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Restoring public trust in public lands

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Restoring Public Trust in the Public Lands: An Agenda for the New Administration

*By Eric Biber, Holly Doremus, Dan Farber, Rick Frank, and Joseph Sax**

Federally-owned and managed public lands occupy approximately thirty percent of the land area of the United States, and anywhere from forty-five percent to over eighty percent of the land area of many of the states of the West, including California.¹ Those federal lands are significant sources of economically important natural resources for the United States, including timber, rangeland, and minerals. In particular, they are an important source of energy resources for the United States, both fossil fuel (oil, natural gas, and coal) and renewable (wind, solar, geothermal).² Many communities in the West continue to rely on the extraction of these resources as important components of their economies.

But these lands are not only important for the exploitation of natural resources. They provide unparalleled recreational opportunities for a wide range of Americans, including fishing, backpacking, skiing, and off-road vehicle use. Indeed, those recreational opportunities have become central to the quality of life of many of the residents of rapidly growing Intermountain West cities such as Denver, Salt Lake City, Reno, Boise,

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1. See CHRISTINE A. KLEIN ET AL., *NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES* 37–38 (2005).

2. See *generally* Bureau of Land Mgmt., U.S. Dep't of the Interior, Oil and Gas, http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas.html (noting that federal public lands produce eleven percent of U.S. natural gas and five percent of U.S. oil); U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., & U.S. DEP'T OF ENERGY, *ASSESSING THE POTENTIAL FOR RENEWABLE ENERGY ON PUBLIC LANDS* (2003), *available at* <http://www.nrel.gov/docs/fy03osti/33530.pdf>.

and Missoula, and they are a significant reason why so many people have moved to those cities, as well as