton administration and the State of Utah knew that if and when the administration changed, the new Interior Department could come out with a different interpretation of FLPMA."[175]

Critically, Order 3310's statement of authority, as well as the statement of authority for accompanying handbook direction, specifically disclaims section 603 authority. Neither the Order nor the accompanying BLM manuals refer to WSAs, and Secretary Salazar separates the WSA process under section 603 from the current initiative.[176] Moreover, when entering into the Settlement, Secretary Norton and Governor Leavitt did not dispute that the BLM has a duty under FLPMA section 201 to inventory for all multiple use values on BLM lands, including wilderness characteristics.[177] Likewise, as the Federal District Court concluded, the BLM possesses "extensive authority" under section 202 to achieve results similar to the non-impairment standard.[178] The Ninth Circuit confirmed wilderness characteristics continued "vitality as a resource category covered by the BLM's multiple-use land use planning mandate."[179] Consequently, it appears that the Order neither revokes nor violates the Settlement Agreement.[180]

2.5. Non-WSA Lands with Wilderness Characteristics and the 2008 RMPs

In late 2008, after years of effort and analysis, the BLM released revised RMPs for six of Utah's BLM field offices.[181] One of the most contentious issues faced in preparing the RMPs was the extent of lands outside of existing WSAs that possessed wilderness characteristics, and for those lands possessing wilderness characteristics, which should be managed to protect wilderness character.[182] In order to answer these questions, the BLM reviewed lands identified through public comment and revisited the 1999 inventory to identify lands possessing wilderness character.[183] In determining whether an area possessed wilderness character, the BLM defined "Non-WSA Lands with Wilderness Characteristics" as:

> [L]ands that (1) generally appear to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) have outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) have at least five thousand acres of land or are of sufficient size as to make practicable its preservation and use in an unimpaired condition; and

(4) may also contain ecological, geological or other features of scientific, educational, scenic, or historical value.[184]

The criteria used to identify Non-WSA Lands with Wilderness Characteristics are drawn from the Wilderness Act and track the criteria set forth in Order 3310.

Not all Non-WSA Lands with Wilderness Characteristics are suitable for management emphasizing wilderness character. For example, lands could be subject to existing but undeveloped mineral claims or leases where the exercise of valid existing rights would impair wilderness character. Such areas are generally considered unsuitable for management emphasizing wilderness character. Lands with wilderness characteristics deemed suitable for protective management are referred to as "Natural Areas" in the Records of Decision (RODs) for all six RMPs.

Deciding which Non-WSA Lands with Wilderness Characteristics should be managed as Natural Areas proved to be challenging because, pursuant to the *Utah v. Norton* Settlement, the BLM had withdrawn handbook guidance.[185] Notwithstanding the lack of guidance, the BLM attempted to apply common criteria in the RODs for the six RMPs when it explained why certain areas were managed for wilderness character while others were not. The ROD for the Moab RMP is illustrative in that it considered size, contiguity with other protected areas, compatibility with other management actions, lack of conflict with the development potential for mineral resources, lack of existing oil and gas leases, lack of planned range management or vegetative treatment activities, and lack of protection afforded by overlapping designations (e.g. ACECs).[186] Other field offices applied similar criteria, modified to reflect what are presumably local issues of concern. Accordingly, the ROD for the Kanab and Price RMPs also considered conflicts with anticipated off highway vehicle (OHV) demand;[187] the ROD for the Monticello RMP considered demand for firewood;[188] and the ROD for the Richfield RMP considered impacts on "existing and future rights-of-way, access to state lands, water developments, mineral and mining areas, and support facilities for grazing."[189]

These RMP decisions predate Order 3310. Whether these variations differ significantly from the Order's directions is debatable, and how the BLM will proceed remains to be seen. It is also difficult to evaluate the manner in which the BLM considered these factors on a case-by-case basis because most of the NEPA documents lack site-specific discussions. The ROD for the Vernal RMP is a notable exception. Areas not selected were "considered to have high potential for oil and gas resources and currently have a large portion of the lands leased."[190] However, under the Vernal ROD, Non-WSA Lands with Wilderness Characteristics that were *not* managed to protect those values had as little as fourteen percent of the area under active leases (Hideout Canyon).[191] Areas inventoried as possessing wilderness characteristics and managed to protect those values sometimes had moderate to high oil and gas development potential and a much higher level of active leasing. For example, Bull Canyon has moderate oil and gas development potential and eighty-nine percent of the area is subject to active leasing.[192] Likewise, the Mountain Home area has moderate to high oil and gas development potential and sixty-four percent of the area is subject to active leases[193] — but both Bull Canyon and Mountain Home were carried forward for management to protect wilderness character.[194] Notably, the Vernal RMP emphasizes that interest in leasing Hideout Canyon remains high,[195] possibly explaining why it is not managed to protect wilderness character despite the low level of existing lease activity.

The ROD for the Moab RMP also raises questions regarding the policy's application. According to the ROD, many areas identified as possessing wilderness characteristics were not

practicable to manage for wilderness character because they were cut off from the larger unit (usually a WSA) by state lands, "resulting in a lack of size as a stand-alone unit sufficient to provide these opportunities."[196] Other areas (e.g. Gooseneck and Labyrinth Canyon) suffered from competing uses, such as existing oil and gas leases or OHV riding. However, Granite Creek, Mill Creek Canyon, Negro Bill Canyon, and Westwater Creek were not designated for management protecting wilderness character, despite being adjacent to WSAs, possessing zero acres identified as impractical for wilderness character management, and having no current oil or gas leases. The EIS and ROD do not explain why the Moab Field Office chose not to protect these areas for wilderness character.

Explanatory information regarding these portions of the Moab and Vernal RMPs may be contained in the project file or other management requirements may have made wilderness characteristic emphasis unnecessary. Revisions to management boundaries that occurred between the Final EIS and ROD may also help explain possible discrepancies. While these examples appear to call application of BLM's stated criteria into question, Natural Area designation may not have been necessary in light of other considerations that are not readily apparent from the EIS and ROD. Unfortunately, neither the EIS nor the ROD contains sufficient detail to fully evaluate application of the BLM's decision-making criteria. Uncertain and potentially inconsistent application of the selection criteria may prove to be important as how competing resource uses were treated could prove to be a deciding factor in determining whether prior decisions will need to be revisited under Order 3310.[197]

2.6. Order 3310

In the wake of the *Utah v. Norton* settlement and withdrawal of BLM Handbook direction, the BLM found itself "without comprehensive national guidance on how to inventory and manage lands with wilderness characteristics."[198] Secretary of the Interior Ken Salazar issued Order 3310 in an attempt to fill this gap. The Order first reaffirms the BLM's obligation to maintain an up-to-date inventory of BLM-managed lands, including lands with wilderness characteristics, and to consider those values in land use planning. Second, the Order clarifies the process for determining when lands with wilderness characteristics should be managed to emphasize wilderness character or managed to emphasize other uses such as commodity production. Third, the Order directs that all "BLM offices *shall* protect [ ] inventoried wilderness characteristics when undertaking land use planning and when making project-level decisions by avoiding impairment of such wilderness characteristics unless the BLM determines that impairment of wilderness characteristics is appropriate and consistent with applicable requirements of law and other resource management considerations."[199] Under the Order, lands with wilderness characteristics that are managed to protect wilderness character are referred to as "Wild Lands."[200] As the DOI explained:

> The guidance will bring consistency across the BLM and provide a process for conducting wilderness inventories and considering lands with wilderness characteristics in land use planning and project-level decisions . . . . These new policies will support the Secretary's Order and provide BLM State Offices with the structure needed to determine where wilderness characteristics exist on public lands and how to manage lands determined to have those characteristics.[201]

Two months later, the BLM released final versions of three new BLM Manuals, providing detailed instructions to agency staff regarding the Order's implementation.[202] These three Manuals remained operative until July 25, 2011, when the BLM released an Instruction Memorandum (IM) that, in pertinent part, "places . . . Manuals 6301, 6302, and 6303 into

abeyance until further notice."[203] As discussed in more detail in section 2.7, the IM responded to congressional action temporarily prohibiting the expenditure of funds on the Order's implementation.

While the DOI and BLM are prohibited from expending funds to implement Order 3310 through September 2012,[204] the Order remains in effect and continues to require that "[a]ll BLM offices shall protect these inventoried wilderness characteristics when undertaking land use planning and when making project-level decisions by avoiding impairment of such wilderness characteristics unless the BLM determines that impairment of wilderness characteristics is appropriate and consistent with applicable requirements of law and other resource management considerations."[205] Furthermore, the BLM did not rescind the Manuals — the IM placing the Manuals in "abeyance" is scheduled to expire on September 30, 2012.

The IM and the attachments thereto parallel the three Manuals with one important exception — the IM and its attachments do not include the presumption in favor of wilderness character protection. Instead, they direct that "[t]he BLM will use the land use planning process to determine how to manage lands with wilderness characteristics as part of the BLM's multiple-use mandate. The BLM will consider a full range of alternatives for such lands when conducting land use planning."[206] While the presumption in favor of wilderness character protection contained in the Manuals will not apply through September 2012, the presumption is based on direction contained in the Order. Since the Order remains in effect, the presumption does as well. The Order, Manuals, IM, Secretarial Memorandum, and the supporting documents appended thereto also beg related questions as to the force and effect of these documents. The remainder of this subsection addresses those two issues. We include a discussion of the Manuals because, while in abeyance, their suspension is only temporary and are subject to reinstatement at any time.

2.6.1. The Order and Accompanying Direction

Order 3310 contemplates two general classes of decisions: (1) determining whether an area possesses wilderness character, and (2) where wilderness character exists, determining whether the area is suitable for management emphasizing these values and excluding incompatible activities. The Order's requirement to "maintain a current inventory of land under [BLM] jurisdiction and identify within the inventory lands with wilderness characteristics that are outside of the areas designated as [WSAs]"[207] reflects an obligation contained in FLPMA section 201 that is not in dispute.[208] In conducting its inventory and determining whether an area possesses wilderness characteristics, the BLM utilizes the definition of wilderness set forth in the Wilderness Act.[209] BLM Manual revisions that accompany the Order contain a six-page explanation of how to address the characteristics of size, naturalness, outstanding opportunities for solitude or a primitive and unconfined type of recreation, and supplemental values.[210] Manual direction appears consistent with direction appended to the IM.[211] The inventory phase is thus consistent with both the Wilderness Act definition, and the definitions applied in the inventory completed for the 2008 Utah RMP revisions.

Under the Order, the BLM land use plan revisions "shall designate" lands with wilderness character as wild lands "unless the BLM determines . . . that the impairment of wilderness characteristics is appropriate and consistent with applicable requirements of law and other resource management considerations. Wild Lands *shall* be managed to protect their wilderness characteristics as part of BLM's multiple use mandate."[212] The central question therefore becomes when designation is "appropriate."

Guidance regarding when impairment of wilderness character is appropriate is contained in BLM Manual 6302 — *Consideration of Lands with Wilderness Characteristics in the Land Use Planning Process*. While subject to temporary suspension, Manual 6302 directs the BLM to look at two factors: (1) manageability, and (2) resource values and uses enhanced or forgone if the area is managed as Wild Lands.[213] These factors are also addressed in the IM. As defined in the Manual, manageability is a question of:

> [W]hether the [lands with wilderness characteristics] may be managed to maintain their wilderness values by protecting identified wilderness characteristics over the life of the plan, based on present knowledge of the resources, ongoing uses, and valid existing rights in the area . . . . If the ongoing uses, including the likely exercise of valid existing rights, are expected to impair the area's wilderness characteristics even after any reclamation is completed, then the BLM may reasonably conclude and document that the affected portion should not be managed to protect wilderness characteristics as Wild Lands.[214]

Manageability under Manual 6302 is substantively equivalent to direction contained in the IM.[215] Factors that may compromise the BLM's ability to protect wilderness characteristics include subsurface rights owned by a party other than the federal government,[216] non-federal inholdings,[217] or legal mandates that are incompatible with wilderness character protection.[218]

In deciding whether an areas should be managed to protect wilderness character, resource values forgone are evaluated based on the extent of the competing resource or use,[219] the potential to develop the competing use or resource,[220] the availability of a substitute resource or use outside the area,[221] and the "degree to which use or development of each resource is compatible with or conflicts with management . . . as Wild Lands."[222] An additional factor is the extent to which local, regional, or tribal values associated with the lands at issue could be enhanced through Wild Land designation.[223]

Manual 6302 provides eleven examples of resource uses that should be considered: commercial uses, wildland fire management, facility maintenance, leasable minerals, Native American uses, rangeland management, recreational uses, renewable energy development, the need for rights-of-way, scientific research, and travel management.[224] The Manual indicates that some commercial activities and scientific research are consistent with wilderness character protections.[225] Likewise, wildfire management and livestock grazing is generally consistent with protecting wilderness character.[226]

The IM does not include language equivalent to that contained in Manual 6302, but has similar substantive effect because management decisions are made as part of the land use planning process that considers the resources mentioned in Manual 6302.[227] The IM also specifically notes that while the land use planning process can culminate in a decision to protect wilderness character over other multiple uses, it may also emphasize other multiple uses over wilderness character protection, or adopt an intermediate approach utilizing mitigation or use restrictions.[228]

Under both the Manual and IM, manageability and resource values enhanced or foregone are evaluated through the NEPA process. Where lands with wilderness characteristics "have been identified through the inventory process, the NEPA document used to support the land use plan (or land use plan amendment or revision) decision shall contain a full range of reasonable alternatives to provide a basis for comparing impacts to wilderness

characteristics and to other resource values or uses."[229] The NEPA process guarantees the public a voice in identifying issues and developing management alternatives.

The BLM recognizes that not all areas have been inventoried for the existence of wilderness characteristics, and not all lands with wilderness character have been evaluated for the suitability of managing such areas as Wild Lands. The absence of inventory and planning-level decisions is not intended to preclude or unreasonably delay project-level authorizations. Under the Manuals, "[i]f wilderness characteristics are clearly lacking and documented as such, the project can be considered without conducting a wilderness inventory."[230] Where wilderness characteristics may be present but project implementation can occur without impairing these values, the project can be considered without conducting a wilderness inventory.[231] In all other instances where RMP direction is lacking, a project-scale inventory is required. Under the IM, wilderness characteristic management can be addressed through target RMP amendments to address specific projects or proposals[232]

The Handbooks direct that, in making decisions in the absence of plan-wide direction, the "BLM shall avoid impairing such wilderness characteristics unless, as part of its decision-making process, the BLM concludes that impairment of wilderness characteristics is appropriate and consistent with applicable requirements of law and other resource management considerations."[233] District and Field Managers are authorized to approve emergency actions that would impair wilderness characteristics.[234] District and Field Office Managers may also approve certain projects that would impact wilderness characteristics but not preclude the BLM from later exercising its discretion to manage for wilderness character.[235] Where the project would preclude the BLM from future Wild Land designations, actions are not categorically precluded, but BLM Director approval is required.[236] The IM does not include a comparable preference in favor of protection, but since both the Handbooks and IM draw their inspiration from the Order, which remains in effect, the preference has been clearly articulated to local BLM officials.

The Handbook process subjecting impacts to lands with wilderness characteristics that have not been addressed in management plans to site-specific review and evaluation by higher level BLM officials may prove troublesome since it could be seen as representing a new procedural requirement, and therefore prohibited because of funding limits. However, if the 2008 RMP revisions are treated as satisfying the Order, elevation and other implementation level decisions are unlikely to impact oil shale or oil sands development because Utah's oil shale and oil sands bearing regions are governed by recently revised RMPs that considered wilderness quality lands in detail.

The significant question regarding Order 3310 is how it applies where, as part of recent RMP revisions, the BLM considered the existence of wilderness characteristics but did so in a manner that departs from the direction contained in the Order. Attachments to the IM indicate that new inventories are not required, but rather, the BLM must continue to maintain an inventory and update it as new information becomes available.[237] New information must, at a minimum, "document how that information substantially differs from the information in the BLM inventory of the area's wilderness characteristics."[238] Thus, prior inventories are likely adequate, but it is less clear when the BLM must revisit decisions to manage areas with wilderness characteristics.

2.6.2. The Weight Afforded to Order 3310

Order 3310's validity is a matter of ongoing litigation, with a central question being whether the Order has the force and effect of law and is therefore subject to the Administrative Procedures Act's (APA) notice and comment rulemaking requirements.[239] The issue with respect to the APA is not whether Order 3310 is a lawful interpretation of the DOI's or the BLM's duties under the Wilderness Act and FLPMA (though both are disputed on other legal grounds), but whether the DOI complied with procedural requirements in issuing the Order. At the heart of this debate is the question of whether the Order is legislative or interpretative in nature. Legislative rules grant rights or impose obligations and are subject to the APA's notice and comment rulemaking requirements; interpretive rules and guidance explain existing rules and are not subject to notice and comment rulemaking requirements.[240] Thus, the Order's intended effect determines the manner in which it must be issued.

Statutes routinely delegate to agencies the day-to-day responsibility for implementation of statutory programs. Statutes also routinely authorize agencies to promulgate regulations that fill in the substantive and procedural details of complex regulatory programs. In promulgating such rules, agencies must comply with the APA, which in its most basic form requires the agency to provide notice to the public of proposed rulemaking.[241] Notice is followed by an opportunity for the public to comment on the proposed rulemaking and agency publication of a concise explanatory statement.[242] Rules, once adopted in conformance with the APA, create legally enforceable requirements.

In order to avoid an overwhelming burden on agency operations, the APA exempts matters involving "public property,"[243] interpretive rules, general policy statements, and rules of agency procedure and practice from APA rulemaking requirements.[244] Despite this exemption, FLPMA expressly provides that its provisions shall be implemented through rulemaking conducted pursuant to the APA;[245] but this requirement does not prevent either the DOI or the BLM from issuing interpretive rules, general policy statements, and rules of agency procedure and practice. Order 3310, the three BLM Handbooks, and the IM were all issued without public comment, and their validity may depend on whether they reflect interpretation of existing direction or new substantive rules.

FLPMA requires the BLM to maintain an up-to-date resource inventory that includes wilderness characteristics.[246] FLPMA also requires the BLM to consider these resources in its planning efforts.[247] The Order, Handbooks, and IM clarify what should be considered in determining whether an area possesses wilderness character, how that evaluation should be conducted, and how competing values should be treated. Critically, all three classes of documents contemplate further agency action. As such, the Order, Handbooks, and IM appear to be interpretive in nature rather than final agency actions. Moreover, they explain how existing obligations should be satisfied without creating new obligations.[248]

While interpretive in nature, it can be argued that by directing that wilderness character be protected "unless . . . impairing wilderness characteristics is appropriate and consistent with applicable requirements of law and other resource management considerations,"[249] the BLM issued direction that has a substantive legal effect, thereby converting this portion of the guidance documents into a legislative rule. However, even this language, when read in context, fails to persuade. "[T]he question of whether an agency document is a final 'regulation . . . or requirement' . . . is substantially similar to the question of whether it is a legislative rule under the APA."[250] Finality is important because under the APA, only final agency actions are

reviewable; "preliminary, procedural, or intermediate action . . . is subject to review on review of the final agency action."[251]

With respect to wilderness character, the DOI anticipates that where wilderness characteristic inventories exist the BLM will, at a minimum, need to determine whether existing inventories are adequate, update inventories as needed, and potentially amend RMPs, which will trigger NEPA and a requirement to consider management alternatives.[252] In the absence of adequate wilderness character reviews, the BLM will need to conduct a project-specific review and in most cases consult with either the State Director or the Washington Office before determining whether to deny, approve, approve with mitigation, or postpone a decision.[253] Even where current inventories are available, the BLM still needs to determine whether Wild Land designation is appropriate. Each of these issues represents a decision node that argues against finality. The Order, Handbooks, and IM therefore appear to lack the finality of a final agency action and are unlikely to be considered legislative rules.

The Order's challengers may attempt to distinguish the authorities cited above as applicable only to agency guidance that is enforceable against third parties,[254] arguing that guidance applicable to the agency itself should be treated differently. Such arguments are also unlikely to prevail. Two cases are instructive. In *Wilderness Society v. Norton*, the Wilderness Society (TWS) contended that the National Park Service (NPS) violated its policies and directives by failing to identify and manage wilderness quality lands within its jurisdiction.[255] The court concluded that even if the alleged violations did occur, NPS Management Policies were unenforceable against the agency. The policy in question directed the NPS to "take no action that would diminish the wilderness suitability of an area possessing wilderness characteristics until the legislative process of wilderness designation has been completed."[256] Even with this clear direction, the NPS, as the court noted, "has wide discretion to decide how to proceed."[257] The NPS could allow various uses that would not conform with wilderness management requirements so long as those uses did not preclude wilderness suitability if Congress chose to act. "In short, TWS has not shown that NPS has committed itself to managing areas as if they were wilderness once it commences a review of lands for wilderness suitability."[258] Absent such a showing, TWS lacked standing to pursue its challenge.

But the court did not stop there. Even if TWS had been able to proceed it would not have prevailed on the merits of its argument. As the court explained,

> In determining whether an agency has issued a binding norm or merely a statement of policy, we are guided by two lines of inquiry. One line of analysis focuses on the effects of the agency action, asking whether the agency has (1) imposed any rights and obligations, or (2) genuinely left the agency and its decisionmakers free to exercise discretion . . . . The second line of analysis focuses on the agency's expressed intentions. The analysis under this line of cases looks to three factors: (1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency.[259]

As the court explained, the NPS Policies, when read as a whole, did not "read as a set of rules." Despite including mandatory language such as "will" and "must," the Policy "lacks precision in its directives, and there is no indication of how the enunciated policies are to be prioritized."[260] The court also found NPS's failure to publish the Policies in the Federal Register telling for its implication that the NPS did not intend them to have a regulatory effect. Likewise,

the ability to obtain a waiver from the policy implied that the NPS "retained unfettered discretion to act as it sees fit . . . ."[261] Finally, NPS was under no obligation to prepare wilderness management plans.

The Order, Handbooks, and IM similarly do not read like a set of rules focused on standards and regulatory timelines; instead, they emphasize discretion and procedural considerations. They were not published in the Federal Register and the DOI has never referred to them as rules. Like the policies at issue in *Wilderness Society v. Norton*, the Order, Handbooks, and IM have no binding effect on private parties, and their effect on the BLM is to merely reiterate existing obligations.

Wilderness Society v. Norton forms the basis for the Ninth Circuit Court of Appeal's opinion in *River Runners for Wilderness v. Martin*.[262] *River Runners* also involved a challenge to the NPS's alleged failure to manage National Park System lands with wilderness characteristics in accordance with NPS policies. At issue was an approved management plan that permitted continued use of motorized rafts in the Grand Canyon National Park, in conflict with NPS policies for management of wilderness quality lands. The Ninth Circuit virtually mirrored the analysis in *Wilderness Society v. Norton*, quoting it at length and concluding that NPS Policies "do not prescribe substantive rules, nor were they promulgated in conformance with the procedures of the APA."[263]

It is also worth noting that under the *Utah v. Norton* Settlement, the DOI withdrew "information bulletins, instruction memorandums, and handbooks" setting forth the process by which the BLM would inventory for and establish management requirements applicable to lands with wilderness character. The State of Utah, as part of the Settlement, agreed that these documents "have been issued as guidance and policies that bind only BLM and, as a result, the change contemplated in this Agreement need not follow the Administrative Procedures Act rulemaking procedures or other public notice and comment procedures. These concessions cut against current arguments that comparable replacement guidance violates the APA.

Finally, it is possible that courts will sidestep the question of Order 3310's validity as unripe given that the policy has yet to be applied in a concrete manner. Waiting for policy implementation could clarify whether the Order merely clarifies existing obligations or results in new substantive protections for certain public lands. Under this approach, until the BLM acts to implement the policy, opponents would lack standing to challenge it since any injury would be speculative in nature.

2.6.3. De Facto Wilderness

The Order's detractors are also likely to argue that if implemented, the Order would result in creation of *de facto* wilderness. Whether federal public lands can be managed to protect wilderness character without violating the prohibition against *de facto* Wilderness management depends on differences between the management requirements applicable to congressionally designated Wilderness Areas and areas managed for protection of wilderness character. A recent appellate opinion provides the legal test for whether discretionary management results in *de facto* wilderness management.

In *Wyoming v. United States Department of Agriculture*,[264] the State of Wyoming challenged the Forest Service's Roadless Area Conservation Rule (RACR), claiming in part that the rule resulted in *de facto* Wilderness management. Wyoming contended that RACR, by prohibiting road construction and reconstruction within inventoried roadless areas (IRAs) and

prohibiting the cutting, sale, or removal of timber from IRAs (subject to limited exceptions), created areas that were substantively equivalent to Wilderness in terms of their management status. Such management, according to Wyoming, was unlawful because only Congress can designate Wilderness. The test, according to the Court of Appeals was whether Wilderness Areas and IRAs were "'functionally equivalent' or essentially the same."[265] Based on a detailed comparison of the Wilderness Act and IRA management, the court concluded that the protections afforded to Wilderness Areas are "greater in both number and scope" than those applicable to IRAs.[266]

Applying the *Wyoming* test we see that Wild Lands identified under the direction provided in Order 3310 are substantively different from congressionally designated Wilderness and therefore unlikely to constitute creation of *de facto* Wilderness. Wild Lands are also substantively different from WSAs. First, and most importantly, the BLM utilizes discretion in designating Wild Lands and can revise or rescind a decision to designate Wild Lands as part of the management plan revision process. Conversely, only Congress can designate Wilderness.[267] The BLM has no discretion to designate or rescind congressional Wilderness designation. Likewise, once created, WSAs must be managed under a non-impairment standard until Congress either releases the area from consideration for Wilderness designation or designates the area as Wilderness.[268]

Second, management requirements applicable to Wild Lands are set forth in RMPs and subject to modification as part of the plan revision process. Management requirements applicable to Wilderness Areas are set forth in the Wilderness Act.[269] Likewise, FLPMA sets forth management requirements for WSAs.[270] The BLM has no discretion to change or disregard these statutory directions.

Third, a "wider range of actions and activities may be allowed in Wild Lands than can occur in Wilderness."[271] For example, "[s]ome commercial activities, such as commercial or competitive special recreation permits, may be consistent with protection of [lands with wilderness characteristics]."[272] Limiting motor vehicle use to existing routes may be consistent with protection of wilderness characteristics.[273] Likewise, "[l]imited or existing motorized or mechanized (e.g., mountain bike) access may be consistent with protection of wilderness characteristics."[274] Structures can also exist within Wild Lands and the BLM can maintain such structures.[275] In contrast, within Wilderness Areas, "there shall be no commercial enterprise and no permanent road within any wilderness area . . . except as necessary to meet minimum requirements for the administration of the area for the purpose of this chapter . . . there shall be no temporary road, no use of motor vehicles, motorized equipment or motorboats, no landing of aircraft, no other form of mechanical transport, and no structure or installation within any such area."[276]

Furthermore, No Surface Occupancy (NSO) stipulations may be sufficient to protect Wild Lands.[277] However, Wilderness Areas are "withdrawn from all forms of appropriation under the mining laws and from disposition under all laws pertaining to mineral leasing and all amendments thereto."[278] Because of these differences, arguments that Order 3310 will result in creation of *de facto* wilderness are likely to fail. Such arguments may also be subject to the ripeness concerns noted above.

2.6.4. Changing Policies

Order 3310's detractors may also argue that the Order represents a reversal of the policy reflected in the Settlement.[279] Such a reversal, the argument goes, should be invalidated

as arbitrary and capricious when the agency fails to provide an explanation for the change of course.[280] We first address whether Order 3310 reflects a policy reversal, and then turn to whether a change in policy includes sufficient explanation.

The *Utah v. Norton* Settlement, while not a model of clarity, precludes the BLM from establishing new WSAs under the authority granted in section 603 of FLPMA.[281] The Settlement also prevents the BLM from establishing, managing, or otherwise treating lands as Wilderness or WSAs under FLPMA section 202 absent congressional authorization.[282] Likewise, the Settlement bars the BLM from utilizing the 1999 Wilderness Inventory to "manage public lands as if they are or may become WSAs."[283] However, the Settlement also expressly recognizes the BLM's continuing authority to prepare and maintain an inventory of all public lands and their resources and values, including "the characteristics that are associated with the concept of wilderness."[284] The Settlement further recognizes the BLM's authority to manage public lands consistent with the law and within the lawful exercise of agency discretion.[285] This discretion, as the Federal District Court for the District of Utah held, includes "the discretion to manage lands in a manner that is similar to the non-impairment standard by emphasizing protection of wilderness characteristics as a priority over other potential uses."[286]

To the extent that the Settlement expresses a clear statement of policy, that policy reflects a three-fold commitment to: (1) not establish new WSAs under section 603 of FLPMA, (2) to continue to inventory for wilderness characteristics and consider those characteristics in land management decisions, and (3) to manage lands with wilderness characteristics in a manner that is less restrictive than congressionally designated Wilderness. Order 3310 does not change this policy; rather, it makes explicit the policy that was implicit in the Settlement and routine BLM actions.

First, Order 3310 expressly disclaims authority under section 603, emphasizing instead section 201, 202, and 302 requirements. Likewise, the Order does not propose to designate new WSAs, under section 603 or any other authority. The Order therefore does not reverse BLM's policy of abstaining from action under FLPMA section 603.

Second, the commitment to a policy favoring inventory and management activity is evident in recent RMP revisions, including the six Utah RMP revisions finalized during 2008. That RMP revision process took years to complete in large part because of the need to inventory for and consider management of lands with wilderness characteristics.[287] Moreover, the analysis underpinning the 2008 RMP decisions builds upon existing inventory efforts that occurred over several decades. The Order, in reiterating the Settlement's recognition of survey and management obligations that the BLM had been actively pursuing within Utah for years, did not announce a new policy.

Third, as discussed in the preceding sections, Wild Land management is less restrictive than the management applicable to congressionally designated wilderness. Order 3310 is therefore consistent with the third and final component of the BLM's policy, as reflected in the Settlement.

However, even if the Order is seen as a reversal in policy, "the mere fact that an agency interpretation contradicts a prior agency position is not fatal."[288] Agencies are afforded "ample latitude to 'adapt their rules and policies to the demands of changing circumstances.'"[289] But, "[s]udden and unexplained change, or change that does not take account of legitimate reliance on prior interpretation, may be 'arbitrary, capricious [or] an abuse of discretion.'"[290] Even if

Order 3310 does reflect a change in policy, such change appears to be supported by an adequate explanation.

Order 3310, while sprung upon the public in a somewhat sudden manner, did not go without explanation. In explaining the need for the Order the DOI noted that following the Settlement, the BLM had been operating without "comprehensive national guidance" for seven years.[291] The Order and its associated guidance "bring consistency across the BLM and provide a process for conducting wilderness inventories and considering lands with wilderness characteristics in land use planning and project-level decisions. This guidance will bring clarity to an area of BLM management that has suffered in the wake of the 2003 Norton-Leavitt Settlement."[292] Explanations did not note a shift in policy because no substantive shift occurred. It is more accurate to describe the Order as clarifying policy rather than changing policy.

Furthermore, the Order does not offer support for ignoring legitimate reliance on prior interpretation. In accordance with prior interpretations, the Order expressly states that management decisions are to be made "subject to valid existing rights."[293] Second, the Order relies, where available, upon existing wilderness characteristic inventories.[294] Finally, the Order expressly states that it "does not alter or affect any existing authority of the BLM. This Order does not change the management of existing Wilderness Study Areas pending before Congress or congressionally designated units of the National Wilderness Preservation System."[295]

Because Order 3310 appears to fully comport with prior policy and has been adequately explained, the Order is likely to withstand the challenge that it represents an unexplained policy reversal.

2.7. Defunding Order 3310 and the Department of the Interior's Response

On April 14, 2011 Congress enacted the Department of Defense and Full-Year Continuing Appropriations Act of 2011,[296] funding the federal government for the remainder of fiscal year 2011.[297] The Appropriations Act was signed into law the following day and defunds implementation of Order 3310: "For the fiscal year ending September 30, 2011, none of the funds available by this division or any other Act may be used to implement, administer, or enforce Secretarial Order 3310 . . . ."[298] This prohibition was extended for fiscal year 2012 as part of the Consolidated Appropriations Act, 2012.[299] In light of continuing statutory obligations to inventory for wilderness characteristics and consider those characteristics in management decisions, the practical effect of defunding remains uncertain.

Order 3310 sets forth direction regarding the implementation of several existing statutory obligations — the obligation to "prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values"[300] under FLPMA section 201; the obligation to "develop, maintain, and when appropriate, revise land use plans"[301] under FLPMA section 202; and how to manage lands with wilderness characteristics within the context of FLPMA section 302's multiple use mandate.[302] These obligations are independent of Order 3310. While Congress apparently intended to prevent the BLM from administratively expanding wilderness,[303] Congress did not order the BLM to cease its other operations, including its inventory, planning, and management functions.[304] Moreover, wilderness characteristics are likely to appear in public comments on both RMP amendments and project level NEPA authorizations, and as such, must be addressed.[305]

Because the BLM remains under a continuing obligation to maintain a current inventory of wilderness characteristics, plan in accordance with resource information, manage its lands in

accordance with multiple use principles, and respond to public comments, the BLM cannot ignore these obligations even if Order implementation is prohibited. The question therefore becomes what the appropriation curtailments preclude.

One interpretation is that the requirement to "designate" Wild Lands is unique to the Order, and "designation" cannot be completed under the continuing appropriations. However, the BLM must continue to include in RMPs management prescriptions indicating what can and cannot be done on any given parcel of land, including lands with wilderness characteristics. The BLM can protect wilderness characteristics by imposing NSO stipulations or similar management requirements so long as it does so without formally designating Wild Lands. This approach has been used in past agency action. For example, one of the reasons given for not designating lands as "Natural Areas" in the 2008 RMP revisions was that the areas were already protected by other management requirements.[306] More specifically, in the Moab RMP, 80,421 acres of land with wilderness characteristics are protected by NSO stipulations to protect riverine, scenic or recreational values as well as water resources associated with municipal water supplies.[307] NSO stipulations also provide indirect protection for wilderness character. "Designation," therefore, appears to have more symbolic meaning than substantive impact because similar results can be achieved by other means.

On June 1, 2011, Secretary Salazar released a memorandum to the BLM Director, addressing implementation of Order 3310.[308] The memorandum was widely characterized in the media as capitulation on the Wild Lands policy.[309] In actuality, however, the memorandum states in part, that, "pursuant to the 2011 [continuing resolution], the BLM will not *designate* any lands as 'Wild Lands.'"[310] The memorandum, however, neither rescinds Order 3310 nor prevents the BLM from designating Wild Lands after the fiscal year prohibitions expire. Moreover, the memorandum does not preclude the BLM from inventorying for wilderness characteristics or managing public lands in ways that protect wilderness characteristics. In fact, the memorandum expressly states that:

> As required by law, the BLM will continue to maintain inventories of lands under its jurisdiction, including lands with wilderness characteristics. Also, consistent with FLPMA and other applicable authorities, the BLM will consider the wilderness characteristics of public lands when undertaking multiple use land use planning and when making project level decisions.[311]

In essence, the memorandum merely recommitted the DOI to an open, public process for determining what lands deserve protection based on the existence of wilderness characteristics[312] — a process it was already obligated to undertake.

RMP revisions, including those that address management of lands with wilderness characteristics, almost invariably trigger NEPA's requirement to carefully consider the environmental impact of the proposed action.[313] As part of the NEPA process, the BLM must "[i]nvite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and any other interested person . . . ."[314] Agencies that have legal jurisdiction or special expertise with respect to any environmental impact involved in a proposal, including state, local, or tribal agencies, may not only comment on the decision, but are entitled to participate more fully as cooperating agencies.[315] The memorandum, therefore, merely recognizes existing requirements.

Recently, Secretary Salazar signaled his intent to pursue expanded protection of lands with wilderness character in a letter to Congress where he committed that the DOI would, by

mid-October 2011, "submit to Congress a list of 'crown jewel' areas that we believe are ready for immediate Wilderness designation by Congress."[316] While the Secretary invited congressional input, he signaled that the DOI is not waiting for Congress to act and is not abandoning protection of lands with wilderness character. The Secretary also reiterated DOI's commitment to manage and protect lands with wilderness character, and to work with interested parties to develop an appropriate management framework.

In November of 2011, the BLM released a preliminary report identifying BLM managed public lands that the Bureau believes warrant formal Wilderness protections.[317] Lands identified within Utah are located exclusively within Grand County. The State of Utah, unlike other western states, did not identify any BLM managed public lands as needing additional protections. The Grand County lands reflect a county recommendation contained in the county's 1999 Wilderness Plan, which is an amendment to the Grand County General Plan.[318] The Grand County General Plan calls for formal Wilderness protections for eleven separate areas.[319] The BLM's draft report calls for designation of three new Wilderness Areas within Grand County: Desolation Canyon, Millcreek Canyon, and Westwater Canyon.[320] While the BLM Report does not map the geographic extent of Wilderness proposals or quantify acreage, if consistent with the Grand County Plan, these three areas would need to be smaller than the existing WSAs.[321] Since the three areas proposed for protection by the BLM are existing WSAs, designation would have little practical effect since all three areas are currently managed to prevent impairment of wilderness character.[322] Despite the limited effect of the BLM's proposal, Utah's political leaders quickly stated their opposition.[323] It remains to be seen whether any new protections will come to pass and how the BLM will choose to address its obligations regarding lands with wilderness character.

3. Impacts on Oil Shale and Oil Sands Development in Utah

Although defunded through fiscal year 2012, Order 3310 remains in effect and subject to future implementation.[324] Even if funding prohibitions are extended, the BLM's underlying obligation to inventory wilderness characteristics and consider such characteristics in public land management planning remains very much in force.

In order to assess the impact management of federal public lands with wilderness characteristics may have on oil shale and oil sands development within Utah, the Institute for Clean and Secure Energy (ICSE), together with the University's Digitally Integrated Geographic Information Technology Lab (DIGIT Lab), completed a GIS analysis of lands with wilderness character. The analysis overlays maps of lands with wilderness character on maps of oil shale and oil sands resources to identify the approximate level of conflict and areas of greatest concern to prospective developers. *This analysis and the associated maps are intended to provide a general assessment of the level of conflict and should not be relied on for site-specific decisions*. A discussion of data and methodology is contained in Appendix A.

The GIS analysis uses surface estate ownership coverage obtained from the Utah Automated Geographic Reference Center. Boundaries of the eleven federally designated Special Tar Sands Areas (STSAs) and the area designated as open for application for commercial oil shale leasing (the most geologically prospective area or MGPA) were overlaid upon surface ownership. Volumetric oil shale data was obtained from the Utah Geologic Survey.

ICSE and the DIGIT Lab obtained GIS coverage of the BLM's wilderness characteristics inventory and reviews completed for the six RMP revisions completed during 2008, and utilized this data to determine the impact management of lands with wilderness character may have on oil shale or oil sands development. The 2008 wilderness review data is divided into three sub-categories: (1) areas determined by the BLM to lack wilderness character; (2) areas determined by the BLM to possess wilderness character but not carried forward for management to protect wilderness character; and (3) "Natural Areas," which are areas determined by the BLM to possess wilderness character that the BLM chose to manage for wilderness character protection.[325] Existing Wilderness Areas and WSAs were also included to provide context. Wilderness Areas and WSAs are subject to statutory protections that cannot be changed without an act of Congress and are not discussed in detail because the BLM's limited management discretion.

The BLM determined whether areas possessed wilderness character based on definitions contained in the Wilderness Act and consistent with definitions contained in Order 3310, Handbooks, and the IM. The BLM also made discretionary decisions regarding which lands were appropriate for management to protect wilderness character. While the RODs for the six RMPs discuss the factors considered when determining whether management should emphasize wilderness character, it remains difficult to determine whether these factors were applied consistently and in accordance with Order 3310's direction across all areas and all six plans. If the BLM's 2008 decisions regarding management of lands with wilderness character are deemed to comport with the Order's direction, "Natural Areas" can be used to identify the extent of resulting protections. If, however, the inventory decisions are accurate but the management decisions must be revisited in light of new direction, the 2008 inventory data approximates the maximum extent of the potential wilderness character protection.[326] The figures reflecting this more expansive approach are almost certain to overstate what areas would actually be managed to protect wilderness character because competing resource values

and uses are ignored. However, they include a reasonable representation of the most protective management option. Because Order 3310 requires areas identified as possessing wilderness character to be managed to protect those values until longer-term planning determinations can be made, these maps and figures also represent a reasonable estimation of areas where oil shale or oil sands development, if proposed, could require further analysis and careful documentation.

The subsections that follow map and quantify the extent of the potential conflict between protection of lands with wilderness character and unconventional fuel development. Minor variations in numbers reflect rounding error and discrepancies in base mapping.

3.1. Oil Shale

Within Utah, roughly two-thirds of the almost 800,000 acres within the MGPA are under BLM management. Only areas identified as potentially possessing wilderness characteristics have been surveyed for the existence of wilderness character. Of these lands potentially possessing wilderness character, less than 7,000 acres are currently managed as "Natural Areas." If all BLM lands identified as possessing wilderness character were managed to protect wilderness character — a scenario that ignores all competing values and uses, and is therefore more protective than called for under the Order — barely ten percent of BLM land and about seven percent of the total MGPA (approximately 56,000 acres) would be subject to new restrictions to protect wilderness character.

Existing WSAs are even less of an obstacle to oil shale development, as less than 300 acres of the MGPA are within existing WSAs. There are no congressionally designated Wilderness Areas within the MGPA.

On a volumetric basis, designated Natural Areas overlay approximately 1.4 percent of oil shale resources within the MGPA and approximately 2.1 percent of BLM managed oil shale resources within the MGPA. If protective management was extended to all areas with wilderness character — a scenario that again ignores all competing values and uses and is therefore more protective than necessary under Order 3310 — approximately 6.6 percent of the MGPA and 9.7 percent of BLM managed lands within the MGPA would be unavailable for commercial oil shale leasing because of wilderness quality land issues.

A detailed summary of the acres impacted by wilderness related issues is contained in Table 1. Table 2 indicates the amount of oil equivalent that would be impacted by protections of lands with wilderness character. While these tables include values for non-BLM managed lands, these latter numbers are included solely to clarify the extent of non-federal inholdings within BLM managed lands. Neither BLM wilderness characteristics inventories nor their associated management requirements apply on non-BLM managed lands. Figure 8 shows the geographic distribution of oil shale resources, with the thickest deposits shown in darker red; lands inventoried for wilderness characteristics are overlaid as shown in the legend.

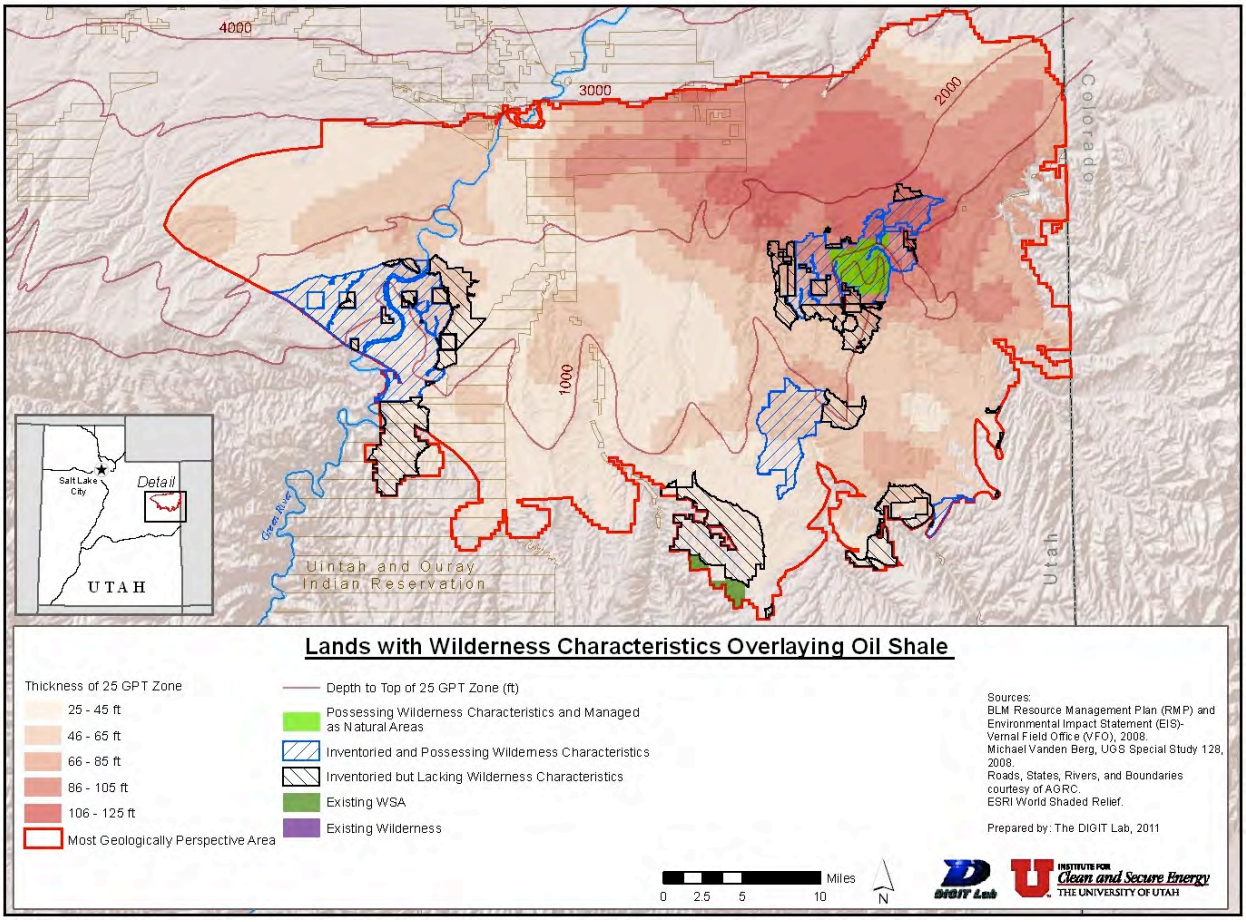
Table 1 - Oil Shale with Wilderness Characteristics (acres)

	BLM	Private	SITLA	Tribal	Other	TOTAL
Most Geologically Prospective Area Total	539,000	46,000	93,000	101,000	9,000	788,000
Wilderness Study Areas	300	--	--	--	--	300
Natural Areas	6,700	--	--	--	--	6,700
Areas with Wilderness Character	56,200	--	--	--	--	56,500
Areas Lacking Wilderness Character	30,400	400	4,900	7,700	0	43,500

Table 2 - Oil Shale with Wilderness Characteristics (million barrels)

	BLM	Private	SITLA	Tribal	Other	Total
Most Geologically Prospective Area Total	58,000	5,200	10,500	10,500	700	84,800
Natural Areas	1,200	--	--	--	--	1,200
Areas With Wilderness Character	5,600	--	--	--	--	5,600
Areas Lacking Wilderness Character	2,800	100	500	400	0	3,800

Figure 8 - Oil Shale With Wilderness Characteristics



3.2. Oil Sands

The eleven STSAs cover approximately one million acres. Only areas identified as potentially possessing wilderness characteristics have been surveyed for the existence of wilderness character. Of the roughly 170,000 acres surveyed, approximately 98,000 acres possessed wilderness character and less than 13,000 acres are managed as Natural Areas. Of the eleven STSAs, five do not contain any land identified as necessitating an inventory for wilderness characteristics or as possessing wilderness character.[327] Table 3 depicts surface acreage ownership within the six STSAs that were subject to at least partial wilderness characteristic review. While wilderness characteristic inventories may include acreage not under BLM control, BLM management requirements have no force or effect in these areas and are included only to provide context. Because mineral development is generally incompatible with the NPS mission,[328] all areas under NPS management are presumed to be off limits to commercial oil sands development regardless of the presence or absence of wilderness character. Areas with wilderness character are shown in Figure 9 and Figure 10.

Table 3 - Special Tar Sands Areas with Wilderness Character (acres)*

	BLM	NPS	Private	SITLA	Tribal	Other	Total
Hill Creek							
Natural Areas	0	0	0	0	0	0	0
Areas with WC	900	0	0	0	0	0	900
Areas without WC	0	0	0	0	400	0	400
Total	20,600	0	7,800	1,900	75,500	500	106,300
P.R. Spring							
Natural Areas	0	0	0	0	0	0	0
Areas with WC	20,300	0	0	0	0	0	20,300
Areas without WC	58,800	0	0	0	0	0	58,800
Total	186,800	0	7,900	71,100	100	7,500	273,400
San Rafael							
Natural Areas	12,900	0	0	0	0	0	12,900
Areas with WC	37,100	0	0	0	0	0	37,100
Areas without WC	2,000	0	0	7,300	0	0	9,300
Total	99,400	0	0	14,900	0	0	114,300
Sunnyside							
Natural Areas	0	0	0	0	0	0	0
Areas with WC	10,000	0	0	0	0	0	10,000
Areas without WC	0	0	0	2,000	0	0	2,000
Total	80,000	0	61,500	13,700	0	2,700	157,800
Tar Sand Triangle							
Natural Areas	0	0	0	0	0	0	0
Areas with WC	24,300	0	0	0	0	0	24,300
Areas without WC	0	0	0	0	0	0	0
Total	82,900	60,700	0	11,200	0	0	154,900
White Canyon							
Natural Areas	0	0	0	0	0	0	0
Areas with WC	5,500	0	0	0	0	0	5,500
Areas without WC	1,500	0	0	0	0	0	1,500
Total	8,000	0	0	2,400	0	0	10,500
STSA TOTAL							
Natural Areas	12,900	0	0	0	0	0	12,900
Areas with WC	98,100	0	0	0	0	0	98,100
Areas without WC	62,300	0	0	9,300	400	0	62,300
Total	568,100	93,900	104,200	139,000	85,700	17,800	1,008,900

* Table 3 does not include data for the Argyle Canyon, Asphalt Ridge, Circle Cliffs, Pariette, and Ravens Ridge STSAs because these areas do not contain areas identified as possessing wilderness characteristics. These areas are, however, reflected in the total acreage.

Figure 9 - Special Tar Sands Areas with Wilderness Characteristics (North)

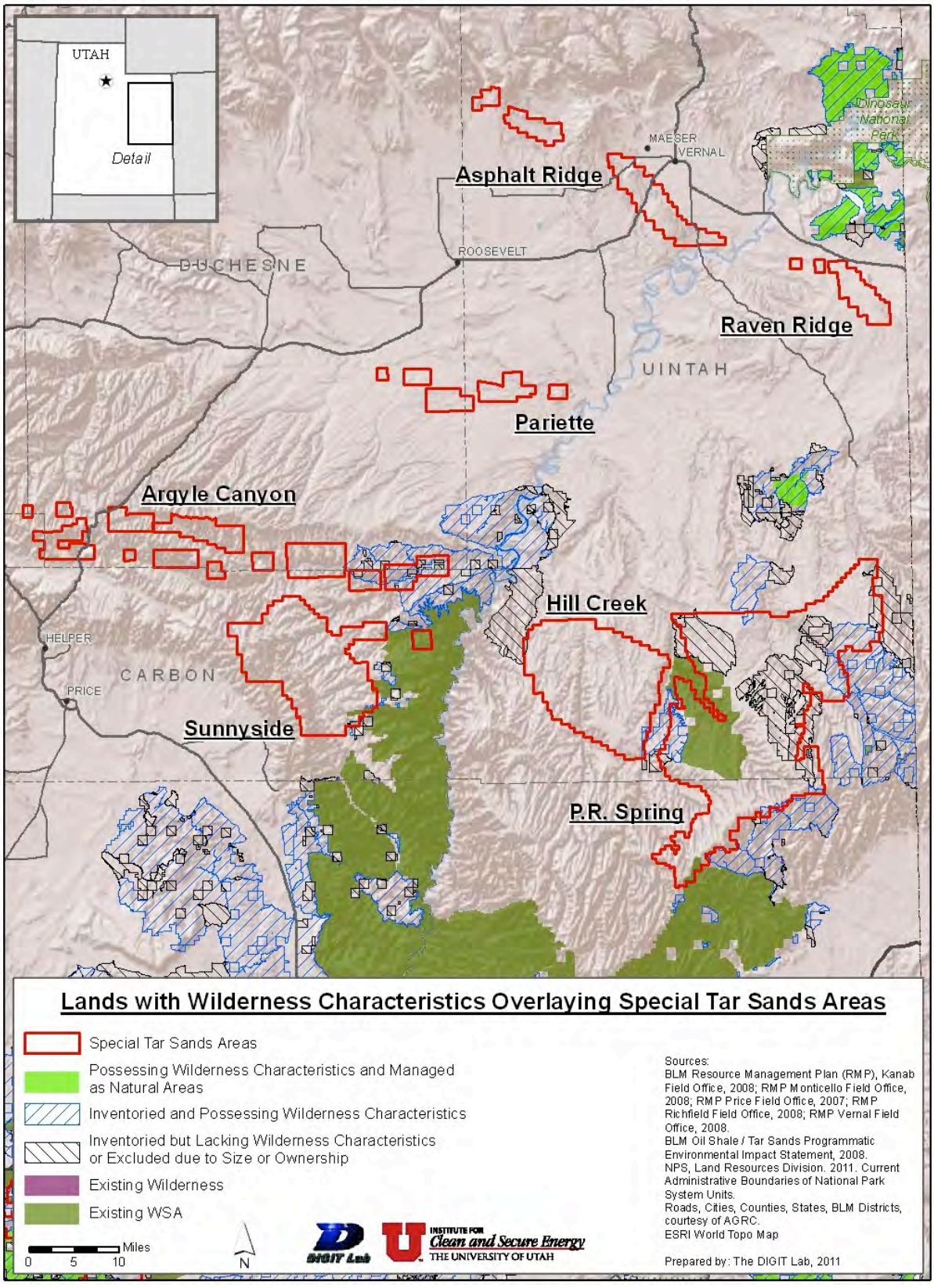
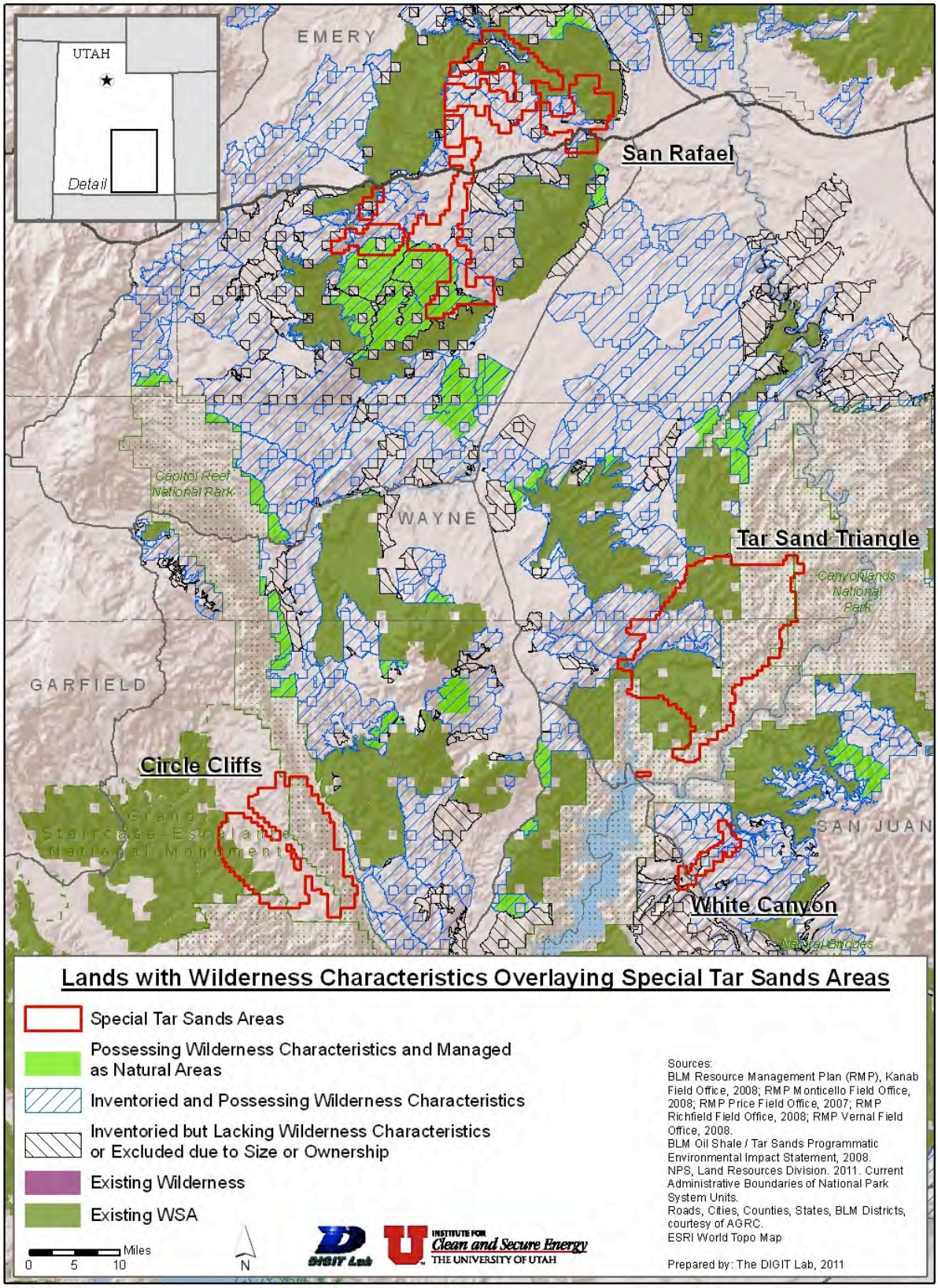


Figure 10 - Special Tar Sands Areas with Wilderness Characteristics (South)



Compared to oil shale, oil sands resources are distributed across a broader geographic area and more constrained by wilderness related issues. The STSAs total roughly one million acres, of which just over one-half are managed by the BLM. Roughly 147,000 acres of the STSAs overlap existing WSAs. See Table 4. In contrast, less than 13,000 acres are subject to "Natural Area" management. If all federal lands with wilderness character were managed to protect wilderness values — a scenario that ignores competing resource values and uses and is therefore more protective than the Order requires — roughly 100,000 acres of federal land (17 percent of federal lands within the STSAs and 10 percent of the total STSAs) would be subject to additional protections. While lands with wilderness character would add to the acreage unavailable for development, the additive effect is small in comparison to the effect of existing WSAs.

Table 4 – Existing WSA Acreage within Special Tar Sands Areas

STSA	WSA acreage	Total STSA Acreage
Argyle Canyon	--	32,200
Asphalt Ridge	--	39,100
Circle Cliffs	10,900	91,200
Hill Creek	--	106,300
Pariette	--	22,600
P.R. Spring	39,100	273,400
Raven Ridge	--	16,500
San Rafael	32,200	114,300
Sunnyside	4,000	157,800
Tar Sand Triangle	60,600	154,900
White Canyon	--	10,500
TOTAL	146,800	1,008,900

Oil sands resources within Southern Utah are already constrained by existing resource management plan requirements. The Circle Cliffs STSA is almost entirely made up of Capitol Reef National Park, the Grand Staircase-Escalante National Monument, and existing WSAs. As such, it was effectively closed to new mineral development prior to Order 3310's issuance and lands with wilderness characteristics are unlikely to have any additional effect. Portions of the San Rafael STSA are also heavily constrained, independent of wilderness character. Only a small portion of the Tar Sand Triangle is outside of Canyonlands National Park and existing WSAs, and that portion of the STSA contains wilderness character, calling into question the development potential of this area.

Wilderness character represents a greater challenge for prospective oil sands developers than for prospective oil shale developers largely because of the contrast between existing oil and gas development within the Uinta Basin, where oil shale resources are found, and the dramatic and less developed landscape of Southern Utah. While a potential reduction in developable resources is likely to result from protection of lands with wilderness character, uncertainty regarding which lands will be managed for wilderness character protection appears to pose the more immediate and significant question. In theory, Order 3310 has the potential to reduce some of the uncertainty and to make federal land management decisions more

defensible in a court of law. However, the controversy surrounding the Order may prove to be more important than these theoretical benefits. Nonetheless, the BLM must continue to make decisions regarding management of lands with wilderness character and the uncertainty surrounding Order 3310 only serves to create confusion for BLM employees and those interested in public land management.

4. Resource Management Plan Constraints

The BLM controls the majority of land containing oil shale and oil sands resources.[329] The BLM's planning and management obligations are set forth in FLPMA; planning and plan implementation are also subject to review under NEPA.[330] Both acts are discussed in detail in other ICSE reports.[331]

During 2008, the BLM finalized revisions to six Utah RMPs. These RMPs reflect consideration of numerous resources, many of which carry associated management requirements. In addition to the RMPs, the BLM also finalized programmatic RMP amendments to address areas available for application for commercial oil shale and oil sands leasing. The BLM's FINAL PROGRAMMATIC EIS for oil shale and oil sands development works in tandem with the RMPs, and the documents must be read together in order to ascertain the management requirements applicable to any particular area. The following subsections address key management requirements contained in the RMPs governing management of Utah BLM lands containing unconventional fuel resources.

4.1. Surface Use Stipulations

The RMP for the BLM's Vernal Field Office covers management of federal public lands within the Uinta Basin, including the MGPA for oil shale. The Vernal RMP mapped and considered more than eighty separate land and resource values, many of which have associated management requirements. Of primary importance are the oil and gas surface use stipulations. The oil and gas surface use stipulations capture management requirements intended to protect other resources; they also apply much more broadly than their name implies. As the ROD for the Vernal RMP explains:

> The Approved RMP specifies restrictions for permitted activities to resolve concerns regarding the impacts of these uses. These conditions apply not only to oil and gas leasing, but also apply, where appropriate, to all other surface disturbing activities associated with land-use authorizations, permits, and leases, including other mineral resources.[332]

Substantively identical language is contained in all six RODs of the 2008 Utah RMP revisions.

There are four classes of surface use stipulations. Standard Lease Terms and Conditions are the least restrictive and allow the BLM to require the operator to move proposed facilities by up to 200 meters and prohibit new surface disturbing operations for up to sixty days per year.[333] The BLM imposes three different classes of surface use stipulations when Standard Lease Terms and Conditions are insufficient to protect sensitive resources: Controlled Surface Use (CSU), Timing Limits, and No Surface Occupancy (NSO). The BLM can also close an area to leasing when stipulations are insufficient to protect sensitive resources.

CSU stipulations require site-specific authorization of surface disturbing activities in accordance with applicable RMP requirements. Timing Limits are imposed where access must be limited for more than sixty days in order to protect sensitive resources, such as wildlife breeding and rearing. Areas subject to Timing Limits are closed to surface disturbing activities during the identified time frames but remain open to operational and maintenance activities, including associated vehicle travel, during the closed period, unless otherwise specified in the stipulation. Areas subject to NSO stipulations are closed to any surface disturbing activity unless specific program decisions within the approved RMP exempt surface disturbing activities

from the decision. NSO areas are avoidance areas for locating public utilities and closed to new road construction.[334]

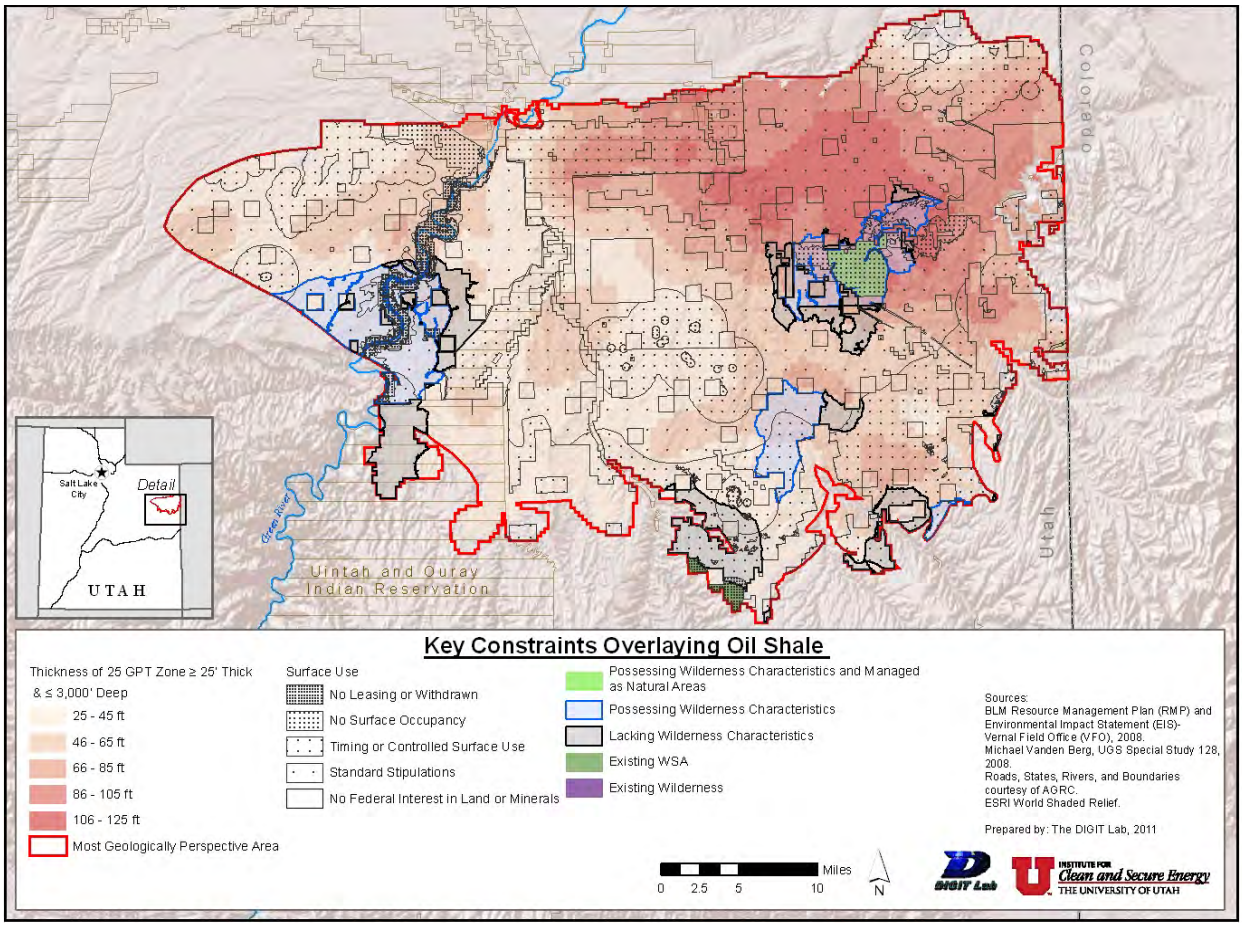
Notably, surface use stipulations are subject to exceptions, modifications, and waivers. Exceptions may be available on a one-time basis. Modifications change surface stipulations, either temporarily or permanently. Waivers permanently exempt the occupant from the requirements contained in the surface use stipulation. Exceptions, modifications, and waivers are not granted without site-specific environmental review. To exempt, modify, or waive a stipulation, the environmental analysis must show that: "(1) the circumstances or relative resource values in the area had changed following issuance of the lease, (2) less restrictive requirements could be developed to protect the resource of concern, and (3) operations could be conducted without causing unacceptable impacts."[335]

ICSE partnered with the University of Utah's DIGIT Lab in order to assess the extent to which surface use stipulations could impact oil shale and oil sands development. The DIGIT Lab obtained resource, land ownership, and management prescription mapping for areas covered by the six recent RMP revisions. Utilizing GIS technology, the DIGIT Lab mapped and quantified surface use stipulations applicable to oil shale bearing lands and the STSAs within the state. An explanation of project methodology is contained in Appendix A. The subsections that follow summarize how surface use stipulations could impact oil shale and oil sands development within the Uinta Basin. *This analysis and the associated maps are intended to provide a general assessment of the level of conflict and should not be relied on for site-specific decisions*.

4.1.1. Impacts on Oil Shale Development

Of the roughly 540,000 acres of BLM surface estate within the MGPA, approximately 9,000 acres (1.7 percent) are subject to no leasing stipulations, approximately 24,000 acres (4.4 percent) are subject to NSO stipulations, and 192,000 acres (35.6 percent) are subject to timing limitations or CSU stipulations. The remaining 311,000 acres (57.6 percent) are available subject to standard lease terms and conditions. Areas subject to surface use stipulations are shown in Figure 11. No leasing areas are generally associated with existing WSAs and river corridors deemed suitable for inclusion in the Wild and Scenic Rivers System. NSO stipulations apply in large part to areas with wilderness characteristics.

Figure 11 - Surface Use Stipulations and Oil Shale



4.1.2. Impacts on Oil Sands Development

Of the roughly one million acres within the STSAs, nearly 570,000 acres are under BLM management. Of the federally controlled acres, approximately 158,000 acres (27.7 percent) are unavailable for future leasing, roughly 82,000 acres (14.4 percent) are subject to NSO stipulations, and approximately 217,000 acres (38.2 percent) are subject to timing or controlled surface use stipulations. The remaining 110,000 acres (19.3 percent) are subject to standard lease terms and conditions.[336] See Table 5. These areas are shown in Figures 12 and 13.

The Circle Cliffs STSA is effectively closed to new mineral development because of requirements associated with Capitol Reef National Park, Grand Staircase-Escalante National Monument, and existing WSAs.[337] The Tar Sands Triangle STSA is also effectively closed to new development because of Capitol Reef National Park, existing WSAs, and NSO stipulations. The three northern-most STSAs, Asphalt Ridge, Raven Ridge, and Pariette are the least constrained areas.

In contrast to management of federal lands with wilderness characteristics, broadly based land management requirements stand as a more formidable barrier to unconventional fuel development on federal public lands. As was noted with respect to wilderness quality lands, these restrictions are generally more severe in Southern Utah and therefore a greater concern to prospective oil sands developers in that region. While federal surface use

stipulations do not preclude development, they may indirectly shift development interest to non-federal lands where such considerations do not apply. This could potentially impact development of national energy and environmental policies.

Table 5 - Surface Use Stipulations for BLM Surface Within Special Tar Sands Areas

Special Tar Sands Area	Acres	Special Tar Sands Area	Acres
Argyle Canyon		*Raven Ridge*	
Standard Stipulations	1,000	Standard Stipulations	7,000
Timing or Controlled Surface Use	0	Timing or Controlled Surface Use	7,000
No Surface Occupancy	0	No Surface Occupancy	0
No Leasing or Withdrawn	0	No Leasing or Withdrawn	0
Total	1,000	*Total*	14,000
Asphalt Ridge		*San Rafael*	
Standard Stipulations	3,000	Standard Stipulations	24,000
Timing or Controlled Surface Use	2,000	Timing or Controlled Surface Use	8,000
No Surface Occupancy	0	No Surface Occupancy	34,000
No Leasing or Withdrawn	0	No Leasing or Withdrawn	34,000
Total	5,000	*Total*	99,000
Circle Cliffs		*Sunnyside*	
Standard Stipulations	46,000	Standard Stipulations	16,000
Timing or Controlled Surface Use	0	Timing or Controlled Surface Use	34,000
No Surface Occupancy	0	No Surface Occupancy	20,000
No Leasing or Withdrawn	11,000	No Leasing or Withdrawn	10,000
Total	57,000	*Total*	80,000
Hill Creek		*Tar Sand Triangle*	
Standard Stipulations	0	Standard Stipulations	0
Timing or Controlled Surface Use	20,000	Timing or Controlled Surface Use	0
No Surface Occupancy	0	No Surface Occupancy	24,000
No Leasing or Withdrawn	0	No Leasing or Withdrawn	58,000
Total	21,000	*Total*	83,000
Pariette		*White Canyon*	
Standard Stipulations	8,000	Standard Stipulations	0
Timing or Controlled Surface Use	3,000	Timing or Controlled Surface Use	7,000
No Surface Occupancy	2,000	No Surface Occupancy	0
No Leasing or Withdrawn	0	No Leasing or Withdrawn	0
Total	12,000	*Total*	7,000
P.R. Spring		***STSA Totals***	
Standard Stipulations	4,000	Standard Stipulations	110,000
Timing or Controlled Surface Use	137,000	Timing or Controlled Surface Use	218,000
No Surface Occupancy	2,000	No Surface Occupancy	82,000
No Leasing or Withdrawn	45,000	No Leasing or Withdrawn	158,000
Total	187,000	*Total*	567,000

Figure 12 - Constraints on Oil Sands Development (North)

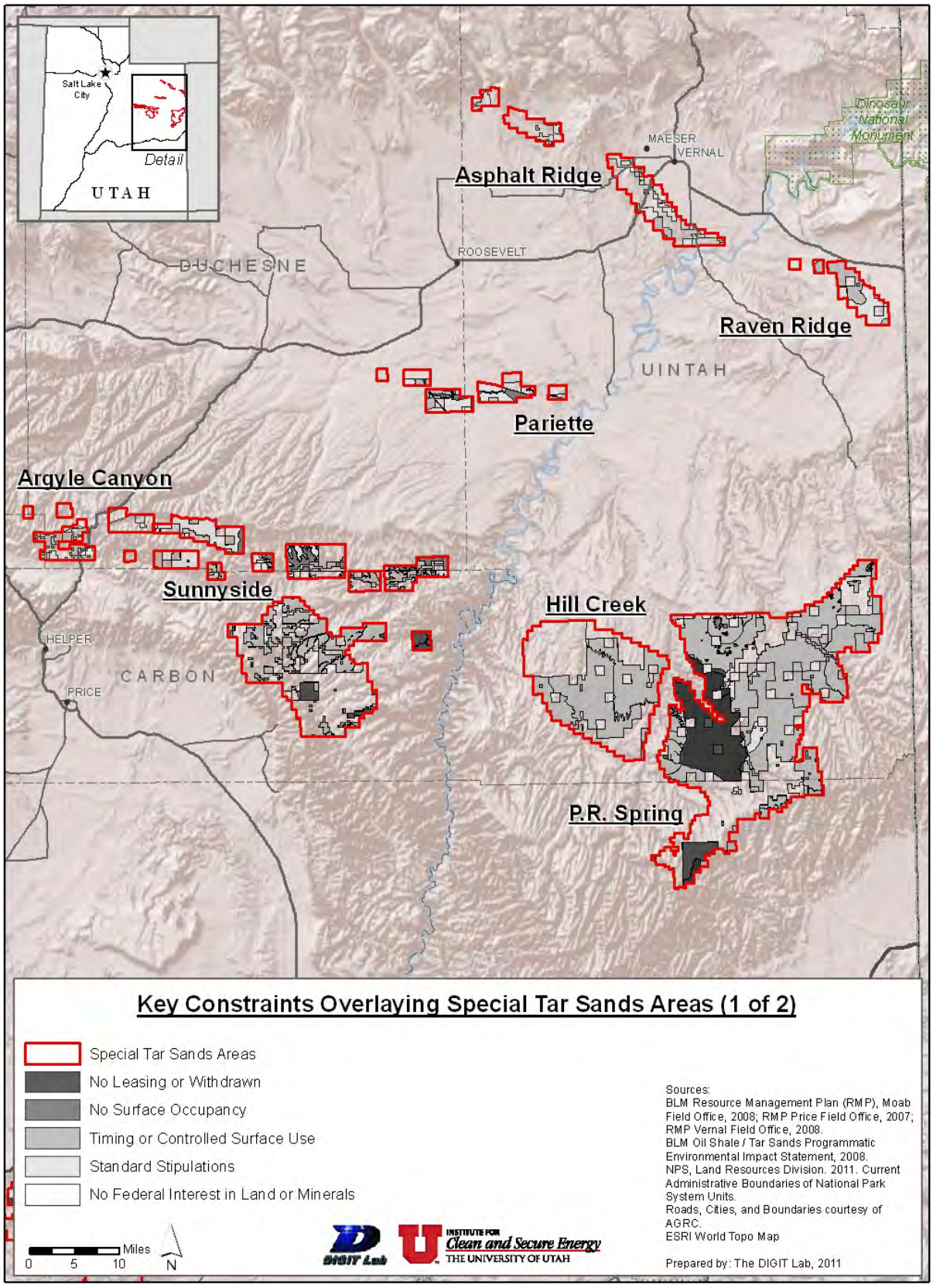
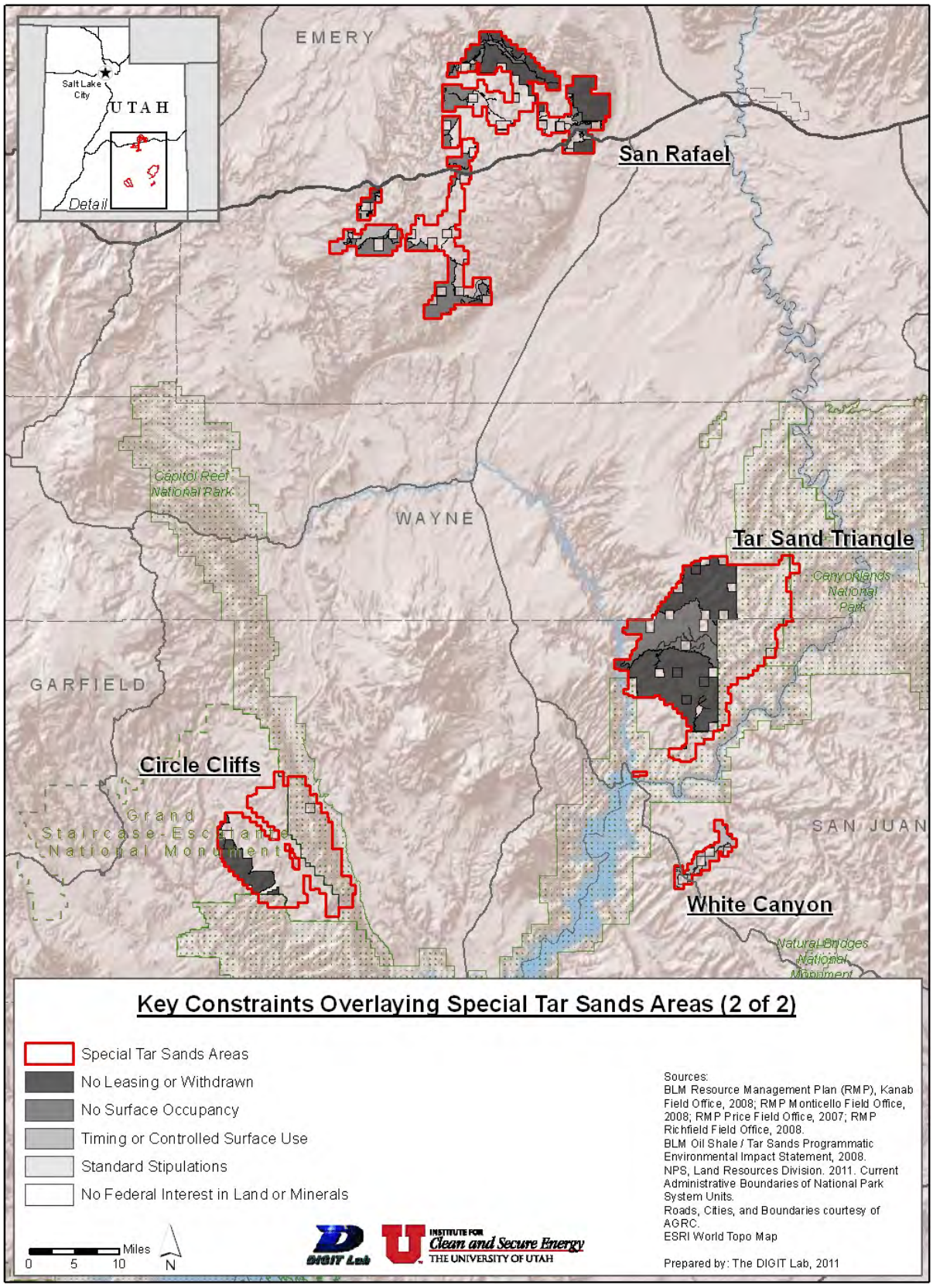


Figure 13 - Constraints on Oil Sands Development (South)



5. Land Use Case Studies

Utah is rich in both energy resources and environmental values. These resources exist across a broad landscape that is fragmented by owners who are subject to what are often conflicting management mandates. For years, interests have argued past each other in their efforts to either increase commodity production or protect more public lands. These pervasive conflicts complicate management efforts, delaying energy development and stalling protection of untarnished landscapes. Collaboration between traditionally divergent interests can break through the protection versus development dilemma. While collaboration will not provide competing interests with everything they desire, collaboration represents an alternative to protracted conflict and litigation and can result in outcomes that improve the management situation for all interests.

Collaborative groups can address diverse interests by including all relevant interests and individuals that are empowered to act and willing to compromise. Successful efforts recognize the legitimacy of competing viewpoints and seek solutions with this in mind. In working towards a mutually acceptable end, collaborative groups and the interests their participants represent must recognize the legal limits on available action and proceed in a manner that is open, transparent, and respectful to competing viewpoints. Collaborative efforts, as we shall see, are also far more likely to succeed when subject to the leadership of a committed champion that is able to bring diverse interests together and shepherd negotiations through the challenges that inevitably arise.

This section looks at separate but related efforts to either protect federal public lands and / or to consolidate public land ownership in furtherance of improved management efficiency. Because events build upon the knowledge gained through prior efforts, case studies are presented in chronological order. We believe that improved understanding of the roots of current conflicts and the lessons learned from past efforts will prove useful to prospective unconventional fuel developers, land managers, and wilderness advocates alike.

5.1. The Oil Shale Exchanges

Shortly after the Supreme Court released its opinion in *Andrus v. Utah* (discussed in section 1.2) holding Utah's in lieu selections were properly limited to lands of equal value, the State of Utah initiated five land exchanges intended specifically to facilitate oil shale development. The lands conveyed by the state were already subject to state oil shale leases, but were scattered across the landscape.[338] The lessees contended that the state leases could not be developed economically due to their limited size and scattered location. Specifically, the cost of transporting shale from isolated mining locations to a central refining facility made operations prohibitively expensive. To address high transportation costs, the lessees convinced the state to exchange their leased tracts for nearby federal public lands. Public lands to be conveyed to the state were in blocks large enough to comprise logical oil shale mining units. The lessees then relinquished their existing state lease and negotiated new state leases on the lands conveyed to the state.[339]

The exchange was intended to involve resources of equal value, but valuing the parcels to be exchanged proved challenging. The three means of equalizing values authorized under then existing regulations — the comparable sales method, the cost method, and the income method — all proved unworkable because of the nascent nature of the oil shale industry.[340] The absence of an established industry and functioning market for oil shale precluded reliance on comparable sales and left appraisers without adequate cost or income data. In light of these

problems, the state and its lessees proposed instead to utilize a "barrel-for-barrel" or "resource-for-resource" approach that would account for the grade, thickness, and depth of the oil shale resources.[341] Adoption of this approach required an amendment to administrative rules applicable to federal land exchanges.[342]

As finalized, the Quintana exchange involved 7,317 acres of state oil shale bearing lands that were exchanged for 5,499 acres of consolidated federal oil shale lands.[343] The four other exchanges were similar in nature. Lands conveyed from the federal to the state government were valued higher because of the recoverable barrels per acre of oil equivalent involved and the lower development cost associated with consolidated holdings. The effect of these exchanges is evident today in the blocks of consolidated SITLA land that are shown in 7.

Two points regarding the oil shale exchanges are notable. First, the exchanges demonstrate early recognition of the problems involved in valuing oil shale resources in the absence of a commercial synthetic fuels industry and a willingness to equalize value on a resource-for-resource basis. Second, there was almost no discussion of the oil shale exchanges in secondary sources, likely indicating a lack of controversy.

5.2. Project Bold

The next major exchange proposal was much broader in scope. Project Bold began in the early 1980s and was Utah's first comprehensive effort to address the blue rash.[344] The four-year effort culminated in a proposal to consolidate approximately 5,000 scattered state sections totaling roughly 2.5 million acres into forty-seven large blocks. Consolidation was to occur via a statewide land exchange.[345] Project Bold proved too ambitious and support could not be sustained. While not finalized, the work that went into the proposed exchange created the foundation for future efforts.

Project Bold responded to three key drivers. First, the checkerboarded landscape left over from the 19th century resulted in what then Governor Matheson described as "*de facto* Federal management" of the literally millions of acres of state trust land that were completely surrounded by federal land.[346] Because of this haphazard pattern of ownership and control, "State [trust] lands are managed more often by circumstance than by plan or design."[347] "All land managers in the state would benefit from more rational land ownership patterns and the beneficiaries of most state [trust] lands, Utah schools, would receive increased revenue from better opportunities for state land management."[348] Second, prior efforts to exchange lands and consolidate management had languished. As of 1982, more than twenty-two exchange applications remained pending, covering more than 200,000 acres, some of which had been pending since June of 1967.[349] With small-scale exchanges foundering, a large-scale congressional exchange became an attractive alternative. Third, the U.S. Supreme Court had recently held that in selecting in lieu lands, selection should not be on an acre-for-acre basis as Utah had argued, but based on the value of the parcels.[350] The decision was a "shock" to Utah and, according to then Governor Matheson, "highlighted the state's historical inability to use and manage its own lands and led to consideration of the broader problem, the inherent flaws in the land ownership pattern created by the 1896 grant."[351] In response to these problems and the Court's decision, "Governor Matheson decided to attack the state land status problem in depth."[352]

With these factors as impetus, the state began a multi-year effort to eliminate the blue rash. Lands identified for conveyance to the State of Utah were intended to: (1) Complete Utah's selection of in lieu or indemnity lands, (2) eliminate state inholdings within federal

reservations, (3) eliminate checkerboarding of the public domain, (4) avoid Federal Wildlife Management Areas, Wilderness Study Areas, and other federal lands of national environmental significance, (5) maintain consistency with local planning documents, (6) maintain the integrity of grazing allotments, (7) increase the size of existing state blocks of land and improve management, (8) avoid federal mining claims, and (9) respond to federal land management agency preferences.[353] The state, in identifying lands for acquisition, focused on multiple use lands, lands of comparable value, lands appropriate for state management, and a regional mix of lands and resources sufficient to maintain a diverse landscape.[354]

As with most land exchange proposals, equalizing parcel values proved to be a significant hurdle.[355] According to the state, federal law required detailed core drillings in order to quantify mineral values. The time and expense involved in assessing resources across thousands of parcels proved prohibitive and made a traditional exchange infeasible.[356] Project Bold proposed to "substitute[ ] Congressional approval of the completed project plan for the strict valuation procedures in FLPMA, avoiding the endless appraisals and counter-appraisals which have plagued earlier exchange efforts."[357]

While expediting approval, the exchange was still intended to involve parcels of approximately equal value,[358] with the state receiving 27,195 more acres than it gave up in order to equalize values.[359] This apparent advantage to the State of Utah reflected value equalization for inholdings within National Parks, Monuments, and Recreation Areas that contained valuable minerals and had revenue generating potential to the state, but where no development would occur when these parcels were transferred to the federal government.[360]

To assure equivalency while avoiding bureaucratic gridlock, resources were broken out by size, region, quality, quantity, and individual mineral resource.

> For example, if the State inventory currently includes 55,000 acres of medium-quality coal in central Utah, the exchange proposal will leave the State with 55,000 acres of medium-quality coal in central Utah, though in a different configuration . . . . Project BOLD does not [propose to] exchange coal for oil and gas or grazing lands or uranium lands. Equity has been maintained both by resource type and by region.[361]

"To further assure protection of federal and state interests in the exchange, mineral revenues generated on most exchanged lands [would be] . . . split,"[362] and all acquisitions would be subject to valid, existing rights.[363] Revenue splitting was intended to protect against one party receiving a windfall should new mineral deposits be discovered after the exchange had occurred.

Another controversy involved Federal Payments In Lieu of Taxes (PILT). Federal lands are generally exempt from state and local property taxes, and with roughly two-thirds of Utah under federal ownership, the State of Utah, like many western states, lacks a major source of revenue. Federal PILT funds are provided to rural counties in accordance with their federal land holdings to partially offset uncaptured property tax revenue. PILT money is, however, unavailable for tax exempt state lands that are conveyed to the federal government. Therefore, because state trust lands to be conveyed to the federal government were already exempt from local taxation, the mutual exchange would have reduced the tax base by millions of acres and resulted in a significant loss of county revenue.[364] To resolve this problem, the state enacted legislation assuming funding obligations with respect to rural counties, thereby offsetting foregone federal PILT revenue.[365]

Still another challenge involved management requirements applicable to state trust lands. Under the Utah Enabling Act, lands were granted to the state for the express purpose of funding schools and other state institutions.[366] Some saw this grant as too narrow, precluding consideration of environmental benefits that did not directly result in revenue generation. Others complained that state trust lands should be more widely available to local governments in order to support governmental purposes, even if such uses did not maximize revenue for school and institutional trusts. Still others argued that financial mandates made it too easy to displace traditional uses, such as grazing, that produced limited revenue but that remained critical to preservation of rural community values.[367] To resolve these challenges, Project Bold called for amendments to both federal and state law to allow for broader management considerations and below market leasing of state trust lands.

Both the extent and strength of support for Project Bold is unclear. On one hand, then Governor Matheson noted support from such diverse interests as the Navajo Tribal Council, National Cattlemen's Association, Society of American Foresters, Utah Wildlife Federation, and Western Governors Association.[368] The project also received support from the State of Utah, with sixty-one of seventy-five members of the Utah House of Representatives co-sponsoring a concurrent resolution in support of the exchange.[369] On the federal side, the BLM, President Reagan, and congressional leadership also supported the exchange.[370]

While Project Bold garnered support from key constituents and responded to a real management problem, all stakeholders did not feel the need for such a large exchange equally. Most land managers saw tangible benefits from "blocking up" land, but some contended that the blue rash guaranteed the state a foothold in federal land management decisions and the federal government a similar role in management of state trust lands. Once consolidated, this leverage would be lost. Some local interests feared that a monolithic land manager would be less responsive to their concerns. Thus, the justification for the exchange was also one of the exchange's greatest challenges. Further complicating matters, Project Bold lacked the imminent threat or sense of urgency that is a key element in most successful land exchanges.

In the end, Project Bold lost its champion and was not enacted into law. Governor Matheson retired and his successor, Governor Bangerter, did not make land consolidation a high priority. The Utah congressional delegation was not requested to introduce legislation and no formal process was initiated to finalize the project.[371] At a hearing on a subsequent exchange proposal, Governor Bangerter testified that he had "found little or no support for such a large statewide land exchange" but "widespread support for selective federal-state land exchanges . . . ."[372] The reasons behind this change of direction are unclear, but several explanations have been posited. Chamberlain argues that conflicts between special interests, local governments, local citizens, environmental groups, and miners and ranchers were to blame. These groups had diverging views regarding valuation, grazing management, existing mineral rights, and the legislative process.[373] Another possibility is that private interest groups found the status quo more attractive than Project Bold's radical redrawing of the state's political landscape.[374] Bruce and Rice identify federal distrust of Utah's ability to protect non-economic values as a major cause of concern.[375] Professor Coggins offers yet another explanation:

> What appeared to be a promising opportunity for improved management of western resources became mired in the complexity of entrenched federal land management practices when opposition surfaced from interest groups who saw many of their subsidized benefits threatened. Governor Matheson and Secretary Watt apparently underestimated the inertial power of the status quo. Mr. Watt's

perceived general overzealousness also may have contributed to the failure of this promising approach.[376]

In the end, Project Bold collapsed under its own weight. The area involved in the proposed exchange — roughly 2.5 million acres (3,900 square miles) — is more than the land area of Rhode Island, Connecticut and the District of Columbia *combined*.[377] The exchange also impacted every conceivable interest from ranchers, to miners, to sportsmen and environmentalists; and it was simply too much to keep all the divergent interests aligned. Not only was the scale of the endeavor overwhelming,[378] but also the length of the process made staff turnover inevitable. Changes in key federal administrators first threatened to derail the process; while those were overcome, Governor Matheson's departure left the project without a champion.

While Project Bold was not enacted into law, the wealth of information produced along the way provided a basis for future exchanges, and of equal import, the challenges that formed the impetus for its enactment continued to plague state and federal land managers. Project Bold also introduced the idea of sharing mineral revenues to address valuation and equalization challenges. This idea lay dormant for years but has seen a recent resurgence in interest.

5.3. The Utah Schools and Lands Improvement Act of 1993

As of 1993, Utah's trust lands within federal reservations (including National Parks, National Forests, and Indian reservations) totaled approximately 195,480 acres (approximately 305 square miles) of surface and sub-surface rights, plus an additional 9,980 acres (approximately 16 square miles) of sub-surface rights.[379] Under the Utah Schools and Lands Improvement Act of 1993,[380] these lands were to be conveyed to the tribes and agencies that manage surrounding lands in return for approximately 3,640 acres (approximately 6 square miles) of federal land, unleased coal in four tracts of land, royalties for coal leases on a fifth tract of land, and a portion of royalties on existing federal geothermal, oil, gas and mineral leases.[381] Total royalty payments to the State of Utah were capped at $50 million.[382]

Congress specifically declared that conveyance of the specified tracts and interests should be construed as satisfying FLPMA's public interest requirement.[383] Congress did not, however, provide for expedited valuation of the lands to be exchanged. Instead, the exchange had to be of equal value, as documented in an appraisal report prepared in accordance with nationally recognized appraisal standards.[384] Disputes over valuation were to be resolved through litigation in federal court.[385] The appraisal process did not produce mutually acceptable valuations, and the State of Utah commenced litigation.[386] The anticipated exchanges were not concluded and the funds were not conveyed.[387] During congressional testimony five years later, David Terry, SITLA's Director, noted that the appraisal-based process for valuing state trust lands in the 1993 Act broke down for several reasons: The sheer magnitude of lands involved made appraisals expensive and time-consuming, and the state and federal governments disagreed on how to value lands with nationally significant natural characteristics.[388]

5.4. Creation of the Grand Staircase-Escalante National Monument

On September 18, 1996, President Bill Clinton, standing at the south rim of the Grand Canyon, signed a proclamation creating the Grand Staircase-Escalante National Monument (GSENM).[389] The President created the Monument using authority contained in the Antiquities Act of 1906.[390] Unlike Wilderness Area designation that is the product of bicameral legislation,

National Monument designation is a purely executive function that does not require congressional involvement or acquiescence.

The proclamation establishing the Monument is a recitation of the unique and unspoiled resources found within the Monument.[391] Under the proclamation, "[a]ll Federal lands and interests in lands within the boundaries of this monument are hereby appropriated and withdrawn from entry, location, selection, sale, leasing, or other disposition under the public land laws, other than by exchange that furthers the protective purposes of the monument."[392]

Containing roughly 1.7 million acres (approximately 2,660 square miles) of federal land as designated, the GSENM is thirty-six percent larger than the State of Delaware.[393] The Monument's geographic reach is even larger because, as designated, it contained state and private inholdings and approximately 200,000 acres of SITLA-managed lands and minerals.[394] Monument opponents were also quick to note that the Monument was believed to contain sixty-two billion tons of low-sulfur coal, between three and five billion barrels of oil, and two to four trillion cubic feet of natural gas.[395] "The estimated value of these deposits ranges from tens to hundreds of billions of dollars."[396]

"Reactions to the new Monument were swift and rarely equivocal. Environmental groups generally applauded the designation, viewing it as an important step forward in permanently protecting southern Utah's vulnerable landscapes. State and local political leaders uniformly condemned the decision, labeling it a land grab, crass political opportunism, and much worse."[397] "Nearby communities went into mourning, Congress embarked upon an investigation of the Monument decision process, numerous bills were introduced in Congress to amend the Antiquities Act, and three lawsuits were filed challenging the legality of the designation."[398]

The Monument was set aside and with almost no advance notice to the State of Utah or local residents.[399] Utah's residents and congressional delegation first learned of the Monument's pending designation in the newspaper, less than two weeks before designation occurred.[400] As Joe Judd, former Kane County Commissioner tells it; he was among a delegation that visited the White House the day before the proclamation was issued.

> When we asked about the area being discussed for the Monument, they chose to tell us that they had no monument plan. 'Nothing was going to happen. We don't know anything about it.' Then, when we told them where we thought it was going to be, they said, 'Do people really live there?' And then I knew we were in trouble.[401]

Perceived ignorance of their very existence and the decision to forego public input were slaps to the faces of local residents. The manner in which the federal government acted, combined with the decision to announce the designation from another state, left a scar on relations that lingers to this day.

While the GSENM's detractors are correct in noting that the Monument was designated without state or public input, establishment was not a complete surprise and the federal government was hardly unaware of state or local interests.[402] As early as the 1930s, President Franklin Roosevelt considered withdrawing part of Utah's red rock country to create the Escalante National Monument.[403] In fact, fifty-six years before Monument designation Utah's Governor Henry Blood prophetically stated that "[s]ome morning we may wake up and find that . . . the Escalante Monument has been created by presidential proclamation, and then it will be too late to forestall what we in Utah think would be a calamity."[404] Over the decades that

followed, National Park, National Conservation Area, National Recreation Area, and Wilderness designation proposals were all brought forward in an effort to protect federal public lands in southeastern Utah.

Six decades of interest in protecting Utah's red rock country made federal officials well aware of state and local concerns. John Leshy served as DOI Solicitor during the Clinton administration and notes that development in southern Utah had been hotly debated for more than twenty years prior to the designation, and state as well as local concerns were well known.[405] These concerns were addressed in the Monument Proclamation, which explicitly recognizes the existence and ongoing validity of existing rights, and the State of Utah's authority to manage fish and game within the Monument. The Proclamation also expressly authorizes continued livestock grazing undertaken pursuant to valid federal leases, disclaims reserved water rights claims, and made the BLM rather than the Park Service responsible for management.[406] President Clinton also recognized the existence of non-federal inholdings within the newly created monument, committed to exchange these inholdings for developable federal lands elsewhere within the state, and to resolving "reasonable differences in valuation in favor of the school trust."[407] Finally, the President directed the BLM to work with state and local governments to ensure that state and local concerns were addressed in Monument management.[408]

While the administration took unprecedented steps to recognize state and local interests during post-designation planning,[409] earlier communication and more aggressive outreach might have provided tangible benefits. Reaching out to state and local officials earlier, and explaining the administration's interest in monument designation as well as its commitment to addressing state and local concerns over valid existing rights, non-federal inholdings, grazing, wildlife management, and water rights might have changed the nature as well as the tone of subsequent discussions. In any event, an argument over the extent to which state and local interests had been addressed would have likely been more productive than responding to allegations that whole populations had been ignored.

Setting aside questions whether designation could have been handled better, much of the concern over federal public land management stems from a culture rich in heritage and tied to the land. Area residents traditionally relied on public lands and extractive industries to provide the jobs to feed their families. Many in rural Utah continue to fear that the President may create additional National Monuments and that local community interests will again be ignored. Utah's rural residents fear that monuments will "take away jobs that sustain families. Without money, homes will have no heat, and children will go hungry."[410] These fears remain so strong that fifteen years after the Monument's creation, members of the Utah congressional delegation continue to introduce legislation to prohibit presidential creation of additional National Monuments within Utah unless Congress votes in support of such designations.[411] These fears do not end at Utah's borders; several neighboring states' congressional delegations have introduced similar legislation.[412]

Injuries attributed to Monument creation, both real and perceived, form the backdrop for today's federal land management actions within Utah. All of the competing interests effected by the GSENM designation care deeply about public land management and want to play an active role in ensuring their interests are protected. Local communities want more control, or at a minimum, the ability to prevent what they see as abdication of control to federal bureaucrats.[413] Many local residents recognize that agriculture is in decline and that tourism represents a growth area, but they "do not want their towns turning into another Moab."[414] The sagebrush rebels want to limit restrictions on development. "Their main interests are downgrading the

protected status of the Monument, opening more land for the production of oil and gas, protecting grazing rights, and promoting human needs over animal protection."[415] The ranching community wants to protect its ranching heritage and way of life. "The ranching community lobbies for, and publicly vocalizes, their need to graze on public lands. They desire to maintain an independent lifestyle and resent restrictions placed on them by the BLM . . . . Their heritage is deeply rooted in their relationship with the land that they work and live on every day of their lives."[416] A common refrain is that ranchers know the land better than anyone else; their lives are tied to the land and they would never do anything to destroy the land or their livelihood, and they don't understand why their input is not better received.[417] The environmental community values the land for its intrinsic features and wants to minimize the imprint of humans on wild places.[418] BLM employees see public lands from the perspective of land managers and are often not given credit for their hard work and the difficult balance they strive to strike.[419]

Understanding these disparate perspectives is important, as is giving them a voice. It is virtually guaranteed that where interests feel ignored, those interests become defensive. A defensive posture and distrust almost invariably engender pushback, making future collaboration more difficult. Overcoming the legacy of prior events may be the most formidable challenge for future collaborative public land management.

5.5. The Monument Exchange

When President Clinton established the 1.7 million acre (approximately 2,660 square mile) GSENM, he "trapped" hundreds of square miles of state trust land within the monument's boundaries.[420] Recognizing the problem created by inholdings, the President proclaimed that the Monument "should not and will not come at the expense of Utah's school children," and directed the federal government to promptly respond to all exchange requests and other issues submitted by the state.[421] Moreover, President Clinton directed the Secretary of the Interior to resolving "reasonable doubts" as to land value in favor of Utah's trust lands.[422] Barely eighteen months later, the Secretary and then Governor Leavitt agreed to exchange all state trust lands and mineral interests within the monument.[423] The agreement also settled ongoing litigation over valuation of school trust lands within National Parks, National Forests, and Indian reservations that arose out of the foundering Utah School and Lands Improvement Act of 1993.

Representative James Hansen introduced exchange legislation on May 12, 1998. The Act's principal purpose was described as "to ensure that the President's promise to protect Utah's school children does not ring hollow," by exchanging Utah's trust lands within the Monument for federal lands outside.[424] Enacted into law on October 31, 1998, the Act implemented an agreement conveying to the federal government 379,739 acres (approximately 593 square miles) of state school trust land inholdings, including 176,699 acres (approximately 276 square miles) within the GSENM, 80,000 acres (approximately 125 square miles) within National Parks, National Recreation Areas, and other National Monuments, 47,480 acres (approximately 74 square miles) within Indian reservations, 70,000 acres (approximately 109 square miles) within National Forests, and 2,560 acres (approximately 4 square miles) in Kane County coal fields. In exchange, the federal government gave the state $50 million in cash,[425] the right to $13 million in potential future coal rents and royalties, 138,647 acres (approximately 217 square miles) of federal land, and mineral rights to roughly 160 million tons of coal and 185 billion cubic feet of coal bed methane in Emery and Carbon Counties.[426]

The agreement did not utilize FLPMA's appraisal process for the exchanged lands and resources. Instead, both sides analyzed resource data, market analyses, and other pertinent information for negotiations,[427] and Congress declared the interests conveyed pursuant to the

exchange to be "approximately equal in value."[428] Congress also declared that agreement regarding the exchange was in the public interest.[429]

The exchange was the largest in the history of the lower 48 states,[430] and has been described as "the single most significant land swap in Utah since the Utah Enabling Act was passed in 1894."[431] While the exchange was consummated successfully, it has not been without its critics. The Western Lands Project criticized the exchange as the product of intense political pressure and economically skewed in favor of Utah.[432] Citing an unnamed BLM source, the Western Lands Project contends that the "[l]ands traded to the State have a long-term value of about $1 billion, while the lands coming to the pubic are valued at about $70 million."[433]

Criticism aside, the Monument Exchange succeeded in large part because of a catalyzing event that brought the parties to the table and forced them to work towards a mutually satisfactory end. There was also strong political will and the emphatic direction of the President of the United States to drive the discussion. The exchange succeeded also because satisfaction of procedural barriers such as the public interest review and value equalization were streamlined. Whether the benefits of the exchange outweigh the costs remains a matter of dispute as the actual land use foregone is a matter of some speculation. However, in terms of the ability to consummate the exchange, the Monument Exchange stands out because of its size and the speed with which it was concluded. It is also noteworthy that the Monument and associated exchange became handles to address more geographically distant fragmentation problems.

5.6. The Utah West Desert Land Exchange of 2000

The Utah West Desert Land Exchange Act of 2000 was signed into law by President Clinton on Oct. 13, 2000, authorizing the exchange of federal public lands for certain state trust lands within existing and proposed WSAs in the West Desert Region of Utah. The exchange, which came on the heels of the Monument Exchange, was part of a broader effort to resolve wilderness quality land management issues. Governor Leavitt and Secretary of the Interior Bruce Babbitt had been engaged in negotiations over a potential Wilderness Area in Utah's west desert and the exchange of SITLA inholdings was an essential element of the proposal.[434] While the exchange succeeded, the connected Wilderness bill did not, apparently at least in part because county and environmental interests were not involved at the outset of the project.[435]

Congress again played a secondary role in this exchange, ratifying an exchange agreement negotiated between the State of Utah and the BLM. Under the exchange, the state acquired approximately 128,000 acres (approximately 200 square miles), consolidating over 225 scattered school trust parcels into eighteen more manageable blocks, while the BLM acquired about 118,000 acres (approximately 184 square miles) of school trust lands.[436] Approximately 483 acres of land conveyed to the United States was designated as critical habitat for the Desert Tortoise, which is protected under the Endangered Species Act.[437] Overall, the agreement was described as "place[ing] important natural lands into public ownership, and further[ed] the interests of the State trust lands, the school children of Utah, and these conservation resources."[438]

As with prior exchanges, "[t]raditional appraisal approaches would make it very difficult and expensive to complete the land exchange given the vast acreage and scattered nature of the parcels involved and the detailed processing and documentation requirements of standard appraisal techniques."[439] Congress therefore declared the exchange to be in the public interest,[440] and exempted the exchange from FLPMA's process for equalizing values while

retaining the substantive requirement for approximately equal values.[441] Therefore, before exchanging lands, the Secretary of the Interior and the State of Utah were required to document how the value determination was made and to select independent qualified appraisers to determine if the lands were actually of approximately equal value. Both the State of Utah and the BLM established rough estimates of value at the outset of the process, and those estimates were within twenty-five percent of each other.[442] From that starting point it took almost twelve months of deliberations for the state and BLM negotiators to reach an agreement and required inclusion of additional state-owned lands within the Washington County Habitat Conservation Plan area to offset higher value state-selected lands containing producing mineral areas.

Despite the proponents' belief that "the school children of Utah, federal land users, taxpayers, and the environment will all be winners when this bill is passed,"[443] the Western Land Exchange Project strongly opposed the exchange, arguing that legislative land exchanges are "backroom deals driven and controlled by the non-federal proponents, and that neither public lands nor taxpayer interest are being sufficiently protect."[444] The Western Land Exchange Project is also critical of legislative exchanges for shutting out public participation and circumventing the NEPA process.[445] However, state and federal officials defend legislative exchanges as following an open process.[446]

Others criticized the nature of the exchange by noting that the lands that the state received are highly developable large blocks located along highways and near communities, while the lands the state gave up generally have limited development appeal.[447] This criticism highlights the difficulty inherent in valuation. There would be no point in an exchange if lands were identical in their location and development potential. The BLM obtained value from improved management efficiency and preservation of lands within protected areas, benefits that are difficult to quantify in economic terms. The State of Utah received value in enhanced economic development potential consistent with its trust management obligations. The different values each side sought to maximize were the reason for the exchange, and the difficulty equalizing these values was the reason for congressional action rather than utilization of FLPMA's administrative exchange procedures. These considerations were also the root of opponents' criticisms.

5.7. The San Rafael Swell Exchange

Despite growing criticism of legislative land exchanges, Utah and the federal government continued to follow their tried and true model. The Federal-Utah State Trust Lands Consolidation Act of 2002 was intended to consolidate federal holdings in the San Rafael Swell area,[448] acquire remaining state trust land in the Red Cliffs Desert Reserve, and eliminate state inholdings in the Manti-La Sal National Forest by exchanging 133,283 acres (approximately 208 square miles) of federal lands for 112,815 acres (approximately 176 square miles) of SITLA lands.[449] Like previous exchanges, the San Rafael Swell exchange was intended to "resolve longstanding environmental conflicts with respect to existing and proposed wilderness study areas, place important natural lands into public ownership, and further the interests of the State trust lands, the school children of Utah, and these conservation resources."[450]

The San Rafael Swell area had long been seen as a likely candidate for federal protection. "[M]any people believed that it was only a matter of time before the San Rafael Swell was designated as a National Monument through presidential proclamation. In fact, it was often rumored that Secretary Babbitt had a 'list,' and that the San Rafael was not only on it, but more than likely near the top."[451] Governor Leavitt proposed creation of a new National Monument and the proposed San Rafael Swell exchange was a step towards designation.[452]

The Leavitt proposal gave the State of Utah a prominent role in defining the monument's extent and management. As Representative Chris Cannon noted, the state was "caught unaware" when President Clinton designated the GSENM. In proposing this exchange, the state recognized that formal protection of the San Rafael Swell is likely to occur and wanted to act proactively to avoid the management challenges encountered with the GSENM.[453]

The proposed exchange was again legislative in nature, ratifying an agreement negotiated between the state and the BLM. The agreement included both a public interest determination[454] and a finding that the parcels involved were of approximately equal value.[455] Procedurally, the parties had agreed to follow the approach utilized for the West Desert Exchange by examining market data rather than using standard appraisals to determine value,[456] and the negotiated determination of approximately equal value was to be confirmed by a mineral assessment addressing oil shale bearing lands.[457] Notably, the proposed exchange included a revenue sharing provision applicable to oil shale resources[458] that was intended to avoid difficulties inherent in appraising their value, and ensure that both parties received fair value in the event that mineral assessments proved inaccurate.

Not all, however, were satisfied with the agreement. The BLM conducted an internal investigation after Kent Wilkinson, a Senior BLM Appraiser, alleged that the proposed exchange would result in a federal loss of between $96.7 million and $116.7 million because of "improper valuation of federal mineral resources and inconsistent treatment of appraisals . . . ."[459] Mr. Wilkinson asserted that some mineral values were disregarded altogether and that reliance on scenic character is an improper criterion for appraised value.[460] The Office of Inspector General ordered an independent review responding to Mr. Wilkinson's assertions.[461] The ensuing report found that the BLM continuously failed to appraise lands at fair market value and land exchanges are highly politicized.[462] In the case of the San Rafael exchange, DOI officials "negotiated away a substantial interest in the potentially very valuable oil shale resource" and devalued mineral resources in the Uinta Basin federal parcels.[463]

In response, the BLM and SITLA negotiators released a "White Paper" in support of the exchange agreement, defending the proposed exchange as in the public interest and including lands of approximately equal value. Although BLM defended its methods, it ultimately created a work group to evaluate the agency's land exchange and appraisal process.[464]

Upon receiving the report commissioned by the Inspector General, Interior Secretary Gale Norton canceled the exchange agreement. In a letter to the bill's sponsor, Representative Chris Cannon, Secretary Norton stated, "[a]lthough some aspects of this land exchange proposal still have merit, because doubt and uncertainty would cloud future consideration of it, we no longer believe that pursuit of this exchange would be in the best interest of the federal or state government or the public."[465] Earlier, and to the dismay of Monument proponents, Governor Leavitt ended his plans for Monument designation after Emery County residents voted against supporting monument establishment.[466] Plagued by evaporating support and controversy over the fairness of the exchange, the exchange died an ignominious death.

While not consummated, the San Rafael exchange is particularly relevant to today's oil shale and oil sands producers. The main challenge to the exchange was finding a way to value unconventional fuel resources. It was extremely difficult to determine what resources were commercially viable or their value absent a developed industry and market. That challenge persists, and the success of contemporary efforts likely hinges upon the ability to negotiate a revenue sharing formula that negates the need for precise valuation and equalization of mineral values.

5.8. The Cedar Mountain Wilderness

The path to designating the Cedar Mountain Wilderness Area, which is located approximately fifty miles west of Salt Lake City, is worthy of special attention. Like the GSENM Exchange before it, this effort to protect federal public lands was the product of unique political factors.

The Cedar Mountain Wilderness Area borders the Utah Test and Training Range, a 1,712,000 acre (approximately 2,675 square mile) military installation dedicated to "air-to-ground, air-to-air, ground force exercises, and large footprint weapons testing."[467] Initially proposed as part of the "Utah Test and Training Range Protection Act,"[468] the Cedar Mountain Wilderness Area was specifically designed to avoid conflicts with its Department of Defense neighbors, with the majority of the bill addressing military operations and overflights. The bill was incorporated into the "National Defense Authorization Act for Fiscal Year 2006,"[469] and signed into law on January 6, 2006.[470]

At approximately 100,000 acres (approximately 156 square miles), the Cedar Mountain Wilderness is both an odd neighbor to a military installation and the rare BLM managed Wilderness Area in the State of Utah to receive broad support from Utah's congressional delegation. What is never mentioned in the Act and not readily apparent from the text is that Wilderness designation was a means to an end. Wilderness was the means to block rail access to a proposed high-level nuclear waste storage facility on the nearby Skull Valley Goshute Indian Reservation. For several years, the Goshute Indians and a consortium of nuclear power companies known as Private Fuel Storage, had been proposing to develop a nuclear waste storage facility on the Goshute Reservation. Project proponents had planned to build a rail line through the area to deliver 44,000 tons of spent nuclear waste to the site.[471] The State of Utah was opposed to the facility but lacked jurisdiction over land use within the reservation's boundaries. With issuance of a license from the Nuclear Regulatory Commission considered imminent, the state was actively pursuing other means to thwart the project. Wilderness designation prevented rail line construction, and the waste storage project has not been built.

Unique circumstances make creation of the Cedar Mountain an unlikely model for future land protection efforts. However, this unique project is emblematic of what can be accomplished when divergent interests come together in response to a galvanizing event. Notably, SITLA retains inholdings within the Cedar Mountain Wilderness Area that have yet to be exchanged for federal public lands outside the area.

5.9. The Utah Recreational Land Exchange

The Utah Recreational Land Exchange Act (URLEA) was first introduced in 2004. While the House and Senate versions differed in their specifics, both proposed to exchange lands "surrounding the Colorado River in Grand County, Utah, Dinosaur National Monument in Uintah County, Utah, and the Book Cliffs area of Uintah County, Utah."[472] Five years later, President Obama signed a subsequent version of the bill into law.[473]

Under the URLEA, the State of Utah would convey to the United States 95 parcels of land containing 45,502 acres (79 parcels containing 40,611 acres of surface and mineral rights, plus 16 parcels containing 4,891 acres of mineral interest only), mostly along the Colorado River or in the scenic red rock country near Moab, Utah.[474] These lands are desirable to the BLM because they represent inholdings, the development of which would interfere with management of sensitive lands and scenic landscapes, including lands near Arches National Park. In return

for these lands, the State of Utah stands to receive 34 parcels of land totaling approximately 35,564 acres (approximately 56 square miles), mostly in southern Uintah County (24 parcels containing 33,664 acres (approximately 53 square miles) of surface and mineral rights, 9 parcels containing 1,290 acres of mineral interests only, and the surface estate for one 610 acre parcel). The lands conveyed to the State of Utah are generally contiguous with existing SITLA parcels and will consolidate control over lands containing oil shale and conventional fluid mineral resources.

As initially introduced, both versions of the URLEA called for an "equal value exchange,"[475] but it appears that lands were to be exchanged first and values equalized later. Both bills required the Secretary of the Interior to accept the state's offer, provided that offer was made within thirty days of the bill's enactment into law.[476] Both bills also included provisions for resolution of disagreements over value and for equalizing value if the exchange was not "approximately equal."[477]

The original bills notably omitted any mention of oil shale resources within the exchange area. With the feasibility of commercial oil shale development unknown, valuation became problematic. One position contended that because commercial oil shale development had not occurred and no promising technology was on the horizon, future development of these resources was speculative and should not be considered in property valuations. Others contended that the potential windfall to the recipient of oil shale-rich lands (the State of Utah) could be immense and should not be dismissed purely because of uncertainty.

To overcome these obstacles, the URLEA, as signed into law in 2009, reserves to the United States fifty percent of any payment received by the state as consideration for securing an oil shale lease or developing oil shale from the parcels conveyed to the state.[478] The share of rents and royalties reserved to the United States was intended to match revenue that would accrue to the United States if oil shale resources were leased by the BLM, thereby equalizing values.[479] In light of this provision and its apparent protection of federal interests, Congress directed that federal lands that would be conveyed to the state be appraised without regard to the presence of oil shale.[480]

Revisions have not resolved all issues associated with the exchange, or with parcel valuation in particular. Exchange finalization requires equalization of parcel values in accordance with the procedural requirements of FLPMA section 206.[481] Whether state sections conveyed to the federal government should be assessed based on potential future commodity development foregone by the state, or based on aesthetic and recreational values obtained by the BLM, remains in dispute. At the heart of this dispute is the same question that plagued oil shale valuation — what uses are reasonably foreseeable both with and without the exchange? While it is possible that state sections along the Colorado River could be sold, developed into high-end resort property, or that some stand-alone commodity production could occur on inholdings within federal lands, the likelihood of such development remains unclear and contested. Even if these questions are resolved, valuations are heavily influenced by commodity prices that are subject to fluctuations.

The exchange is also subject to NEPA review, which has been initiated but not completed. The BLM will complete an Environmental Assessment for the exchange, considering the exchange described in the legislation and a no action alternative.[482] NEPA is required because the exchange is subject to section 206 of FLPMA,[483] subparagraph (a) of which requires a public interest determination that is discretionary in nature.[484] Likewise, lands

may need to be added to or removed from the exchange in order to equalize values and the determination of which lands to add or remove also involves discretion.

The URLEA is remarkable for the breadth of support secured. In addition to support from federal, state, and local government officials, the exchange received support from a coalition of environmentalists including the Southern Utah Wilderness Alliance (SUWA), the Sierra Club, the Wilderness Society, the Wasatch Mountain Club, and the Natural Resource Defense Counsel.[485] In light of the broad support for the exchange, it is odd that the URLEA relied on FLPMA valuation procedures and did not include NEPA compliance language. But prior valuation controversies forced Congress to adopt a more formal and transparent approach. Therefore, URLEA stands as a caution that the consequences of overreaching, whether real or perceived, can linger beyond the life of any individual project. Future projects should bear these lessons in mind and consider carefully whether to include such language in future proposals. While such provisions are likely to make legislation more difficult to pass, their omission appears to represent an at least equally formidable barrier to exchange completion.

More then two years have passed since URLEA's enactment and the exchange's completion appears increasingly doubtful. Appraisals have not commenced due to administrative and budgetary issues within the BLM.[486] Perhaps URLEA's greatest legacy will be proof that the competing justifications for land use and procedural obstacles effectively preclude application of FLPMA's valuation process across broad landscapes. If procedural requirements block implementation of even relatively modest federal-state exchanges, larger scale exchanges cannot be expected to succeed absent congressional support. Federal-state land exchanges have come full circle with respect to valuation, but are unlikely to represent a useful path forward until legislation once again circles back upon itself, allowing large-scale exchanges to bypass highly technical appraisal and valuation requirements with negotiated agreements.

5.10. The Uintah and Ouray Indian Reservation Relinquishment and Selection

Eastern Utah is home to the Ute Indian Tribe, and many tribal members reside on the Uintah and Ouray Reservation. The reservation's exterior boundary is defined by the original boundaries of the Uintah Valley Reservation and the Uncompahgre Reservation, plus the Hill Creek Extension. The Hill Creek Extension is a portion of the original Uncompahgre Reservation that was removed from the original reservation but returned to the Tribe in 1948.[487] The return of lands within the Hill Creek Extension was subject to valid existing rights, including mineral rights held by the State of Utah. The State of Utah subsequently conveyed title to the surface of SITLA managed lands within the reservation, but retained title to subsurface minerals. SITLA therefore retains oil and natural gas interests located within the reservation's external boundary. The Tribe engages in energy development on the northern half of the reservation (north of the Uintah — Grand county line) and the Tribe and SITLA are cooperating with respect to mineral development north of the county line. The Tribe, however, is not pursuing development south of the county line because of significant wilderness and cultural values.[488]

Since 2006, the Tribe and SITLA have been working to relinquish school trust mineral rights in the southern portion of the reservation and replace relinquished lands with BLM administered minerals underlying tribal lands in the Uintah County portion of the reservation. These efforts have stalled because existing federal legislation does not allow the state to select BLM administered minerals within the reservation.[489] In response to this concern, Senator Orrin Hatch and Congressman Jim Matheson have introduced legislation that, if enacted into law,

would permit SITLA to relinquish its mineral lands in the Grand County portion of the reservation and select an equal number of BLM administered mineral acres in the Uintah County portion of the reservation.[490]

According to SITLA, the proposed transfer would involve approximately 18,000 acres on each side.[491] Under both the House and Senate versions of the bill, transfer would occur on an acre-for-acre basis, without regard for the value of the minerals involved.[492] The lands to be relinquished by the State of Utah are outside of the Most Geologically Prospective Area for oil shale and the nearby Hill Creek STSA, so unconventional fuel valuations do not appear to be a major issue. Nonetheless, both bills have been referred to committee where progress has stalled because of concerns over valuation. Specifically, some have expressed a concern that an acre-for-acre transfer could result in a windfall for the state and that formal mineral appraisals may be required.[493] In response to these concerns, the Tribe and SITLA have jointly developed new legislative language intended to avoid delays and uncertainty associated with mineral appraisals while simultaneously providing the federal government full value for its mineral estate.[494]

> Under the State / Tribal proposal, the United States would reserve an overriding interest in the lands conveyed to the State in an amount equal to the amount that would have been retained by the U.S. Treasury under the Mineral Leasing Act had they been retained in federal ownership. The State would retain an equivalent overriding royalty in the state trust lands relinquished to the United States. Each party would effectively be held harmless in comparison to its current position. If the BLM mineral lands conveyed to the State produce a windfall, the United States retains what it would otherwise have been entitled to had the lands stayed in public ownership. If the lands produce little or nothing, the parties share in that negative result.[495]

It remains to be seen whether the joint proposal will be introduced and enacted into law. However, revenue sharing was considered as part of the oil shale exchanges, Project Bold and again in the URLEA. If structured appropriately, revenue sharing agreements hold promise as a means to address both concerns over inequitable valuation and the transaction costs associated with mineral appraisals.

5.11. The Washington County Exchange

The Washington County Growth and Conservation Act was first introduced in 2006,[496] but failed to pass Congress. As introduced, the Act was intended to "establish wilderness areas, promote conservation, improve public land, and provide for high quality economic development in Washington County, Utah, and for other purposes."[497] As introduced, the Act would have authorized the sale of 4,300 acres of federal land in Washington County and the sale or exchange, at the discretion of the Secretary of the Interior, of at least 20,000 additional acres of federal land.[498] Proceeds from the land sales were to be used, in part, to acquire non-federal land that would be used to create a new National Conservation Area.[499] Sales would be expedited, being offered for sale no later than one year after enactment of the act.[500]

Opponents initially labeled the legislation "a miserable piece of legislation," "woefully inadequate," a "heist," a "crackpot scheme," and "subsidized sprawl."[501] After the legislative failure, Washington County decided to sponsor a Washington County Regional Quality Growth Initiative, known as Vision Dixie, to facilitate incorporation of public input into regional planning.[502] Vision Dixie provided significant community input from residents on their

preferences and concerns regarding community growth. The legislation's second incarnation[503] addressed many of these issues and concerns, such as expanding the amount of Wilderness Area protection and additional National Conservation Areas. Despite these revisions, the second attempt also failed to obtain broad congressional support.

After further meetings, public input, and stakeholder negotiations, a revised bill was incorporated into omnibus legislation where it received less opposition. The decrease in opposition from environmental groups appears to have little to do with the legislation's repackaging, and "likely reflects their engagement with the bill's sponsors who have reached out and provided some substantial environmental concessions."[504] Although environmental groups originally opposed the Act, they participated in lengthy discussions and negotiations that resulted in significant changes to the bill. By the time it passed, these groups supported the legislation as adequately protecting the environment.[505]

Legislation was finally enacted into law as part of the Omnibus Public Land Management Act of 2009.[506] Under Subtitle O, the Washington County Growth and Conservation Act designated sixteen new Wilderness Areas totaling 256,338 acres (approximately 400 square miles),[507] as well as two new National Conservation Areas totaling 112,808 acres (approximately 176 square miles).[508] New Wilderness Areas included 131,932 acres (approximately 206 square miles) on BLM lands, and 124,406 acres (approximately 194 square miles) inside Zion National Park. The Act also designed 165.5 miles of the Virgin River and its tributaries as Wild and Scenic Rivers.[509] As the product of compromises reflecting legitimate competing interests, the Act also authorized sale of public lands previously identified for disposal,[510] conveyed five specific parcels to local governments,[511] and authorized the sale of a 66.07 acre parcel of National Forest System land.[512] Five percent of sale proceeds go to SITLA,[513] and the remaining ninety-five percent are to be used to acquire high priority, biologically significant non-federal inholdings within Wilderness Areas and National Conservation Areas.[514]

Keys to the Washington County approach include a universally recognized need to address land management and growth in one of the west's fastest growing areas. This common need made the status quo untenable. Of equal importance, Senator Bennett was a strong supporter of the Vision Dixie process and the Washington County bill. Without his stewardship it is unlikely that the effort would have succeeded. The Vision Dixie process brought diverse constituents together in a problem-solving forum. Through hard work, all involved grew to better understand opposing interests and viewpoints; facilitating a shift from arguments based on position to efforts to satisfy interests. While all involved gave up something to achieve a workable plan, the end result reflected community values and has been held out as a procedural model for other Utah counties.[515]

5.12. The Red Rock Wilderness Bills

For more than two decades, wilderness advocates have unsuccessfully attempted to enact Utah-wide wilderness legislation. Utah Rep. Wayne Owens first introduced a version of the Utah Wilderness Coalition's citizens' proposal into Congress as the Utah BLM Wilderness Act of 1989, proposing designation of slightly less than five million acres.[516] New York Representative Maurice Hinchey assumed sponsorship of the bill in 1993,[517] and Senator Richard Durbin of Illinois first introduced a corresponding bill into the U.S. Senate in 1997.[518] Representative Hinchey and Sen. Durbin reintroduced an expanded bill into Congress in 1999.[519] The proposal has evolved over the years and the most recent version of the Red Rock Wilderness Bill would protect over almost 9.2 million acres of Utah land as wilderness,[520] including existing WSAs. Utah Representatives Jim Hansen and Enid Greene, proposing to

designate 2.1 million acres of wilderness in Utah, introduced competing legislation during 1995.[521] Utah's Senators Orrin Hatch and Robert Bennett introduced companion legislation in the Senate.[522] None of the various bills garnered sufficient congressional support, and within Utah, statewide BLM wilderness designation has not occurred.[523]

Notably, the Red Rock Wilderness Bill has grown in size over time and the bill's cosponsors have also increased.[524] But while national interest has increased, local congressional support remains elusive. None of Utah's House or Senate members supports the current legislation, and it is unlikely to come to a floor vote in the face of 100-percent home state opposition. One Utah Congressman has stated that he will not support any new wilderness designations within Utah unless such areas are first considered and approved by the Utah legislature.[525] While the Utah legislature has enacted strict conditions on its support for Wilderness Area designation involving National Forest System lands,[526] no such statutory limits have been set for support of BLM managed Wilderness. One influential state legislator has, however, drafted a three-page list of potential conditions for future support of Wilderness designation that, if complied with, would result in designations with nominal protective effect.[527] While the list is but the musings of one lawmaker, it likely reflects a larger body of opinion and its requirements, if enforced rigidly, could prove incompatible with future Wilderness Area designation.

The polarization and animosity produced by the Red Rock Wilderness Bill is contextually important for all other efforts at government regulation and environmental protection within Utah. The Red Rock Wilderness Bill process is also a lesson in how to stifle collaboration. The Bill is the product of a single perspective that, while valid in its own right, failed to adequately consider alternate perspectives or values. This narrowly focused approach guarantees opposition from communities that equate public land access with their economic and social wellbeing. It also allows those same communities to characterize the Bill as the product of outside special interests that are insensitive to the human cost of the proposal. This characterization in turn fuels equally unproductive opposing characterizations of wilderness opponents as pro-development extremists willing to leave nothing for future generations. This us-versus-them polarization and dehumanization of opposing views guarantees no progress can occur. As time has passed, positions have only hardened, solidifying the division between the pro-development and pro-wilderness camps. Vocal representatives of opposing views have squeezed moderate positions out, and future statewide efforts appear unlikely to succeed. Whether an approach like that utilized in Washington County can overcome these entrenched hostilities remains to be seen.[528]

5.13. Wild Lands

The recent Wild Lands Order, which is discussed in detail in section 2, failed to take advantage of lessons from earlier efforts. As noted above, the Order contains direction regarding how the BLM should conduct inventories for lands with wilderness characteristics, when to protect wilderness characteristics, and when to authorize activities that will result in the loss of wilderness characteristics.

The Secretary did not announce his intention to provide policy direction in advance of releasing the Order and did not seek input from the states or communities that perceive themselves to be impacted by the Order. But as noted with respect to the Grand Staircase-Escalante Nation Monument designation, the Secretary was hardly unaware of state and local concerns. Issuance, even if well informed with respect to state and local concerns, proved troublesome for the administration. Rural communities were caught off guard, and the lack of

outreach resulted in fundamental misunderstandings of what the Order requires and how it will impact rural communities. Like the Monument proclamation fourteen years earlier, the Order was seen as evidence of a federal government that had either forgotten or forsaken rural communities. Caught off guard by Order 3310, opponents of public land protection responded with a flurry of angry comments,[529] litigation,[530] and federal legislation to limit its impact.[531] The reaction should have come as no surprise because the federal government ignored lessons learned from establishment of the GSENM, where the Monument was sprung upon rural communities without prior notice or input.

The response, while referencing Order 3310, really targeted the larger issues of federal control of public lands and what some perceive to be a shift in management away from commodity production and motorized use towards resource protection. The nature of the response created two immediate problems: First, the DOI had to convince a hostile audience that Order 3310 did not create new obligations. This proved to be exceedingly difficult given the pervasive distrust of the federal government. Second, the DOI was powerless to respond to the underlying concerns and cede authority over public lands. The BLM remains obligated to inventory for wilderness characteristics, to consider these characteristics in the combined NEPA / FLPMA planning process,[532] to undertake multiple use, sustained yield management,[533] and to protect "scientific, scenic, historical, ecological, environmental, air and atmospheric, water resources, and archaeological values."[534] In short, even if the DOI withdraws the Order, the Order's opponents' concerns will remain unaddressed.

In hindsight, the federal government could have proceeded differently. The Secretary might have announced that the BLM needed to clarify how lands with wilderness characteristics are treated through the planning and NEPA process, that the DOI intended to issue guidance to ensure consistent administration of existing legal obligations, and that the DOI was not proposing to create any new Wilderness Areas. Public comments could have been taken. In inviting public comment, the DOI could have clarified its ongoing obligations and the scope of the guidance, noting that no change in law or regulation would be considered and site-specific decisions would not be entertained. Even if it still chose to forego public comment, the DOI would have had an opportunity to explain that comments were not necessary because guidance would not change existing obligations or create new requirements. There was also a missed opportunity for the DOI to explain that guidance could actually benefit local communities by expediting decision-making and making decisions more defensible. Discussing the problem before proceeding to the solution might have eased tensions, possibly changing both the tone and substance of state and local reactions. Given the already tense relationship between the BLM and many rural communities (at least within Utah), it was unlikely that advanced notice and better message management would have diffused all concerns, but better message management could have focused and improved the discussion.

The DOI has since redirected its efforts towards collaboratively identifying for protection areas where there is broad public support for possible congressional designation as Wilderness.[535] Early indications are that scars and distrust run deep, and the State of Utah has not identified any BLM manages lands it believes are worthy of formal Wilderness protections.

The controversy surrounding the Order and its legal effect was exacerbated by the media, which mischaracterized both the Order and its effect. News accounts blurred the line between Wilderness Areas and lands with wilderness character, and ignored the BLM's ongoing legal obligations.[536] Furthermore, the media mischaracterized DOI's post-Order efforts to clarify its intent, implying that efforts to protect lands with wilderness character had ceased.[537] While these problems appear to reflect mistakes made in the haste to report rather than intentional

mischaracterizations, the effect is largely the same. Inaccurate reporting could undermine future efforts to find common ground as effected communities find out that, contrary to what the media reported, the DOI remains committed to wilderness quality land protection. In an atmosphere already characterized by a distrust of the federal government, opponents may wrongly assume that the DOI has been less than forthright with respect to its intentions.

State government, local communities, and their representatives also misread or mischaracterized the Order. Much of the harsh response to Order 3310 was based on assumptions regarding the Order's content rather than informed opinion.[538] In the parlance of the west, people shot first and asked questions later — if they asked questions (or read the Order) at all. While such a reaction is not surprising given the tense relationships, officials on all sides can do better. Taking the time to understand the issues is not just good governance; it is key to collaboration and effective management across a fragmented landscape.

Issuance of Order 3310 as well as the response to the Order is, in short, an example of how not to promote collaboration on public land management issues. The federal failure to make the case for new guidance and their top-down approach guaranteed a strong negative response. Opponents failed to refrain from responding until carefully reading of the Order and associated Handbook direction, and in the process, either misunderstood or mischaracterized the actions at hand. From this flawed foundation they proceeded to ask the BLM to do the impossible and ignore its legal obligations. They then directed their message towards an already polarized base rather than engage in collaborative dialogue. The media grasped onto inflamed opinions without researching the facts, and in the process, stirred the flames of conflict. Effective communication and cooperation was essentially precluded by the actions of all sides.

5.14. Extension of State Selection to Lands in Conservation Areas

All western states received some federal lands upon admission to the Union, and as in Utah, these lands were dedicated to supporting state schools and public institutions. The Western States Land Commissioners Association (WSLCA) represents twenty-three state agencies that manage state trust lands. The twenty-three states represented by the WSLCA, to varying degrees, struggle to manage state trust lands across a landscape checkerboarded by federal, state, tribal, and private lands.

Traditionally, these challenges have been resolved through direct federal purchase of non-federal lands within the federal management unit or through land exchanges like those discussed above. Federal land purchases are likely to be constrained by budgetary limitations for the foreseeable future. Complex regulations, high transaction costs, and inadequate administrative agency funding, as evidenced by the examples above, complicate land exchange proposals. The WSLCA proposes to create a third option under which states could relinquish title to lands within federal lands managed for conservation purposes and claim comparable lands in lieu of the lands relinquished.

The WSLCA proposal builds upon existing federal law whereby states can select alternate federal public lands in lieu of lands granted to the states but unavailable due to preexisting conveyances of federal reservations.[539] However, in lieu selection is not currently available where conservation designations made after lands were conveyed to the states precludes development of state trust land inholdings. For example, in lieu selection is available for state trust lands within Indian Reservations, which generally predate conveyance to the states, but not for state trust lands within Wilderness Areas, which occurred after admission to the Union.

In essence, the proposal creates a right to exchange under an expedited process that would reduce the BLM's discretion and cumbersome valuation requirements. Under the WSLCA proposal, states would deed lands within conservation areas back to the federal government and select replacement lands from unappropriated federal public lands within the same state.[540] Rather than relying on detailed appraisals, valuation of relinquished and selected lands would be based on "roughly equivalent values" determined using less cumbersome valuation methods. Relinquishment and selection would be considered to be in accordance with FLPMA's public interest requirements and consistent with RMP requirements unless significant public values would be lost or impaired by the selection.[541] "Equities of the states should [also] be considered to the greatest degree permitted by applicable law,"[542] and the BLM would be required to act on state selections within a set period of time.[543] The WSLCA does not seek to exempt relinquishment and selection from NEPA's environmental review requirements provided that the federal government funds required studies.[544]

The WSLCA proposal has not been introduced as federal legislation and its future is far from certain. While the proposal will surely evolve over time, it could represent a promising path forward, especially if revenue sharing mechanisms are included to ensure that neither the states nor the federal government will receive an economic windfall. The proposal recognizes legitimate competing interests and could facilitate both conservation and development. As such, the proposal may represent a significant advancement in efforts to address challenges inherent in managing across checkerboarded western lands, thereby reducing administrative costs while simultaneously facilitating resource development and protection of sensitive landscapes.

The challenges inherent in reconciling energy development and resource protection are not new. Likewise, consolidating land ownership and preserving pristine landscapes are both valuable pursuits that, while often controversial, are not mutually exclusive. Resolving these challenges, while often characterized in dichotomous terms, does not demand polarizing choices. To the contrary, and as the examples discussed above demonstrate, benefits can accrue to broad constituents when these two goals are pursued jointly and collaboratively.

Collaboration has played an important role in projects that have successfully increased resource protection while also improving access to developable commodities. Past efforts are replete with lessons for current and future resource managers — lessons that must be heeded if stalemate is to be avoided. The three key lessons from the cases discussed above are that if collaborative efforts are to succeed: (1) a strong motivating factor must be present to make inaction untenable; (2) a broad and inclusive range of stakeholders must be involved and their concerns addressed through open, transparent, and respectful dialogue; and (3) a powerful and committed champion must be available to shepherd negotiations through the challenges that inevitably arise and to fruition.

In Utah, significant commercial-scale unconventional fuel development is unlikely to occur without either resource consolidation or collaborative management. Significant commercial-scale oil shale or oil sands development is also unlikely to occur unless calls for resource conservation are heeded. Similarly, protection of lands with wilderness character is unlikely to occur at any appreciable level unless wilderness advocates are wiling to compromise and support commodity production elsewhere. Through compromise, in short, all sides stand to improve their position. As the examples discussed above demonstrate, collaboration represents a potential path forward and an opportunity that should be explored further.

6. Conclusion

Utah is home to unconventional fuel resources that are aptly described as massive. If commercially developed, these energy resources have the potential to dramatically reduce dependence on foreign oil and reshape world oil markets. Despite this potential, challenges to commercialization are abundant and include management of resource values that would be lost or displaced by development. This report takes no position regarding the appropriateness of these tradeoffs, but instead seeks to examine management of lands with wilderness character and quantify their potential impact on unconventional fuel development. We also seek to identify lessons learned from prior land exchanges and resource protection efforts.

Recent controversies over management of lands with wilderness characteristics appear to be a symptom of a broader concern over public land management priorities. Utah and its citizens have legitimate reasons for concern over federal land management policies as roughly two-thirds of the land within the state is under federal ownership or control, and how those lands are managed directly impacts public land users and the state economy. Lands with wilderness character are but one of the competing uses that the BLM must balance.

Lost in the controversy is the fact that the BLM has, for decades, been addressing the challenges involved in managing lands with wilderness characteristics — and the BLM must continue to fulfill these obligations as a matter of law. How the BLM chooses to inventory and manage lands with wilderness characteristics will continue to be a matter of great public interest and the BLM will likely face legal challenges no matter which path it follows. The legal measure of the BLM's efforts will not be whether the BLM embraces or foregoes protection, but whether the BLM complies with the appropriate procedural requirements. Clear inventory and management guidance leads to more defensible decisions, reducing delays and the risk of inconsistent efforts. The absence of guidance invites inconsistent approaches as well as procedural questions that will result in delays. The vacuum created by incomplete or uncertain direction will only lead to more confusion and litigation. How these questions may play out, and their effects on the role Utah's unconventional fuel resources can play in energy planning deserve careful consideration.

Lands with wilderness character do not appear to be a major barrier to oil shale development within the Uinta Basin. Existing WSAs also pose little threat to commercial-scale oil shale development. The larger issue for prospective operators involves the surface use stipulations imposed on federal public lands in order to protect a broader suite of sensitive resources. This is not meant to imply that protective stipulations lack merit; but rather, to recognize the extent of the challenges posed by incompatible resource uses.

Within Utah, oil sands resources are more widely dispersed and occur more often in southeastern Utah, which has a higher concentration of lands with wilderness character. Nevertheless, barriers posed by existing WSAs overshadow the potential challenges presented by lands with wilderness character. And even in southeastern Utah, where WSAs and lands with wilderness character are more abundant, more widely applicable surface use stipulations represent the greater challenge.

Regardless of the unconventional fuel resource or its location, the regulatory challenges discussed in this report apply only on federal public lands. While BLM management prescriptions may indirectly restrict access to non-federal inholdings, these lands remain largely unencumbered by wilderness related issues even if they possess wilderness character. Consequently, as the federal government acts to protect resources on federal public lands, non-

federal lands may become more appealing to prospective energy developers. As noted in earlier ICSE reports, when federal lands are unavailable, operators may seek more accessible alternatives and development could shift from federal to non-federal land. A diminished federal role and voice in development discussions may complicate environmental stewardship and public involvement as well as efforts to develop integrated national energy and environmental policies.[545]

How we choose to address the public land management challenges ahead will directly impact those seeking to develop Utah's vast oil shale and oil sands resources, as well as those seeking to protect Utah's wild places. The difficulty associated with development of isolated state sections stands as a formidable barrier to energy development, as does uncertainty associated with management of areas with wilderness character. Likewise, the prospect of precluding economic development stands as an often-cited hurdle to protective land management. However, through carefully constructed collaborative initiatives these challenges can be resolved, both preservation and development interests satisfied, and fuels secured to provide for our common future. The likelihood of progress warrants careful consideration by those planning in anticipation of unconventional fuel development.

While Utah is replete with examples of successful collaboration, solutions to public land management challenges do not come in one-size-fits-all packages. Rote repetition of past processes will often produce unsatisfactory results. We must learn from past missteps, adapt, and improve.

"Blocking up" state trust lands in order to facilitate management and eventual development is not fundamentally at odds with public lands protection. As the Washington County Lands Bill shows, success can be achieved by addressing both goals and, in light of the current political climate, single-purpose projects may not meet with much success. Learning from past efforts, we believe that successful projects have three things in common: strong motivation to act, broad involvement and support, and a committed champion with sufficient power to bind the coalition and push action forward. Where one or more of these elements is missing, the project will most likely fail.

Federal land management emphasizing preservation is unlikely to occur unless other legitimate interests are recognized and addressed. In that respect, the Washington County approach shows promise as a possible path forward. While unilateral federal action under the Antiquities Act remains a distinct possibility, there is growing interest in limiting that authority and the prospect of future presidential proclamations creating new National Monuments may be more forceful as a driver for negotiation than as a tool for unilateral protection. However, the partisan, anti-government atmosphere that characterizes current political discourse as well as the rigid conditions some seek to place on future Wilderness Area designations make collaboration less likely and may leave few alternatives to unilateral executive action.

If collaborative approaches are to have any chance of success, the parties involved must separate interests from positions. Those who seek a path forward that allows all parties to protect or advance their broader interests will either need to identify common interests, or at a minimum, identify interests that are not mutually exclusive. Success will require creativity, commitment, and a willingness to listen as well as willingness to compromise. Successful projects will also need a champion who has the political capital to keep parties at the table as well as the dedication to shepherd to fruition a very difficult endeavor.

Success, if it is to occur, may need to start small. Rather than start with large or intractable problems that span thousands of miles and involve hundreds of stakeholders, parties may need to break issues into their component parts, create small successes, and build upon them. A small success can be the incremental step towards the larger goal. Focus on the big picture and avoid being bogged down by ideological differences, past confrontations, or reasons to say no and give up. Create agreements in principle and then seek ways to make those agreements conform to legal requirements. Starting small also keeps discussions focused on concrete and more manageable issues. The Washington County approach is instructive. It provided an opportunity for comprehensive legislation developed at a county rather than state level and satisfied divergent interests without succumbing to its own weight, as larger efforts have done.

Most importantly, all involved parties must be prepared to walk the proverbial mile in someone else's shoes. Because the use and management of federal public lands raises issues that are close to the heart of many, understanding contrary perspectives is the key to building respect, facilitating dialogue, and eventually developing mutually acceptable solutions. Alternative dispute resolution processes, like those exemplified by the successful examples discussed offer a model for a path forward with respect to many of the issues facing public land managers.

Appendix A — GIS Methodology

Methodology – Oil Shale

Data

Tables 1 and 2 in the report reflect the volume of oil shale by surface owner within Uinta Basin (Oil Shale Volume) and area of oil shale by surface owner within Uinta Basin (Oil Shale Area), which were created from the following shapefiles: Most Geologically Prospective Area (MGPA) (from the BLM, through ICSE), Surface Ownership (from the BLM, through AGRC), and an above 3,000 foot depth of oil shale (provided by Michael Vanden Berg, UGS). Also used was an oil shale thickness raster for the 25 gallons-per-ton (GPT) density (provided by Michael Vanden Berg, UGS).

Methodology

First, the thickness raster was reclassified, by classifying thickness values that were greater than or equal to 50, which corresponds to 24.75 feet. The values of 0 were coded as no data. The reclassified thickness raster was re-sampled, using the nearest neighbor method, to 804.67m^2 (160 acres), the given cell size for analysis. This was converted to a polygon feature layer. This shapefile was clipped by the 3,000 foot depth shapefile. The resulting polygon shapefile is the 25 GPT, greater than or equal to 25 feet thick, and under less than 3,000 feet of overburden. This is the basis for the acreage and volume calculations in the above-mentioned tables, acreage of non-WSA lands overlaying oil shale within the MGPA, and volume of oil shale under non-WSA lands within the MGPA.

This polygon was clipped by the MGPA to determine the area and volumes within and outside the MGPA. These layers, within and outside the MGPA, were intersected with the surface ownership layer. The acreage was calculated by converting the square meters field to acres in a new field. Oil shale ownership by area was calculated by summarizing the "ownership" field by the sum of the "acres" field. This was calculated within and outside the MGPA. To calculate oil shale ownership by volume, a new field was created to store the thickness of the oil shale in meters, which was calculated from the thickness in feet field. A field was created, "volume" (m^3), and calculated by multiplying the "area" (m^2) by the thickness (m). Another field was created, "barrels", and was calculated by (([volume] * 1,000,000 * 2.2) / 907,184.74) * 25 / 42 ("Resource Calculations" Excel Spreadsheet courtesy of Michael Vanden Berg, UGS). Values were created by summarizing on the ownership field by the sum of the volume field.

Methodology – Oil Shale Constraints Analysis

Data

The data used to calculate the acreage of wild lands overlaying oil shale and oil sands were the surface ownership and MGPA discussed above, and the non-WSA lands with wilderness characteristics shapefile, divided into "Possessing Wilderness Characteristics and Managed as Natural Areas," "Inventoried and Possessing Wilderness Characteristics," and "Inventoried but Lacking Wilderness Characteristics or Excluded due to Size or Ownership" categories (provide by the BLM Vernal Field Office).

Methodology

To calculate the acreage of non-WSA lands with wilderness characteristics overlaying oil shale, the wilderness characteristic layers were intersected with the ownership area and volume within the MGPA layer, created above. The three categories were selected separately and the ownership was summarized by the acreage for each wilderness category. Only areas larger than 10 acres were included in these totals because of alignment issues in the data provided, which produce acreages in ownership categories that do not actually intersect with the wilderness characteristic layer. The resulting table is the acreage of non-WSA lands with wilderness characteristics overlaying oil shale that conforms to the stipulations of analysis: 25 GPT, greater than or equal to 25 feet thick, and less than 3,000 feet deep.

The table summarizing the volume of non-WSA lands with wilderness characteristics overlaying oil shale summarizes these areas by volume, using the layer calculated above. The nature of the cells in the thickness shapefile creates additional alignment issues; and the minimum threshold was set to 20 acres. The volume in barrels was recalculated, using the formula: (([volume] * 1,000,000 * 2.2) / 907,184.74) * 25 / 42 ("Resource Calculations" Excel Spreadsheet courtesy of Michael Vanden Berg, UGS). The resulting table is the volume of non-WSA lands with wilderness characteristics overlaying oil shale that conforms to the stipulations of analysis: 25 GPT, greater than or equal to 25 feet thick, and less than 3,000 deep.

The constraint analysis required reclassification of the constraints layers provided. These numbers do not match the overall acres because misaligned slivers less than 20 acres were excluded. The 20 acre threshold was chosen due to the unknown quality and extent of the constraints layers. However, the constraints analysis includes the same spatial extent that the volume analysis considered. In addition to the 20 acre threshold, a visual inspection was performed in areas with suspect classification. Ambiguous areas were still present (e.g. was the constraint created to follow ownership lines or other features?). The resulting table is the acreage of the the maximum constraint overlaying oil shale that conforms to the stipulations of analysis: 25 GPT, greater than or equal to 25 feet thick, and less than 3,000 feet deep.

Methodology – Oil Sands Constraints Analysis

Data

Tables 3, 4, and 5 in the report relate to oil sands. The data used to calculate the acreage of non-WSA lands overlaying Special Tar Sands Areas (Oil Sands Constraint Table) and cumulative constraint overlaying STSAs (Cumulative Oil Sands Constraint Table) were the STSAs (from the BLM, through ICSE), Surface Ownership (from the BLM, through AGRC), and data from the following BLM Resource Management Plans (RMP): RMP Kanab Field Office, 2008; RMP Monticello Field Office, 2008; RMP Price Field Office, 2007; RMP Richfield Field Office, 2008; RMP Vernal Field Office, 2008. Constraint data included ACECs, WSAs, Wilderness, and National Parks (Utah BLM On-line Data and the National Park Service). The constraints were classified as noted above.

Methodology

The Oil Sands Constraint Table was generated by intersecting the STSAs with the Surface Ownership layer. Each STSA was unioned with the appropriate BLM field office non-WSA constraint layers. Each constraint class was summarized on ownership type by acreage. Because of data quality concerns and layer misalignment, only areas larger than 5 acres were included in these calculations.

Data Quality

The intersections of many constraint layer boundaries, which should be coincident, were not. The data quality issues are contained in data obtained from the BLM field offices, and the degree of error varies by field office and by constraint layer. The selection of acreage threshold to exclude from these analyses was according to the spatial characteristics of the individual input layers.

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Endnotes

[1] Oil sands are sometimes referred to as tar sands, and the two terms can be used interchangeably.

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[4] *Id*. at 8-9.

[5] *Id*. at 1.

[6] UNITED STATES ENERGY INFORMATION ADMINISTRATION, ANALYSIS OF CRUDE OIL PRODUCTION IN THE ARCTIC NATIONAL WILDLIFE REFUGE, REPORT NO. SR-OIAF/2008-03 (May 2008), *available at* http://www.eia.doe.gov/oiaf/servicerpt/anwr/methodology.html.

[7] BARTIS ET AL., *supra* note 3 at 9.

[8] RONALD C. JOHNSON, ET AL., UNITED STATES GEOLOGICAL SURVEY, ASSESSMENT OF IN-PLACE OIL SHALE RESOURCES IN THE EOCENE GREEN RIVER FORMATION, UINTA BASIN, UTAH AND COLORADO 1 (2010).

[9] Based on resources capable of producing at least 25 gallons per ton (GPT) of shale and less than 3,000 feet below the surface. If shales bearing 15 GPT and subject to the same overburden constraints were developed, available resources increase to 292.3 billion barrels. MICHAEL D. VANDEN BERG, UTAH GEOLOGICAL SURVEY, BASIN-WIDE EVALUATION OF THE UPPERMOST GREEN RIVER FORMATION'S OIL-SHALE RESOURCE, UINTA BASIN, UTAH AND COLORADO 7 (2008).

[10] UNIVERSITY OF UTAH INSTITUTE FOR CLEAN AND SECURE ENERGY, A TECHNICAL, ECONOMIC, AND LEGAL ASSESSMENT OF NORTH AMERICAN HEAVY OIL, OIL SANDS, AND OIL SHALE RESOURCES 3.15 (2007) (hereinafter ICSE UNCONVENTIONAL HYDROCARBON ASSESSMENT).

[11] *See* 43 U.S.C. §§ 1701(7) and 1702(c).

[12] BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, THE VERNAL FIELD OFFICE RECORD OF DECISION AND APPROVED RESOURCE MANAGEMENT PLAN 29-30 (2008) (hereinafter VERNAL ROD). All RODs for RMPs within Utah that were revised during 2008 contain substantively equivalent provisions. The RMPs do not indicate where application of these conditions would be inappropriate. "Where appropriate" appears to be referencing the BLM's ability to grant waivers, exemptions, and modifications to lease stipulations set forth in RMPs. *See* 43 U.S.C. §§ 3101.1-3 and 1-4.

The DOI, in determining which federal public lands would be made available for application for commercial oil shale and oil sands leasing, considered an alternative under which all lands subject to "no surface disturbance or seasonal limitations . . . for oil and gas leasing" would be unavailable for oil shale or oil sands leasing. BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS / RECORD OF DECISION (ROD) FOR OIL SHALE AND TAR SANDS RESOURCES TO ADDRESS LAND USE ALLOCATIONS IN COLORADO, UTAH, AND WYOMING AND FINAL ENVIRONMENTAL IMPACT STATEMENT 17 (2008) (hereinafter OIL SHALE AND TAR SANDS ROD). In contrast, the selected alternative allows for leasing of areas with highly restrictive oil and gas leasing stipulations, explaining that authorizing leasing of such lands would "allow the agency the opportunity to choose and offer leases when a technology is proposed that can be used compatibly with the resource values in question." *Id*. While lands subject to no surface disturbance or seasonal limits remain available for application for commercial leasing under the OIL SHALE AND TAR SANDS ROD, the different treatment of such stipulations across alternatives indicates that they were intended to apply to oil shale and oil sands development.

[13] JOHN RUPLE AND ROBERT KEITER, TOPICAL REPORT: LAND AND RESOURCE MANAGEMENT ISSUES RELEVANT

TO DEPLOYING IN-SITU THERMAL TECHNOLOGIES 13 at 24 (oil shale) and 30 (oil sands) (2011) (hereinafter LAND USE TOPICAL REPORT) (numbers may vary between reports because of rounding and or variation in base mapping data accuracy).

[14] GEORGE CAMERON COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW 147 (5th ed. 2002).

[15] *See* LAND USE TOPICAL REPORT, *supra* note 13, at 40 (2011).

[16] *H.R. 4968, To Provide for the Exchange of Certain Lands in Utah: Hearing Before the Subcomm. on National Parks, Recreation, and Public Lands of the House Comm. on Res.*, 107th Cong. 10 (2d. Sess. 2002) (statement of Rep. Matheson).

[17] COGGINS ET AL., *supra* note 14, at 147.

[18] *Id*.

[19] *See generally*, CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992) (discussing how ancient public land laws continue to affect modern management decisions).

[20] 30 U.S.C. §§ 21-42.

[21] 43 U.S.C. §§ 161-284 (repealed 1976).

[22] 43 U.S.C. §§ 321-39.

[23] 43 U.S.C. § 224 (repealed 1976).

[24] 43 U.S.C. §§ 291-302 (repealed 1976).

[25] PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 797 (1968).

[26] *Id.* at 385.

[27] Dep't of the Interior, Public Land Statistics 2000, Table 3-2 (2001) *available at* http://www.blm.gov/public_land_statistics/.

[28] 28 Stat. 107 (1894).

[29] GATES, *supra* note 25, at 804.

[30] 28 Stat. 107 at §§ 6-8 and 12. States also hold title to lands lying below the ordinary high water mark of bodies of water that were navigable at the date of statehood. *See* Utah Div. of State Lands v. United States, 482 U.S. 193 (1987). These lands, which are often referred to as "sovereign lands" are managed under the public trust mandate which is broader than the mandate applicable to trust lands and which therefore allows for a broader range of uses. *See* UTAH CODE ANN. § 65A-10-1(1). This report is concerned with state trust lands rather than sovereign lands, and does not refer to sovereign lands unless expressly noted.

[31] 28 Stat. 107 at §§ 7-8, and 12. Approximately 94,000 additional acres (approximately 150 square miles) of land were granted to the state under separate statutory authority.

[32] GATES, *supra* note 25, at 806. The State of Utah also holds title to the beds of Utah's navigable lakes and rivers. These are known as "sovereign lands" and total approximately 1.5 million acres and 2,200 miles of shoreline, including the bed of the Great Salt Lake, Utah Lake, Bear Lake, and portions of the Colorado, Green, Jordan, and Bear rivers.

[33] The Federal government administers 66.8 percent of the mineral estate and 64.5 percent of the surface estate. BLM administered public lands account for 43.3 percent of all lands within Utah. Dep't of the Interior, Public Land Statistics, Table 1-3 (FY2008) *available at* http://www.blm.gov/public_land_statistics/.

[34] UTAH DEP'T OF NATURAL RESOURCES, PROJECT BOLD: ALTERNATIVES FOR UTAH LAND CONSOLIDATION AND EXCHANGE 3, 14-15 (1982) (hereinafter PROJECT BOLD ALTERNATIVES).

[35] 28 Stat. 107, 109 (1894).

[36] United States v. Sweet, 245 U.S. 563, 567 (1918).

[37] *Id*.

[38] 43 U.S.C. § 852.

[39] *See* Andrus v. Utah, 446 U.S. 500 (1980).

[40] *Id*. at 503.

[41] *Id*., citing 43 U.S.C. § 315f.

[42] Utah v. Kleppe, 586 F.2d 756, 767 (10th Cir. 1978).

[43] Andrus v. Utah, 446 U.S. at 506.

[44] CAMPBELL GIBSON AND KAY JUNG, UNITED STATES CENSUS BUREAU, HISTORICAL CENSUS STATISTICS ON POPULATION TOTALS BY RACE, 1790 TO 1990, AND BY HISPANIC ORIGIN, 1970 TO 1990, FOR THE UNITED STATES, REGIONS, DIVISIONS, AND STATES, Table 1 (2002) *available at* http://www.census.gov/population/www/documentation/twps0056/twps0056.html.

[45] For current population estimates, *see* www.census.gov.

[46] Until ratification of the 16th Amendment in 1913, the Federal government lacked the power to levy and collect income taxes.

[47] *See generally*, CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST (1992).

[48] GEORGE CAMERON COGGINS AND ROBERT L. GLICKMAN, PUBLIC NATURAL RESOURCES LAW, § 2.9 (2d ed. 2010).

[49] Steven M. Davis, *Preservation, Resource Extraction, and Recreation on Public Lands: A View From the States*, 48 NAT. RESOURCES J. 303, 332 (2008).

[50] ROBERT B. KEITER, KEEPING FAITH WITH NATURE: ECOSYSTEMS, DEMOCRACY, AND AMERICA'S PUBLIC LANDS 287 (2003).

[51] E-mail from John Andrews, Associate Director/Chief Legal Counsel, Utah School & Institutional Trust Lands Administration, to John Ruple, University of Utah (Sept. 28, 2011, 11:18:10 AM MDT) (on file with authors).

[52] *Id*.

[53] *Id*.

[54] UTAH CODE ANN. § 53C-1-102(2); *see also* LAND USE TOPICAL REPORT, *supra* note 13, at 32-40 (contrasting federal and state land management objectives).

[55] *See* JUDITH A. LAYZER, NATURAL EXPERIMENTS: ECOSYSTEM-BASED MANAGEMENT AND THE ENVIRONMENT 281 (2008).

[56] Negotiated settlements to litigation over both the federal oil shale leasing rule and the determination of which federal lands are available for application for commercial leasing require the DOI to revisit these decisions. *See* Colorado Envtl. Coalition v. Salazar, No. 09-cv-00091-JLK (D. Colo. Feb. 25, 2011) (settlement agreement) (requiring the DOI to undertake leasing rule revision efforts) and Colorado Envtl. Coalition v. Salazar, No. 09-cv-00085-JLK (D. Colo. Feb. 15, 2011) (settlement agreement) (requiring the DOI to undertake efforts to revise determination of which lands are available for application for commercial oil shale leasing).

[57] *See* LAND USE TOPICAL REPORT, *supra* note 13.

[58] Dept of the Interior, Bureau of Land Management, Treasured Landscapes Discussion Paper 1 (2010)

(on file with authors).

[59] 43 U.S.C. §§ 1716(a) and (b).

[60] *See e.g.*, Center for Biological Diversity v. Interior, 581 F.3d 1063 (9th Cir. 2009) (discussing NEPA on land exchange proposal).

[61] Procedural requirements for land exchanges are discussed in more detail in LAND USE TOPICAL REPORT, *supra* note 13, at 78-84.

[62] 16 U.S.C. § 1131.

[63] 16 U.S.C. § 431.

[64] 42 U.S.C. § 15927(n)(1).

[65] 42 U.S.C. § 15927(n)(2).

[66] 42 U.S.C. § 15927(n)(3) (requiring implementation to satisfy the requirements of FLPMA section 206 (43 U.S.C. § 1716)).

[67] Secretarial Orders are *available at* http://elips.doi.gov/app_so/so.cfm/.

[68] Department of the Interior, Secretarial Order 3310, *Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management* § 4 (Dec. 22, 2010) (hereinafter Order 3310).

[69] *See e.g.*, Rainer Huck, *De-fund the BLM*, DESERET NEWS, Jan. 11, 2011, at A10, 2011 WLNR 34974; Jack Johnston, *The Wilderness Skunk*, DESERET NEWS, Jan. 7, 2011, at A14, 2011 WLNR 393230; and Thomas W. Brown, *Tyrannical Policies*, DESERET NEWS, Jan. 3, 2011, at A8, 2011 WLNR 88584.

[70] *See e.g.*, First Amended and Supplementary Complaint, Uintah County v. Salazar, No. 2:10-CV-00970-CW (D. Utah 2010). *See also*, Complaint, Utah v. Salazar, No. 2:11-CV-.00391-DB (D. Utah 2011).

[71] *See e.g.*, Pub. L. No. 112-10, 125 Stat. 38 (2011) (defunding Order implementation temporarily); see also, S. 1027, 112th Cong. (2011) (proposing to rescind Order 3310 permanently).

[72] *See* Pub. L. No. 112-10, 125 Stat. 38 (2011) (fiscal year 2011), and Pub. L. No. 112-74, 125 Stat 786 (2011) (fiscal year 2012).

[73] 16 U.S.C. § 1131(a).

[74] 16 U.S.C. § 1131(c).

[75] The Forest Service is part of the Department of Agriculture.

[76] 16 U.S.C. § 1132(a) and (b).

[77] 16 U.S.C. § 1132(c).

[78] 16 U.S.C. §§ 1132(b) (National Forest System lands), 1132(c) (National Park System lands), and 1132(e) (modifications to designated Wilderness areas).

[79] 16 U.S.C. § 1131(a); *see also* § 1133(b) (directing the managing agency to preserve wilderness character).

[80] 16 U.S.C. § 1133(c).

[81] *Id*.

[82] 16 U.S.C. § 1134(a).

[83] 16 U.S.C. § 1134(b).

[84] 16 U.S.C. § 1134(a).

[85] H.R. Rep. No. 94-1163 (1976).

[86] *Id.*

[87] *Id*. This mandate is reflected in 43 U.S.C. §§ 1701(a) and 1732(a).

[88] 43 U.S.C. § 1701(a)(1).

[89] H.R. Rep. No. 94-1163 (1976).

[90] *Id.*

[91] 43 U.S.C. § 1701(a)(2).

[92] Areas of Critical Environmental Concern (ACECs) are distinct from wilderness. "[T]he BLM does not structure its critical area decisions to protect wilderness characteristics, nor does designation as a critical area necessarily imply the presence of wilderness characteristics." Oregon Natural Desert Ass'n v. BLM, 625 F.3d 1092, 1103 (9th Cir. 2010).

[93] FLPMA § 201 is codified at 43 U.S.C. § 1711 (parenthetical in original, emphasis added).

[94] 43 U.S.C. § 1712(a).

[95] *Id.*

[96] 43 U.S.C. § 1712(c).

[97] 43 U.S.C. § 1712(e)(1) (parenthetical in original).

[98] 43 U.S.C. § 1732(a).

[99] 43 U.S.C. § 1732(b).

[100] 43 U.S.C. § 1702(c).

[101] Utah v. Andrus, 486 F.Supp. 995, 1003 (D. Utah 1979).

[102] Rocky Mountain Oil and Gas Ass'n v. Watt, 696 F.2d 734, 738 (10th Cir. 1982) ("the BLM need not permit all resource uses on a given parcel of land.") *citing with approval* Utah v. Andrus, 486 F.Supp. 995, 1003 (D. Utah 1979).

[103] 43 U.S.C. § 1702(h).

[104] 43 U.S.C. § 1701(a)(8).

[105] 43 U.S.C. § 1701(a)(12) (internal citations omitted).

[106] JEFFREY O. DURRANT, STRUGGLE OVER UTAH'S SAN RAFAEL SWELL: WILDERNESS, NATIONAL CONSERVATION AREAS, AND NATIONAL MONUMENTS 67 (2007).

[107] *See e.g.*, Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 66 (2004) (noting the BLM's discretion in determining how to protect wilderness values within WSAs) and Theodore Roosevelt Conservation Partnership v. Salazar, 616 F.3d 497, 518 (D.C. Cir. 2010) (upholding the BLM's multiple use balancing of competing demands for energy development and resource protection).

[108] As quoted in DURRANT, *supra* note 106, at 86.

[109] 43 U.S.C. § 1782.

[110] 43 U.S.C. § 1784 addresses BLM's obligations with respect to management of wilderness quality lands located within Alaska.

[111] 43 U.S.C. § 1782(a).

[112] *Id*.

[113] *Id.*

[114] 43 U.S.C. § 1782(b).

[115] 43 U.S.C. § 1782(c).

[116] The term "Wilderness Study Area" is not defined by statute, but draws its meaning from an earlier edition of the BLM Handbook, which defined WSAs 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 Handbook H-8550-1, Interim Management Policy for Lands Under Wilderness Review, Glossary, p. 5. *See also*, Letter from 55 Natural Resource Law Professors to Secretary of the Interior Ken Salazar 2 (Sept. 30, 2009) (addressing the Department of the Interior's authority to designate and manage WSAs and other potential wilderness areas) (on file with authors).

[117] Bureau of Land Management, Dep't of the Interior, Wilderness Study Areas. http://www.blm.gov/wo/st/en/prog/blm_special_areas/NLCS/wilderness_study_areas.html

[118] UTAH CODE ANN. § 63J-4-401(6)(b).

[119] *Id.*

[120] *See* UTAH CODE ANN. § 63J-4-401.

[121] UTAH CODE ANN. § 63J-8-103(2).

[122] Senator Mike Lee, Statement on New Wilderness Recommendations (Nov. 14, 2011) 2011 WLNR 23670853.

[123] Memorandum, From Rep. Mike Noel, To: Members of the Governor's Counsel on Balanced Resources, Re: Legislative Checklist for County Land Use Plans (Sept. 20, 2011) (on file with authors).

[124] *See* 16 U.S.C. § 1131(c).

[125] *See generally*, Utah v. Babbitt, 137 F.3d 1193, 1198 (10th Cir. 1998) (recounting inventory and management history).

[126] *See* BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, BLM UTAH FINAL INITIAL WILDERNESS INVENTORY (1979).

[127] *Id*. at ii.

[128] BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, INTENSIVE WILDERNESS INVENTORY, FINAL DECISION ON WILDERNESS STUDY AREAS 2 (1990).

[129] Bureau of Land Management, Dep't of the Interior, List of WSAs in Utah *available at* http://www.blm.gov/pgdata/etc/medialib/blm/ut/natural_resources/nlcs/wilderness_study_areas.Par.38380.File.dat/WSAs%20in%20Utah.pdf. Seventy-nine of the eighty-seven WSAs in Utah were created under section 603; seven of the remaining WSAs were created under section 202; and the authority for Joshua Tree WSA is not stated. *Id*.

[130] Settlement Agreement Between Plaintiffs and Federal Defendants, Utah v. Norton, 2:96CV0870B 6-7 (Sept. 9, 2005) (hereinafter Utah v Norton Settlement).

[131] 43 U.S.C. § 1782(c). WSAs are, however, subject to valid existing rights. *Id*.

[132] Bureau of Land Management, Dep't of the Interior, Public Land Statistics, Table 1-4, Public Lands Under Exclusive Jurisdiction of the Bureau of Land Management, Fiscal Year 1996 *available at* http://www.access.gpo.gov/blm/pls96/contents.html.

[133] Utah Wilderness Coalition, Wilderness at the Edge: A Citizen Proposal to Protect Utah's Canyons and Deserts (1989) *available at* http://action.suwa.org/site/PageServer?pagename=WATE_about.

[134] Southern Utah Wilderness Alliance, The Story of America's Red Rocks Wilderness Bill, http://www.suwa.org/issues/arrwa/the-story-of-americas-red-rock-wilderness-act/.

[135] H.R. 1500, 101st Cong. (1989).

[136] The Story of America's Red Rocks Wilderness Bill, *supra* note 134.

[137] *Id.*

[138] *Id.*

[139] H.R. 1916, 112th Cong. (2011).

[140] H.R. 1745, 104th Cong. (1995).

[141] S. 884, 104th Cong. (1995).

[142] Smaller designations did occur. Approximately 2,700 acres of the Beaver Dam Mountains Wilderness area are located in Washington County, Utah, north of the Virgin River Gorge and Interstate I-15. Approximately 20,000 acres of the Paria Canyon/Vermillion Cliffs Wilderness Area is within Utah, roughly forty-five miles east of Kanab. Both the Beaver Dam Mountains and Paria Canyon/Vermillion Cliffs Wilderness areas were designated in the Arizona Wilderness Act of 1984. Designated in 2000, 5,120 acres of the Black Ridge Canyons Wilderness Area, which straddles the Utah-Colorado border, are within Utah. The Cedar Mountain Wilderness Area is the only BLM managed wilderness area located entirely within Utah and encompasses approximately 100,000 acres of public land 50 miles due west of Salt Lake City, and was designated in January 2006. Certain National Forest System lands have also been designated as Wilderness.

[143] Bureau of Land Management, Dep't of the Interior, Utah Wilderness Inventory vii (1999) *available at* http://www.blm.gov/ut/st/en/prog/blm_special_areas/utah_wilderness/wilderness_inventory.html (quoting a June 1996 letter from Interior Secretary Bruce Babbitt to Representative James Hansen of Utah, Chairman of the Public Lands Subcommittee of the House Resources Committee).

[144] Utah v. Norton Settlement, *supra* note 130, at 7.

[145] Utah Wilderness Inventory, *supra* note 143, at xv. In response to public comment and subsequent agency review of inventory files and field evaluations, the BLM continued to refine the 1999 reinventory from 2001 through 2005. Revision documents are *available at* http://www.blm.gov/ut/st/en/prog/blm_special_areas/utah_wilderness/wilderness_inventory.html/.

[146] Utah Wilderness Inventory, *supra* note 143, at vii.

[147] *Id.*

[148] Utah v. Norton Settlement, *supra* note 130, at 1. The school trust lands were surrounded by the WIAs.

[149] *Id.* at 2; *see also* 16 U.S.C. § 1132(b) ("recommendations of the President for designation as 'wilderness' shall become effective only if so provided by an act of Congress.").

[150] Utah v. Norton Settlement, *supra* note 130, at 1.

[151] *See* Utah v. Babbitt, 137 F.3d 1193, 1199-00 (10th Cir 1998).

[152] *Id.* at 1214.

[153] *Id.* at 1216.

[154] The parties first entered into a consent decree, which was vacated and replaced with the settlement agreement discussed herein. The consent decree and settlement agreement are substantively equivalent. *See* Utah v. Norton, 2006 WL 2711798 (D. Utah 2006).

[155] Utah v. Norton Settlement, *supra* note 130, at 6-7 (citations and parentheticals omitted).

[156] *See* Utah v. Norton, 2006 WL 2711798 (D. Utah 2006) *aff'd* 535 F.3d 1184 (10th Cir. 2008).

[157] *Id.* at *17.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.* at *19 (emphasis in original).

[162] *Id.*

[163] *Id.* at *20.

[164] *Id.* at *22.

[165] *Id.* at *23.

[166] Utah v. Dep't of the Interior, 535 F.3d 1184, 1186 (10th Cir. 2008).

[167] Oregon Natural Desert Ass'n v. BLM, 625 F.3d 1092 (9th Cir. 2010).

[168] *Id.* at 1110.

[169] *Id.* at 1111.

[170] *Id.* at 1098-99 (internal citations omitted).

[171] "The approach of settling environmental disputes, whether through formal legal settlements approved by a court or less formal government-to-government memoranda of understanding, [was] a hallmark of the Bush Administration." Sarah Krakoff, *Constitutional Conflicts on Public Lands: Settling the Wilderness*, 75 U. COLO. L. REV. 1159, 1160 (2004). Whether such agreements are binding on future administrations depends on the agreement's form and constitutionality. Some contend that the Order violates the Settlement. *See e.g.*, First Amended and Supplementary Complaint, Uintah County v. Salazar, No. 2:10-CV-00970-CW (D. Utah 2010) and Complaint, Utah v. Salazar, No. 2:11-CV-.00391-DB (D. Utah 2011). But the stronger argument is that the Order supersedes the Settlement.

The *Utah v. Norton* Settlement is a private settlement, not a consent decree. Unlike consent decrees, private, out-of-court agreements generally are neither enforceable nor binding on future administrations. *See e.g.,* Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295 (1987). Natural resource law professors across the country wrote a letter to Secretary Salazar, arguing that the *Utah v. Norton* Settlement 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 . . . ." Letter from 55 Natural Resource Law Professors to Secretary Ken Salazar, Dep't of the Interior 5 (Sept 30, 2009) (on file with authors).

Even if the Settlement was intended to bind future administrations, it is susceptible to legal challenge. Notably, even if the agreement had been a consent decree, consent decrees may be unconstitutional when they go beyond what a court could have issued in a litigated judgment and when the executive agent lacks authority to bind future legal discretion. McConnell at 301-03. Nothing in FLPMA gives the Interior Secretary authority to bind his successors with regard to land-management policy; but rather, requires land use planning to "remain subject to reconsideration, modification, and termination through revision by the Secretary or his delegate." ANDREW HARTSIG, *Settling for Less: Utah v. Norton*, 2004 UTAH L. REV. 767, 786 (2004) (*citing* 43 U.S.C. § 1712(e)(1)). An additional concern involves an agency's authority to disclaim powers that no court has ever required them to disclaim. *See* Krakoff at 1160-61. In this case, the Settlement and subsequent internal guidance included a nation-wide disclaimer of authority to inventory lands for the purpose of protecting them as wilderness, despite longstanding DOI policy and court precedent. *See* Utah v. Norton Settlement, *supra* note 130. *See also* Memorandum from Bureau of Land Management Director to Assistant Directors and Field Officers, No. 2003-195 (June 20, 2003). Additionally, the prospect of one administration binding a future administration and effectively removing a constitutional question from the courts may overstep constitutional boundaries. Krakoff, at 1188-90.

[172] 625 F.3d at 1111 (internal citations omitted).

[173] *See* Utah v. Kempthorne, No. 06-4240 (10th Cir.).

[174] Phil Taylor, *Utah Counties File Lawsuit Over BLM Policy*, GREENWIRE, Mar. 23, 2011, *available at* http://www.eenews.net/public/Greenwire/2011/03/23/3?page_type=print.

[175] *Id*. (*quoting* Judge Benson).

[176] BLM, Wild Lands Inventory and Planning Guidance Questions and Answers, http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.24135.File.dat/wilderness_Q_and_A.pdf.

[177] *See* Utah v. Norton Settlement, *supra* note 130, at 12-13.

[178] Utah v. Norton, 2006 WL 2711798, *23 (D. Utah 2006) *aff'd* 535 F.3d 1184 (10th Cir. 2008).

[179] Oregon Natural Desert Ass'n v. BLM, 625 F.3d 1092, 1115 (9th Cir. 2010).

[180] In a letter dated April 11, 2003 to Senator Robert Bennett, Secretary Norton confirmed that although BLM was without authority under FLPMA § 603 to establish WSAs after 1991, the BLM may still inventory lands with wilderness values under FLPMA§ 201. The planning process under FLPMA § 202 can then be used to determine how best to manage lands with wilderness values in the context of "multiple use." Newsletter, Denise A. Dragoo, Snell & Wilmer, Utah Public Land Settlements – Impact on BLM Land Use Plan Revisions 3, *available at* http://www.swlaw.com/assets/pdf/publications/2003/06/01/DDragooLandNewlsetter.pdf.

[181] These field offices are: Kanab, Moab, Monticello, Price, Richfield, and Vernal.

[182] The BLM is obligated to give a "hard look" to substantive comments raised during scoping for RMP revisions, including those involving the extent of and management applied to Non-WSA Lands with Wilderness Characteristics. Oregon Natural Desert Ass'n, 625 F.3d 1092, (9th Cir. 2010).

[183] Because the RMPs responded to assertions of wilderness quality made by members of the public, the inventory did not address all BLM lands within the planning area that may potentially possess wilderness characteristics. While the most promising lands have almost certainly been identified, the BLM may need to evaluate any lands that were not previously reviewed in order to comply with Order 3310.

[184] *See e.g.*, Bureau of Land Management, Dep't of the Interior, Moab Field Office Draft Resource Management Plan and EIS X-36 (2007) (hereinafter Moab DEIS).

[185] *See* Utah v. Norton Settlement, *supra* note 130, at 6-7.

[186] Bureau of Land Management, Dep't of the Interior, Moab Field Office Record of Decision and Approved Resource Management Plan 27-28 (2008) (hereinafter Moab ROD).

[187] Bureau of Land Management, Dep't of the Interior, Kanab Field Office Record of Decision and Approved Resource Management Plan 27-28 (2008) (hereinafter Kanab ROD); Bureau of Land Management, Dep't of the Interior, Price Field Office Record of Decision and Approved Resource Management Plan 36 (2008) (hereinafter Price ROD).

[188] Bureau of Land Management, Dep't of the Interior, Monticello Field Office Record of Decision and Approved Resource Management Plan 37 (2008) (hereinafter Monticello ROD).

[189] Bureau of Land Management, Dep't of the Interior, Richfield Field Office Record of Decision and Approved Resource Management Plan 32 (2008) (hereinafter Richfield ROD).

[190] Vernal ROD, *supra* note 12, at 32-33.

[191] *Id*. at 33.

[192] Bureau of Land Management, Dep't of the Interior, Vernal Field Office Proposed Resource Management Plan and Final EIS 4-206 – 207 (2008) (hereinafter Vernal FEIS).

[193] *Id*. at 4-220 – 221.

[194] Vernal ROD, *supra* note 12, at 32.

[195] *Id*., at 34.

[196] Bureau of Land Management, Dep't, Moab Field Office Proposed Resource Management Plan and Final EIS, Appendix P, page 3 (2008). Notably, all of Beaver Creek is managed for wilderness character, even though the BLM identified 2,096 acres as impracticable for such management. *Id*.

[197] In the Master Leasing Plan for the Vernal Field Office, the BLM Director "affirmed the BLM's wilderness character review process and stands firmly on its subsequent decisions regarding the selection and management of the non-WSA lands with wilderness characteristics." Master Leasing Plan Assessment, Vernal Field Office, Attachment 1 at 3 (Dinosaur Lowlands assessment area) and Attachment 2 at 3 (containing identical language regarding the Eastern Book Cliffs assessment area) (Nov. 2010).

[198] Bureau of Land Mgmt., Dept. of the Interior, Wild Lands Inventory and Planning Guidance Questions and Answers (no date) *available at* http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.24135.File.dat/wild_lands_Qs_and_As.pdf.

[199] Order 3310, *supra* note 68, at § 4 (emphasis added).

[200] "Wild Lands" and "Natural Areas" are functionally equivalent. Both are defined utilizing the same criteria and reflect a discretionary management decision emphasizing protection of wilderness characteristics over commodity production.

[201] Wild Lands Inventory and Planning Guidance Questions and Answers, *supra* note 198.

[202] *See* Manual 6301, Wilderness Characteristics Inventory; Manual 6302, Consideration of Lands with Wilderness Characteristics in the Land Use Planning Process; and Manual 6303, Consideration of LWCs for Project-Level Decisions in Areas Not Analyzed in Accordance with BLM Manual 6302.

"The BLM Manual System is a permanent record of written policy and procedural instruction for BLM employees. It contains material having continuing application to BLM programs. Instructions in BLM Manuals are *mandatory* unless the text states otherwise." BLM Manual 1221.13 (emphasis in original).

[203] Bureau of Land Management Instruction Memorandum 2011-154 (July 25, 2011) (hereinafter IM 2011-154).

Instruction Memorandums "are of a short-term, temporary nature." BLM Manual 1221.14. "Instruction Memorandums provide new policy or procedural instructions which must reach BLM employees quickly or interpret existing regulations, policies, or instructions and are used when there is not enough time to issue a Manual Release. IM's are generally used for transmitting material of an urgent nature." BLM Manual 1221.14(A).

[204] *See* Pub. L. No. 112-74, 125 Stat. 786 (2011).

[205] Order 3310, *supra* note 68, at § 4.

[206] IM 2011-154 Attachment 2, Considering Lands with Wilderness Characteristics in the BLM's Land Use Planning Process (hereinafter IM 2011-154, Attachment 2).

[207] Order 3310, *supra* note 68, at 2.

[208] The *Utah v. Norton* Settlement expressly recognizes "BLM's authority under FLPMA to prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values, as described in FLPMA Section 201. These resources and other values include, but are not limited to the characteristics that are associated with the concept of wilderness." Utah v. Norton Settlement, *supra* note 130, at 13.

[209] BLM Manual 6301.14.B. *See also* IM 2011-154 and IM 2011-154 Attachment 1, Policy on Conducting Wilderness Characteristics Inventory on BLM Lands (hereinafter IM 2011-154, Attachment 1).

[210] BLM Manual 6301.14.B.

[211] *See* IM 2011-154 Attachment 1.

[212] Secretarial Order 3310 at § 5(d)(1) (emphasis added).

[213] BLM Manual 6302.12.

[214] BLM Manual 6302.12.B.1.

[215] *See* IM 2011-154 at 2-3.

[216] BLM Manual 6302.12.B.2; IM 2011-154 at 2.

[217] BLM Manual 6302.12.B.3; IM 2011-154 at 2.

[218] *E.g.*, the National Petroleum Reserve Alaska. *See* BLM Manual 6301.12.B.5; IM 2011-154 at 2.

[219] BLM Manual 6302.12.C.1; IM 2011-154 at 2.

[220] BLM Manual 6302.12.C.2; IM 2011-154 at 2.

[221] BLM Manual 6302.12.C.3; IM 2011-154 at 2.

[222] BLM Manual 6302.12.C.5. Substantively equivalent language is contained in IM 2011-154 at 2.

[223] BLM Manual 6302.12.C.4; IM 2011-154 at 2-3.

[224] BLM Manual 6302.13.D.1—11.

[225] BLM Manual 6302.13.D.1 and .10.

[226] BLM Manual 6301.13.D.2 and .6.

[227] IM 2011-154 at 1.

[228] *Id.*

[229] BLM Manual 6302.13.D.

[230] BLM Manual 6303.11.A.

[231] BLM Manual 6303.11.B.

[232] IM 2011-154 at 1.

[233] BLM Manual 6303.14.

[234] *Id.*

[235] *Id.*

[236] BLM Manual 6303.15.

[237] IM 2011-154, Attachment 1 at 2 ("This wilderness characteristics inventory process directive does not mean that the BLM must conduct a completely new inventory and disregard the inventory information that it already has for a particular area. Rather, the BLM must ensure that its inventory is maintained.").

[238] IM 2011-154, Attachment 1 at 2.

[239] See e.g., Uintah County v. Salazar, No. 2:10-CV-00970-CW ¶¶ 230-33, 236 (D. Utah 2010).

[240] *See e.g.*, National Mining Ass'n v. Jackson, 768 F. Supp 2d. 34, 48 (D. D.C. 2011) ("A legislative rule is agency action that has the force and effect of law. Such a rule grants rights, imposes obligations, or produces other significant effects on private interests; narrowly constricts the discretion of agency officials by largely determining the issue addressed; and has substantive legal effect. A rule that effectively amends a prior legislative rule is a legislative, not an interpretative rule. New rules that work substantive changes or major substantive legal additions to prior regulations are subject to the APA's procedures. If

an agency adopts a new position inconsistent with an existing regulation, or effects a substantive change in the regulation, notice and comment are required.") (internal quotations and citations omitted).

[241] 5 U.S.C. § 553(b).

[242] 5 U.S.C. § 553(c).

[243] 5 U.S.C. § 553(a)(2). However, "[a]lthough section 553(a)(2) of the APA exempts rules relating to agency management or personnel, or public property, loans, grants, benefits, or contracts from this requirement, the Department discourages using this exemption." Department of the Interior Manual 318.5.3.

[244] 5 U.S.C. § 553(b)

[245] 43 U.S.C. § 1740, referring to 5 U.S.C. §§ 500—96.

[246] 43 U.S.C. § 1711.

[247] 43 U.S.C. § 1712.

[248] This interpretation is not universally shared; Uintah County and the Utah Association of Counties argue that the Order and Handbooks were issued in violation of the APA. These competing theories will be tested in pending litigation. *See* First Amended and Supplementary Complaint, Uintah County v. Salazar, No. 2:10-CV-00970-CW ¶¶ 230-33, 236 (D. Utah 2010).

[249] BLM Manual 6302.06.

[250] Cement Kiln Recycling Coalition v. E.P.A., 493 F.3d 207, 226 (D.C. Cir 2007) (internal citations omitted) (discussing the Resource Conservation and Recovery Act); *see also* Natural Resources Defense Council v. EPA, 643 F.3d 311, 321 (D.C. Cir. 2011) (applying *Cement Kiln Recycling Coalition* to Clean Air Act guidance).

[251] 5 U.S.C. § 704.

[252] BLM Manual 6302.

[253] BLM Manual 6303.

[254] *See e.g.*, Western Energy Alliance v. Salazar, No. 10-CV-237F, Memorandum Decision and Order (D. Wyo. 2011) (invalidating BLM guidance that narrowed application of categorical exclusions under section 390 of the Energy Policy Act of 2005 as an unlawful legislative rule).

[255] 434 F.3d 584 (D.C. Cir. 2006).

[256] *Id*. at 593.

[257] *Id.*

[258] *Id.*

[259] *Id.* at 595 (internal quotations, citations, and modifications omitted).

[260] *Id.*

[261] *Id.* at 596.

[262] 593 F.3d 1064 (9th Cir. 2010).

[263] *Id.* at 1073.

[264] --- F.3d ----, 2011 WL 5022755 (10th Cir. 2011).

[265] *Id.* at *10.

[266] *Id.*

[267] 16 U.S.C. §§ 1131(a) and 1132(c).

[268] 43 U.S.C. § 1782(c).

[269] 16 U.S.C. §§ 1131—36.

[270] 43 U.S.C. § 1782(c).

[271] BLM Manual 6302.3.

[272] BLM Manual 1602.13(D)(1).

[273] BLM Manual 1602.13(D).

[274] BLM Manual 1602.13(D)(11).

[275] BLM Manual 1602.13(D)(3).

[276] 16 U.S.C. § 1133(c).

[277] BLM Manual 1602.13(D).

[278] 16 U.S.C. § 1133(d)(3).

[279] According to Uintah County's First Amended and Supplemental Complaint for Declaratory, Mandatory, and Injunctive Relief, Civ. No. 2:10-cv-00970-CW (D. Utah), "the Interior Department has adopted a Wild Lands policy that mandates nonimpairment management for the new Wild Lands and LWC areas that are not WSAs. This policy has been adopted without any stated basis for the 180-degree change in the interpretation of the law as embodied in the Settlement Agreement regarding the authority of the agency." *Id*. at 67.

[280] *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 41-45 (1983) (holding that the National Highway Traffic Safety Administration acted arbitrarily and capriciously in revoking certain motor vehicle safety standards because the agency failed to present an adequate basis and explanation for rescinding the requirement.).

[281] Utah v. Norton Settlement, *supra* note 130, at 11.

[282] *Id.* at 12.

[283] *Id.* at 11-12.

[284] *Id.* at 13.

[285] *Id.* at 13.

[286] Utah v. Norton, 2006 WL 2711798, *23 (D. Utah 2006) *aff'd on other grounds* 535 F.3d 1184 (10th Cir. 2008). *See also*, Oregon Natural Desert Ass'n v. BLM, 625 F.3d 1092, 1111 (9th Cir. 2010) (holding that FLPMA sections 202 and 302 authorize the BLM to manage for wilderness values).

[287] Notably, the BLM issued a Supplement to the Draft RMP for the Vernal Field Office in order to better address Non-WSA Lands with Wilderness Characteristics.

[288] Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996) (internal citations omitted).

[289] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983) (internal citations omitted).

[290] Smiley v. Citibank (South Dakota), N.A., 517 U.S. 735, 742 (1996) (internal citations omitted).

[291] Dep't of the Interior, Wild Lands Inventory and Planning Guidance Questions and Answers (no date) (on file with authors).

[292] *Id.*

[293] Order 3310, *supra* note 68, at § 5(d).

[294] *Id.* at § 5(d)(1).

[295] *Id.* at § 5(f).

[296] H.R. 1473, 112th Cong. (2011).

[297] The fiscal year for the federal government runs from October 1 through September 30.

[298] Pub. L. No. 112-10, 125 Stat. 38 at § 1769 (2011).

[299] Pub. L. No. 112-74, 125 Stat. 786 (2011).

[300] 43 U.S.C. § 1711(a).

[301] 43 U.S.C. § 1712(a).

[302] 43 U.S.C. § 1732.

[303] The provision defunding implementation of Order 3310 through fiscal year 2011 was inserted by Idaho Representative Mike Simpson, chairman of the House subcommittee on Interior and Related Agencies Appropriations, who purportedly said the provision was needed to head off illegal designation of wilderness by the administration. PUBLIC LANDS NEWS BULLETIN #6 2 (April 18, 2011) (on file with authors).

[304] *See* Pub. L. No. 112-74, at § 125 ("nothing in this section shall restrict the Secretary's authority under sections 201 and 202 of [FLPMA].").

[305] Oregon Natural Desert Ass'n v. BLM, 625 F.3d 1092, 1115 (9th Cir. 2010) (Once these issues have been raised through the NEPA process, the "BLM must address in some manner in its [ ] EIS whether, and to what extent, wilderness values are now present in the planning area outside of existing WSAs and, if so, how the Plan should treat land with such values.").

[306] *See e.g*. MOAB ROD, *supra* note 186, at 28-29.

[307] *Id*. at 28.

[308] Memorandum from Ken Salazar, Sec'y of the Interior to Dir. of the Bureau of Land Mgmt. (June 1, 2011) *available at* http://www.doi.gov/news/pressreleases/loader.cfm?csModule=security/getfile&pageid=248844.

[309] *See e.g*., Juliet Eilperin, *Salazar Shelves Evaluations of 'Wild Lands,'* WASHINGTON POST, June 1, 2011, *available at* 2011 WLNR 10989141; Thomas Burr, *Salazar Reverser 'Wild Lands' Policy, Vows to Seek Local Input*, SALT LAKE TRIBUNE, June 1, 2011, *available at* http://www.sltrib.com/sltrib/politics/51925051-90/announcement-congress-interior-lands.html.csp.

[310] Memorandum to Dir. of the Bureau of Land Mgmt. *supra* note 308.

[311] *Id.*

[312] From the beginning, the BLM committed to "evaluate potential uses of lands with wilderness characteristics through an open, transparent, and public process." *See* Dep't of the Interior, Wild Lands: Inventory and Planning Guidance Questions and Answers 4 (2010).

[313] *See* 42 U.S.C. § 4332(2)(C).

[314] 40 C.F.R. § 1501.7(a)(1).

[315] *See* 40 C.F.R. §§ 1501.6 (discussing the role of cooperating agencies) and 1508.5 (defining cooperative agency).

[316] Press Release, Department of the Interior, Salazar Takes Next Steps in Push for Bipartisan Wilderness Agenda (June 10, 2011) *available at* www.doi.gov/news/pressreleases/Salazar-Takes-Next-Steps-In-Push-For-Bipartisan-Wilderness-Agenda.cfm#.

[317] BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, PRELIMINARY REPORT ON BLM LANDS DESERVING PROTECTION AS NATIONAL CONSERVATION AREAS, WILDERNESS OR OTHER CONSERVATION DESIGNATIONS

(2011) (hereinafter PRELIMINARY REPORT ON BLM WILDERNESS).

[318] GRAND COUNTY, UTAH, THE WILDERNESS PLAN, AN AMENDMENT TO THE GRAND COUNTY GENERAL PLAN (1999) (on file with authors) (hereinafter GRAND COUNTY WILDERNESS PLAN).

[319] *Id*. at 2.

[320] *See* PRELIMINARY REPORT ON BLM WILDERNESS, *supra* note 317 (pages not numbered).

[321] *See* GRAND COUNTY WILDERNESS PLAN, *supra* note 318, at 2.

[322] 43 U.S.C. § 1782.

[323] *See* Thomas Burr, *Wilderness Plan Zeroes in on Three Southeastern Canyons*, SALT LAKE TRIBUNE (Nov. 11, 2011) (including quotes from elected officials) *available at*: http://www.sltrib.com/sltrib/politics/52889334-90/areas-canyon-congress-county.html.csp.

[324] On June 1, 2011, Secretary Salazar confirmed "that pursuant to the 2011 CR, the BLM will not designate any lands as "'Wild Lands.'" Memorandum to BLM Director, *supra* note 308. Funding restrictions have been extended through fiscal year 2012, and the Department of the Interior will presumably continue with its pledge to not designate Wild Lands in accordance with those restrictions. It is unclear whether the no designation pledge extends beyond 2012.

[325] Data reflects areas inventoried in 1999 as well as areas covered by the Red Rock Wilderness Bill, and areas identified through public comments as potentially possessing wilderness characteristics. All areas identified as potentially possessing wilderness characteristics were evaluated independently by the BLM.

[326] The wilderness characteristics review considered only those areas identified as potentially possessing wilderness characteristics. In order to conform to Order 3310 direction, the BLM will need to determine whether BLM-managed public lands outside those assessed for the 2008 RMP revision process possess wilderness characteristics. In light of the decades of effort that have gone into identifying lands with wilderness characteristics, it is unlikely that significant areas with wilderness characteristics have been overlooked within the study area. However, the BLM may need to confirm that other areas obviously lack wilderness characteristics.

[327] These are Argyle Canyon, Asphalt Ridge, Circle Cliffs, Pariette, and Raven Ridge.

[328] While mining is not categorically prohibited within National Parks, *see* 16 U.S.C. §§1901-12, "all mining operations in areas of the National Park System should be conducted so as to prevent or minimize damage to the environment and other resource values . . . ." 16 U.S.C. § 1901(b).

[329] Neither the National Park Service (NPS) nor the United States Forest Service (USFS) control significant oil shale resources, and because energy development is inconsistent with NPS management objectives, the NPS is not likely to allow development of oil sands resources under its jurisdiction. The USFS controls less than one percent of lands within the STSAs and is subject to planning processes similar to those applicable to the BLM.

[330] 42 U.S.C. §§ 4321-4370d.

[331] *See* ICSE's ANALYSIS OF ENVIRONMENTAL, LEGAL SOCIOECONOMIC AND POLICY ISSUES CRITICAL TO THE DEVELOPMENT OF COMMERCIAL OIL SHALE LEASING ON THE PUBLIC LANDS IN COLORADO, UTAH AND WYOMING UNDER THE MANDATES OF THE ENERGY POLICY ACT OF 2005 (ICSE POLICY ANALYSIS); ICSE's TECHNICAL, ECONOMIC, AND LEGAL ASSESSMENT OF NORTH AMERICAN HEAVY OIL, OIL SANDS, AND OIL SHALE RESOURCES (ICSE UNCONVENTIONAL HYDROCARBON ASSESSMENT); and ICSE's LAND USE TOPICAL REPORT.

[332] VERNAL ROD, *supra* note 12, at 29-30. The RMPs do not indicate where application of these conditions would be inappropriate. The "where appropriate" exception appears to reference the BLM's ability to grant waivers, exemptions, and modifications to lease stipulations set forth in RMPs. *See* 43 U.S.C. §§ 3101.1-3 and 1-4.

The DOI, in determining which federal public lands would be made available for application for

commercial oil shale and oil sands leasing, considered an alternative under which all lands subject to "no surface disturbance or seasonal limitations . . . for oil and gas leasing" would be unavailable for oil shale or oil sands leasing. BUREAU OF LAND MANAGEMENT, DEP'T OF THE INTERIOR, APPROVED RESOURCE MANAGEMENT PLAN AMENDMENTS / RECORD OF DECISION (ROD) FOR OIL SHALE AND TAR SANDS RESOURCES TO ADDRESS LAND USE ALLOCATIONS IN COLORADO, UTAH, AND WYOMING AND FINAL ENVIRONMENTAL IMPACT STATEMENT 17 (2008) (hereinafter OIL SHALE AND TAR SANDS ROD). In contrast, the selected alternative allows for leasing of areas with highly restrictive oil and gas leasing stipulations, because authorizing leasing of such lands would "allow the agency the opportunity to choose and offer leases when a technology is proposed that can be used compatibly with the resource values in question." *Id*. Consideration of divergent treatment of these stipulations and the selected alternative indicate the continued applicability of oil and gas stipulations to unconventional fuel development.

[333] 43 CFR § 3101.1-2

[334] *See* VERNAL ROD, *supra* note 12, at Appendix K.

[335] *Id. See also* 43 C.F.R. § 3101.1-4.

[336] Oil and gas stipulations are generally applicable to other mineral resources. See section 4.1.

[337] *See* OIL SHALE AND TAR SANDS ROD, *supra* note 12, at 28 (Circle Cliffs STSA not available for commercial application for oil sands leasing because "[m]ost of the Circle Cliffs STSA falls entirely within the GSENM and Capitol Reef National Park.").

[338] These exchanges are known informally as the Magic Circle, TOSCO, Paraho, Geokinetics, and Syntana (or Quintana-Syntana) exchanges.

[339] *See e.g*., Bureau of Land Management, Dep't of the Interior, Environmental Assessment UT-080-3-21 (1983) (on file with authors) (hereinafter the Quintana-Syntana Exchange EA).

[340] *See* Letter from W. Robert Wright, Attorney for Quintana Minerals Corp., to James G. Watt, Secretary of the Interior 8 (Aug. 20, 1981) (on file with authors).

[341] *Id.* at 9.

[342] Changes to the regulations are explained at 46 FED. REG. 1638 (Jan. 6, 1981).

[343] Quintana-Syntana Exchange EA *supra* note 339.

[344] Legislation went through multiple iterations. *See e.g.,* S 2471, 98th Cong. (2d Sess.1984); S. 2949, 98th Cong. (2d Sess. 1984); H.R. 5229, 98th Cong., (1984); and H.R. 6197, 98th Cong. (2d Sess. 1984).

[345] UTAH DEP'T OF NATURAL RESOURCES, PROJECT BOLD: PROPOSAL FOR UTAH LAND CONSOLIDATION AND EXCHANGE 1 (1985) (hereinafter PROJECT BOLD PROPOSAL).

[346] Scott M. Matheson & Ralph E. Becker, *Improving Public Land Management through Land Exchange: Opportunities and Pitfalls of the Utah Experience*, PROCEEDINGS OF THE ROCKY MOUNTAIN MINERAL LAW THIRTY-THIRD ANNUAL INSTITUTE § 4.01 (1988).

[347] *Id*. at § 4.02[1] ("Federal land management decisions on surrounding Federal lands normally dictate how state sections will be used and managed."). *See also* PROJECT BOLD ALTERNATIVES, *supra* note 34, at 1.

[348] PROJECT BOLD ALTERNATIVES, *supra* note 34, at 1.

[349] *Id*. at 5; *see also* Matheson & Becker, *supra* note 346, at § 4.03[2].

[350] As of 1965, Utah was still owed approximately 250,000 acres of land under the indemnity selection process. Utah filed for 157,000 acres of land in the Uinta Basin, including oil shale bearing lands, and the Secretary of the Interior refused to convey the lands because of their "grossly disparate values." The State of Utah sued and both the trial and appellate courts found for the State; the United States Supreme Court, however, in a five to four decision, held for the Federal government. *See* Andrus v. Utah, 446 U.S.

500 (1980). *See also*, section 1.2, supra.

[351] Matheson & Becker, *supra* note 346, at § 4.02[2].

[352] *Id*.

[353] PROJECT BOLD ALTERNATIVES, *supra* note 34, at 108-09. In lieu selection was eventually decoupled from the exchange proposal.

[354] *Id*.

[355] Matheson & Becker, *supra* note 346, at § 4.03[2].

[356] *Id*.

[357] PROJECT BOLD ALTERNATIVES, *supra* note 34, at 90.

[358] PROJECT BOLD PROPOSAL, *supra* note 345, at 6-7.

[359] *Id*. at 309.

[360] Matheson & Becker, *supra* note 346, at § 4.07[2].

[361] PROJECT BOLD PROPOSAL, *supra* note 345, at 9.

[362] *Id*. at 10.

[363] *Id*. at 7.

[364] Matheson & Becker, *supra* note 346, at § 4.04[2].

[365] *Id*. The state believed that the increased revenue and jobs generated by development made possible by the exchange would offset the loss of PILT funds.

[366] *See* 28 Stat. 107 (1894). *See also* UTAH CONST. art. XX, § 1 (incorporating same into state law).

[367] Matheson & Becker, *supra* note 346, at § 4.04[5].

[368] *Id*. at § 4.07[3].

[369] *Id*. at § 4.05.

[370] *Utah is Given Title to 93,083 Acres of U.S. Land*, N.Y. TIMES (Aug. 13, 1983) 1983 WLNR 481784 (discussing BLM and presidential support). *See also* Matheson & Becker, *supra* note 346, at § 4.07[3] (discussing support from congressional leadership).

[371] Matheson & Becker, *supra* note 346, at § 4.07[4].

[372] Utah Schools and Lands Improvement Act of 1993, H.R. REP. No. 103-207, at 3 (1993).

[373] Holly Chamberlain, *A Plan of Action: A New Alternative to Traditional School Trust Land Exchanges in the West*, 23 J. LAND, RESOURCES & ENVTL. L. 241, 254 (2003).

[374] Jason M. Keith, Note, *The 1998 Utah Schools and Lands Exchange Act: Project Bold II*, 19 J. LAND, RESOURCES & ENVTL. L. 325, 335-36 (1999).

[375] Melinda Bruce & Teresa Rice, *Controlling the Blue Rash: Issues and Trends in State Land Management*, 29 LAND & WATER L. REVIEW 1, 43 (1994).

[376] George Cameron Coggins & Doris K. Nagel, *"Nothing Beside Remains": The Legal Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 503-04 (1990).

[377] State land area is from United States Census Bureau, GCT-PH1. Population, Housing Units, Area, and Density: 2000 *available at* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-ds_name=DEC_2000_SF1_U&-CONTEXT=gct&-mt_name=DEC_2000_SF1_U_GCTPH1_US9&-redoLog=false&-_caller=geoselect&-geo_id=&-format=US-9|US-9S&-_lang=en.

[378] Representative James Hansen of Utah later noted in comments on a subsequent exchange proposal: "We should have gone along with Governor Matheson, but it was like eating the whole elephant. It was just one big bite. I don't know if we could swallow it." *H.R. 4968, To Provide for the Exchange of Certain Lands in Utah: Hearing Before the Subcomm. on National Parks, Recreation, and Public Lands*, 107th Cong.6 (2d. Sess. 2002) (statement of Rep. Hansen, Chairman, House Comm. on Res.).

[379] Pub. L. No. 103-93, 107 Stat. 995-1000, at §§ 2,3,5, and 6 (1993).

[380] Pub. L. No. 103-93, 107 Stat. 995 (1993).

[381] *Id.* at § 7.

[382] *Id* .7(3).

[383] *Id.*at § 9(c)(1).

[384] *Id.* at § 8(a).

[385] *Id.* at § 8(b).

[386] *See* Utah v. United States, Civil No. 2:97-CV-0589C (D. Utah 1997); SITLA v. Clinton, Civil No. 2:97-CV-492C (D. Utah 1997). As discussed below, this litigation was settled as part of the Grand Staircase-Escalante National Monument (GSENM) exchange. John W. Andrews, *Swapping with the Feds: An Updated Look at Federal Land Exchanges* 51 ROCKY MOUNTAIN MINERAL L. INST. § 8.03[2] (2004).

[387] Utah School and Lands Exchange Act of 1998, H.R. REP. NO. 105-335, at 2 (1998).

[388] Utah Schools and Land Exchange Act of 1998: *Hearing Before the Subcomm. on National Parks and Public Lands of the H. Comm. on Res.*, 105th Cong. (1998) (statement of David T. Terry, Director SITLA).

[389] Proclamation 6920 Establishment of the Grand Staircase-Escalante National Monument, 61 FED. REG. 50223 (Sept. 18, 1996).

[390] 16 U.S.C. § 431-33.

[391] 61 FED. REG. 50223, 50223-24 (Sept. 18, 1996) ("Spanning five life zones from low-lying desert to coniferous forest," the Monument contains a wealth of geological, paleontological, archaeological, historical, and biological resources.).

[392] *Id.* at 50225.

[393] 1.7 million acres is approximately 2,656 square-miles; Delaware's land area is 1,954 square-miles. *See* United States Census Bureau, GCT-PH1. Population, Housing Units, Area, and Density: 2000 *available at* http://factfinder.census.gov/servlet/GCTTable?_bm=y&-ds_name=DEC_2000_SF1_U&-CONTEXT=gct&-mt_name=DEC_2000_SF1_U_GCTPH1_US9&-redoLog=false&-_caller=geoselect&-geo_id=&-format=US-9|US-9S&-_lang=en.

[394] Albert C. Lin, *Clinton's National Monuments: A Democrat's Undemocratic Acts?* 29 ECOLOGY LAW QUARTERLY 707, 723 (2002).

[395] Janice Fried, *The Grand Staircase-Escalante National Monument: A Case Study in Western Land Management*, 17 VA. ENVTL. L.J. 477, 489 (1998) (quoting Michael Satchell, *Clinton's "Mother of All Land-Grabs" on the Sly, He Created a Huge Preserve in Utah*, U.S. NEWS & WORLD REP., Jan. 20, 1997, at 42).

[396] *Id*. *See also*, Lin, *supra* note 394, at 723. "[The State of Utah] and localities asserted lost revenues for schools and potential jobs. [Then] Governor Leavitt claimed that Utah's education system might lose up to $1 billion from the Grand Staircase-Escalante designation. These figures were likely on the high side, as an earlier study by the State of Utah had estimated that planned coal development on the Kaiparowits Plateau would create 599 jobs on an annual payroll of $16.7 million, with only $18 million in total royalties over the life of the mine."

[397] Robert B. Keiter, *The Monument, The Plan, and Beyond*, 21 J. LAND, RESOURCES & ENVTL. L. 521, 524-25 (2001); *see also*, James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness*

Preservation?, 70 U. COLO. L. REV. 483 (1999).

[398] *Id.*

[399] *See* Justin James Quigley, *Grand Staircase-Escalante National Monument: Preservation or Politics?* 19 J. LAND, RESOURCES & ENVTL. L. 55, 89 (1999).

[400] *See* Tom Kenworthy, *President Considers Carving National Monument out of Utah Land*, WASH. POST, Sept. 7, 1996, at A3, 1996 WLNR 6470741; see also Rasband, *supra* note 397, at 484.

[401] Joe Judd, *County Collaboration with the BLM on the Monument Plan and its Roads*, 21 J. LAND, RESOURCES & ENVTL. L. 553 (2001).

[402] *See e.g.*, Rasband, *supra* note 397.

[403] *Id.*, at 489. *See also*, Christopher Smith, *Grand Staircase National Monument: It's a New Name But an Old Idea; Monument: New Status, Old Idea*, SALT LAKE TRIBUNE Oct, 6, 1996 ("In January 1936, the Park Service announced that as a result of the recommendations of the Utah Planning Board, the agency was planning to seek congressional approval for the 6,968-square-mile 'Escalante National Monument.'").

[404] As quoted in Smith, *supra* note 403.

[405] John D. Leshy, *Putting the Antiquities Act in Perspective*, in VISIONS OF THE GRAND STAIRCASE-ESCALANTE, EXAMINING UTAH'S NEWEST NATIONAL MONUMENT 86-88 (Robert B. Keiter et al. eds.1998).

[406] *Id*. *See also*, Proclamation 6920, *supra* note 389. BLM management was significant as most assumed that the Park Service, because of its conservation oriented mandate, would have taken a more protective posture with respect to resource management.

[407] Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona, 32 WEEKLY COMP. PRES. DOC. 1785, 1787 (Sept. 18. 1996). *See also*, Rashband, *supra* note 397, at 528.

[408] 32 WEEKLY COMP. PRES. DOC. at 1787 (calling for a "land management process that will be good for the people of Utah and good for Americans.").

[409] Proclamation 6920, *supra* note 389.

[410] Jane Burleson Campbell, It's Not About the Monument: Framing Analysis Revels the Multiple Issues in the Grand Staircase-Escalante National Monument Conflict 128-29 (May 2004) (unpublished M.S. thesis, University of Utah) (on file with Marriott Library, University of Utah)).

[411] *See* H.R. 2147, 112th Cong. (2011), and S. 1182, 112th Cong. (2011).

[412] Similar legislation has been introduced during the 112th Congress and remains pending for Montana (H.R. 845), Idaho (H.R. 846), Arizona (H.R. 2877), and Nevada (S. 144 and S. 1182); H.R. 302 would require state authorization before new monuments could be designated within its boundaries; H.R. 758, H.R. 817, S. 122, S. 407, and S. 927 would all require congressional ascent before a new monument could be designated.

[413] *See e.g.*, Campbell, *supra* note 410, at 25 ("The one common interest that stands out is that they [communities neighboring the GSENM] all want a voice in decisions and policies that affect their communities. Locals want to actively participate in the Monument's management.").

[414] *Id*. at 108 (paraphrasing the executive director of the Garfield County Travel Council).

[415] *Id*. at 28.

[416] *Id*.

[417] *Id*. at 29.

[418] *Id*. at 30-33.

[419] *Id*. at 134 ("[O]ne surprise was the sincerity and desire of the BLM's employees to manage the Monument fairly. The news articles did not misrepresent their statement, [but] neither did they convey the reality of their job and the commitment to the Monument and the communities surrounding it.").

[420] Andrews, *supra* note 386, at § 8.03[2]; *see also* Lin, *supra* note 394, at 723.

[421] Remarks Announcing the Establishment of the Grand Staircase-Escalante National Monument at Grand Canyon National Park, Arizona, 32 WEEKLY COMP. PRES. DOC. 1785, 1787 (Sept. 18. 1996).

[422] Andrews, *supra* note 386, at § 8.03[2].

[423] *See* Utah Schools and Lands Exchange Act of 1998, H.R. Rep. No. 105-598, 105th Cong., 2d Sess. (June 24, 1998).

[424] 144 CONG. REC. S.5789 (daily ed. June 9, 1998) (Statement of Sen. Hatch).

[425] This is the same amount previously set aside for Pub. L. No. 103-93, 107 Stat. 995, in 1993.

[426] Utah School and Lands Exchange Act of 1998, H.R. Rep. 105-598 (June 24, 1998).

[427] Utah Schools and Land Exchange Act of 1998: *Hearing Before the Subcomm. on National Parks and Public Lands of the H. Comm. on Res.*, 105th Cong. (1998) (statement of David T. Terry, Director SITLA).

[428] Pub. L. No. 105-225, 112 Stat. 3139, at § 2(15) (1998).

[429] *Id.* at § 2(9).

[430] President William J. Clinton, Statement on Signing the Utah Schools and Land Exchange Act of 1998, (Oct. 31, 1998) 1998 U.S.C.C.A.N. 715.

[431] Utah Schools and Land Exchange Act of 1998: *Hearing Before the Subcomm. on National Parks and Public Lands of the H. Comm. on Res.*, 105th Cong. (1998) (statement of Governor Michael O. Leavitt, Utah).

[432] JANINE BLAELOCH, CARVING UP THE COMMONS: CONGRESS & OUR PUBLIC LANDS 28-29 (2009).

[433] Western Land Exchange Project, *Babbitt is Ready to Deal More Utah Public Lands*, 4 LAND EXCHANGE UPDATE 1, 2 (2000).

[434] *See* Minutes of the Meeting of the School & Institutional Trust Lands Administration Board of Trustees 4-9 (April 21, 2000) *available at*: ftp://lands-ftp.state.ut.us/pub/boardminutes.

[435] *See* Minutes of the Meeting of the School & Institutional Trust Lands Administration Board of Trustees 4-8 (June 5, 2000) *available at*: ftp://lands-ftp.state.ut.us/pub/boardminutes.

[436] *See* Utah West Desert Land Exchange Act of 2000, S. REP 106-463 (2000), Appendix A: Agreement for Exchange of Lands West Desert State-Federal Land Consolidation, for breakdown on lands exchanged. *See also* SITLA, 7th Annual Report, Fiscal year 2001 (stating that the exchange resulted in no net gain of Federal surface acreage in Utah; SITLA acquired approximately 107,000 acres of surface and mineral lands while giving up about 106,000 acres of surface and mineral lands to the Federal government).

[437] *See* Dep't of the Interior, Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for Mojave Population of the Desert Tortoise, 55 FED. REG. 12178-91 (April 2, 1990).

[438] Pub. L. No. 106-301, 114 Stat. 1059-61 (2000).

[439] Utah West Desert Land Exchange Act of 2000, S. REP. No. 106-463 (2000).

[440] Pub. L. No. 106-301, 114 Stat. 1059-61, at § (2)(a)(5) (2000).

[441] *Id.* at §§ (2)(a)(b) and (3)(c).

[442] Utah West Desert Land Exchange Act of 2000, S. REP. No. 106-463 (2000).

[443] *Id.* (testimony of Sylvia Baca, Assistant Sec'y Land and Minerals Mgmt., Dept. of Interior).

[444] Utah West Desert Land Exchange Act of 2000: *Hearing Before the Subcomm. on National Parks and Public Lands of the H. Comm. on Res.*, 106th Cong. (2000) (statement of Janine Blaeloch, Director Western Land Exchange Project). Other opponents to the exchange were concerned that the trade could lead to commercial development at the gateway of Zion National Park. Positive Wilderness Role Model, Deseret News Editorial, July 18, 2000.

[445] *Id*.

[446] Jim Carlton, *Big Land Exchange in Utah Draws Fire; Critics Question Swap Process, Fear Development Will Mar Views of Zion*, WALL ST. J., June 13, 2000, at A2, 2000 WLNR 2030906.

[447] BLAELOCH, *supra* note 444, at 31 (quoting Liz Thomas, SUWA staff attorney).

[448] The San Rafael Swell is a large geologic feature located in south-central Utah, about 30 miles west of the town of Green River, Utah. The San Rafael Swell, which is approximately 75 miles by 40 miles, consists of a giant dome-shaped anticline of sandstone, shale, and limestone.

[449] Acreage to be conveyed by SITLA includes Forest Service and BLM inholdings and is from H.R. 4968, 107th Cong. (2d Sess. 2002); acreage to be conveyed by the United States is from H.R. 4698, To Provide for the Exchange of Certain Lands in Utah: *Hearing Before the Subcomm. on Parks, Recreation and Public Lands*, 107th Cong. (2d. Sess. 2002) (statement of Tom Fulton, Deputy Assistant Sec'y for Lands and Mineral Mgmt., Dep't of the Interior).

[450] H.R. 4968, 107th Cong., at § 2(a)(11) (2d Sess. 2002).

[451] DURRANT, *supra* note 106, at 78. In 2010, several western congressmen obtained an internal BLM memo discussing possible candidates for new National Monument designation. The San Rafael Swell literally topped the list. Bureau of Land Mgmt., Dep't of the Interior, Treasured Landscapes Discussion Paper 15 (2010) (on file with authors).

[452] Jeremy Eyre, *The San Rafael Swell and the Difficulties in State-Federal Land Exchanges*, 23 J. LAND RES. & ENVTL. L. 269, 274 (2003).

[453] *H.R. 4698, To Provide for the Exchange of Certain Lands in Utah: Hearing Before the Subcomm. on National Parks, Recreation, and Public Lands of the H. Comm. on Res.*, 107th Cong. 31 (2d. Sess. 2002) (comments of Rep. Cannon, Member, House Comm. on Res.).

[454] H.R. 4968, 107th Cong., at § 2(b) (2d Sess. 2002).

[455] *Id*. at § 2(a)(12).

[456] Eyre, *supra* note 452, at 279.

[457] H.R. 4968, 107th Cong., at § 4(e) (2d Sess. 2002).

[458] *Id*. at §§ 4(e) and 6.

[459] Disclosure of Kent Wilkinson, Senior Appraiser, before the Office of Special Counsel (Aug. 16, 2002) *available at* http://www.peer.org/docs/ut/land_exchange_disclosure.pdf.

[460] *Id*.

[461] "For years, Federal auditors have criticized the agency for agreeing to value its land at far less than its appraised value in order to consummate the trade, or for overvaluing the private land that is to be acquired at the insistence of the owner." Joel Brinkley, *A U.S. Agency is Accused of Collusion in Land Deals*, NEW YORK TIMES, Oct. 12, 2002, 2002 WLNR 4442346.

[462] Eyre, *supra* note 452, at 286.

[463] *U.S. Drops Plan for Utah Land Swap*, LOS ANGELES TIMES, July 24, 2003, 2003 WLNR 15150918. Notably, the Congressional Budget Office acknowledged that some of the Federal lands contain oil shale

deposits, but believed such resources are unlikely to generate significant revenue in the near future. CBO, Cost Estimate, http://www.cbo.gov/doc.cfm?index=3836&type=0. If Utah developed those resources, the Federal government would receive a portion of the income that they produce. *Id.*

[464] Eyre, *supra* note 452, at 292. "The Appraisal and Exchange Work Group will develop recommendations to 'strengthen management oversight of land exchanges and real estate appraisals and ensure adequate controls are in place for management decisions involving such exchanges and appraisals.'" *Id.*

[465] Christopher Lee, *Administration Cancels Swap of Federal Lands within Utah, WASHINGTON POST*, July 24, 2003, 2003 WLNR 18675316.

[466] Eyre, *supra* note 452, at 275.

[467] http://www.jt3.com/hi_range.asp.

[468] H.R. 1503, 109th Cong. (2005).

[469] H.R. 1815, 109th Cong. §§ 381-85 (2006).

[470] Pub. L. No. 109-163, 120 Stat. 3136, at §§ 381-85 (2006).

[471] Robert Gehrke, *Bush approves Cedar Mountain Wilderness Area*, SALT LAKE TRIBUNE, Jan. 7, 2006 *available at* http://archive.sltrib.com/article.php?id=3379573&itype=NGPSID&keyword=cedar+mountain+wilderness&sdate=2006-01-05&edate=2006-01-10&qtype=all..

[472] H.R. 5330, 108th Cong. (2d Sess. 2004) and S. 2954, 108th Cong. (2d Sess. 2004).

[473] Pub. L. No. 111-53, 123 Stat. 1982 (2009).

[474] Maps of the parcels involved in the exchange are *available at* http://tlamap.trustlands.utah.gov/plat/help/recexchange.htm. The number of parcels involved in the exchange and their acreage are subject to change as needed to equalize land and resource values.

[475] H.R. 5330 § 5(a), 108th Cong. (2d Sess. 2004) and S. 2954 § 5(a), 108th Cong. (2d Sess. 2004).

[476] H.R. 5330 § 4(a), 108th Cong. (2d Sess. 2004) and S. 2954 § 4(a)(1), 108th Cong. (2d Sess. 2004).

[477] Requirements for "approximately equal" value are contained in § 5(a)(1) of both bills. Equalization procedures are addressed in § 5 of both bills.

[478] Pub. L. No. 111-53, 123 Stat. 1982, at § 3(f) (2009).

[479] Under the Mineral Leasing Act, which applies to oil shale and oil sands, fifty percent of all money received from sales, bonuses, and royalties shall be paid to the treasury of the state within which the deposits are or were located. 30 U.S.C. § 191(a). This percentage is reduced slightly, with a portion of the state's revenue committed to supporting a portion of the DOI's administrative costs. Note that the State of Utah is under no obligation to impose rents or royalties equal to what the BLM would require under federal leasing rules, therefore actual returns to the federal treasury may differ from what would have been earned had the resource been leased by the BLM.

[480] Pub. L. No. 111-53, 123 Stat. 1982, at § 3(f)(5)(A) (2009).

[481] 43 U.S.C. § 1716.

[482] Dep't of the Interior, Bureau of Land Management and the State of Utah, School and Institutional Trust Lands Administration, Exchange Agreement Utah Recreational Land Exchange Act of 2009 UTU-87577FD/PT (2011) *available at* www.blm.gov/ut/st/en/prog/more/lands_and_realty/Land_Exchanges.html.

[483] *See* Pub. L. No. 111-53, 123 Stat. 1982, at § (3)(b)(2)(A) (2009), and 43 U.S.C. § 1716.

[484] Nondiscretionary decisions are normally exempt from NEPA. *See* South Dakota v. Andrus, 614 F.2d

1190, 1193 (8th Cir. 1980).

[485] *Wilds Panel Adds New Member*, DESERET MORNING NEWS, Oct. 10, 2008, 2008 WLNR 19313916; Lee Davidson, *2 Matheson Bills Pass Committee*, DESERET MORNING NEWS, June 11, 2009, 2009 WLNR 11165705.

[486] E-mail from John Andrews, Associate Director/Chief Legal Counsel, Utah School & Institutional Trust Lands Administration, to John Ruple, University of Utah (Sept. 28, 2011, 11:18:10 AM MDT) (on file with authors).

[487] Pub. L. No. 80-440, 62 Stat. 72 (1948). For a detailed discussion of reservation establishment and disestablishment, as well as jurisdictional implications and their impact on energy development, *see* Heather J. Tanana & John C. Ruple, *Energy Development in Indian Country: Working Within the Realm of Indian Law and Moving Towards Collaboration*, J. LAND, RESOURCES & ENVTL L. (forthcoming fall 2011); *see also,* LAND USE TOPICAL REPORT, *supra* note 13, at 48-58.

[488] *See* Memorandum from Fredericks Peebles & Morgan, LLP to Utah Congressional Delegation and Staff, Bureau of Land Management Officials and Staff re: Proposed Additional to SITLA Land Exchange Bills (S. 1209 and H.R. 1053) (Oct. 7, 2011) (on file with authors).

[489] *Id*.

[490] S. 1209, 112th Cong. (2011); H.R. 1053, 112th Cong. (2011).

[491] E-mail from John Andrews, Associate Director/Chief Legal Counsel, Utah School & Institutional Trust Lands Administration, to John Ruple, University of Utah (Sept. 28, 2011, 11:18:10 AM MDT) (on file with authors).

[492] S. 1209, 112th Cong. (2011); H.R. 1053, 112th Cong. (2011).

[493] *See* Fredericks Peebles & Morgan Memorandum, supra note 488.

[494] *See id*.

[495] *See id*.

[496] S. 3636, 109th Cong. (2d. Sess. 2006).

[497] *Id*.

[498] Daniel Dansie, Comment, *The Washington County Growth and Conservation Act of 2006: Evaluating a New Paradigm in Legislated Land Exchanges,* 28 J. LAND, RESOURCES & ENVTL. L. 185, 214 (2008).

[499] *Id*. at 214.

[500] S.B. 3636, 109th Cong., at § 102(h)(1)(A)(i) (2d. Sess. 2006).

[501] Dansie, *supra* note 498, at 185-86.

[502] Nancy Perkins, *"Vision Dixie Summit" Tonight in St. George*, DESERET NEWS, Oct. 17, 2006, 2006 WLNR 17970890; Vision Dixie, http://visiondixie.org.

[503] S. 2834, 110th Cong. (2d. Sess. 2008).

[504] Kai S. Anderson & Deborah Paulus-Jagric, A New Land Initiative in Nevada, 17 N.Y.U. ENVTL. L.J. 398, 420 (2008).

[505] Southern Utah Wilderness Alliance, Press Statement, Washington County Wilderness Bill Becomes Law! http://action.suwa.org/site/PageServer?pagename=WashingtonCountyBill_2009PressStatement (expressing support for the final bill).

[506] Pub. L. No. 111-11, 123 Stat. 991, at §§ 1971-83 (2009).

[507] *Id*. at §§ 1972(a)(1) and 1973.

[508] *Id*. at §§ 1974-75.

[509] *Id*. at § 1976.

[510] *Id*. at § 1978.

[511] *Id*. at § 1980.

[512] *Id*. at § 1981.

[513] *Id*. at § 1978(b). *See also* 28 Stat. 107, at § 9 (entitling the State of Utah to fiver percent of the proceeds of public land sales).

[514] Pub. L. No. 111-11, 123 Stat. 991, at § 1978(b) (2009).

[515] *See e.g*., Brandon Loomis, *San Juan County Wilderness Deal Moves on Without Sponsor*, SALT LAKE TRIBUNE, April 21, 2011 *available at* http://www.sltrib.com/sltrib/news/51672879-78/county-wilderness-juan-san.html.csp; *but c.f*., Brandon Loomis, *Utah Lawmakers Balk at County Wilderness Plans*, SALT LAKE TRIBUNE June 15, 2011 *available at* http://www.sltrib.com/sltrib/politics/52014509-90/wilderness-county-committee-areas.html.csp.

[516] H.R. 1500, 101st Cong. (1989).

[517] Southern Utah Wilderness Alliance, *supra* note 505.

[518] *Id*.

[519] *Id*.

[520] H.R. 1916, 112th Cong. (2011).

[521] H.R. 1745, 104th Cong. (1995).

[522] S. 884, 104th Cong. (1995).

[523] Smaller designations did, however, occur. Approximately 2,700 acres of the Beaver Dam Mountains Wilderness area are located in Washington County, Utah, north of the Virgin River Gorge and Interstate I-15. Approximately 20,000 acres of the Paria Canyon/Vermillion Cliffs Wilderness Area is within Utah, roughly forty-five miles east of Kanab. Both the Beaver Dam Mountains and Paria Canyon/Vermillion Cliffs Wilderness areas were designated in the Arizona Wilderness Act of 1984. Designated in 2000, 5,120 acres of the Black Ridge Canyons Wilderness Area, which straddles the Utah-Colorado border, are within Utah. The Cedar Mountain Wilderness Area is the only BLM managed wilderness area located entirely within Utah and encompasses approximately 100,000 acres of public land 50 miles due west of Salt Lake City, and was designated in January 2006.

[524] The most recent bill, H.R. 1916, 122th Cong. (2011), counted 116 cosponsors.

[525] Sen. Mike Lee, Statement on New Wilderness Recommendations (Nov. 14, 2011) 2011 WLNR 23670853.

[526] UTAH CODE ANN. § 63J-4-401(8)(j).

[527] Memorandum, From Rep. Mike Noel, To: Members of the Governor's Counsel on Balanced Resources, Re: Legislative Checklist for County Land Use Plans (Sept. 20, 2011) (on file with authors). *See also*, section 2.2.5, *supra*.

[528] *See* Brandon Loomis, *Utah Lawmakers Balk at County Wilderness Plans*, SALT LAKE TRIBUNE June 15, 2011 available at http://archive.sltrib.com/article.php?id=15599373&itype=storyID.

[529] *See e.g*., Rainer Huck, *De-fund the BLM*, DESERET NEWS, Jan. 11, 2011, at A10, 2011 WLNR 34974; Jack Johnston, *The Wilderness Skunk*, DESERET NEWS, Jan. 7, 2011, at A14, 2011 WLNR 393230; and Thomas W. Brown, *Tyrannical Policies*, DESERET NEWS, Jan. 3, 2011, at A8, 2011 WLNR 88584.

[530] *See e.g*. First Amended and Supplementary Complaint, Uintah County v. Salazar, No. 2:10-CV-00970-

CW (D. Utah 1968) and Complaint, Utah v. Salazar, No. 2:11-CV-.00391-DB (D. Utah 2011).

[531] *See e.g.*, Pub. L. No. 112-10, 125 Stat. 38 (2010) and Pub. L. No. 112-74, 125 Stat. 786 (temporarily defunding Order implementation); *see also* S. 1027, 112th Cong (2011) (proposing to permanently rescind Order 3310).

[532] *See* 43 U.S.C. §§ 1711(a) ("The Secretary shall prepare and maintain . . . an inventory of all public lands and their resources and other values (including, but not limited to, outdoor recreation and scenic values). . . ."), and 1712(a) ("The Secretary shall . . . develop, maintain, and when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands."), and 1712(c)(4) (land use plans shall "rely . . . on the inventory of the public lands, their resources, and other values.").

[533] *See* 43 U.S.C. §§ 1701(a)(7), 1712(c)(1), and 1731(a).

[534] 43 U.S.C. § 1701(a)(8).

[535] *See* Bureau of Land Mgmt., Dep't of the Interior, Instruction Memorandum No. 2011-147, Identification of Areas with Broad Public Support for Possible Congressional Designation as Wilderness (July 15, 2011).

[536] *See e.g.*, Kevin Richert: *This Year's Fight with the Feds: Otter vs. BLM*, IDAHO STATESMAN (Jan. 15, 2011) 2011 WLNR 888309 ("wild lands would be managed as wilderness"); Charles Krauthammer, *Obama's Secret Plan: Governing by Regulation*, CHICAGO TRIB. (Jan. 3, 2011) 2011 WLNR 3183197; Paul W. Mortensen, *The Debate Over Federal Land Use*, DESERET MORNING NEWS, (April 13, 2011) 2011 WLNR 7195766 ("DOI would override its newly adopted land use plans by performing new reviews of lands arbitrarily labeled as 'Wild Lands.'").

[537] *See e.g.*, Jim Magill, *"Wild Lands" Policy Reversed; Industry Cheers*, 28 GAS DAILY 105 (June 2, 2011) 2011 WLNR 12014337; *Interior Adds 'Wild Lands' Designation, Reverses 'No New Wilderness' Policy*, GREAT FALLS TRIBUNE (Dec. 24, 2010) 2010 WLNR 25375567; Matthew Daly, *Herbert, other Western Republicans Decry Wilderness Policy*, DESERET MORNING NEWS (March 2, 2011) 2011 WLNR 4052658.

[538] *See e.g.*, *Taking a Stand*, ST. GEORGE SPECTRUM (April 5, 2011), 2011 WLNR 6565388; *Iron County Responds to Wilderness Plan*, ST. GEORGE SPECTRUM (March 29, 2011), 2011 WLNR 6068627; *Left's New Strategy: Change Through Regulations*, DESERET DAILY NEWS (Jan. 2, 2011), 2011 WLNR 58676.

[539] *See* 43 U.S.C. §§ 851-52.

[540] WSLCA Proposal for Extension of State Selection Rights 1-2 (Aug. 15, 2011) (on file with authors).

[541] *Id*. at 3.

[542] *Id*.

[543] *Id*.

[544] *Id*.

[545] *See* LAND USE TOPICAL REPORT, *supra* note 13, at 106-07.

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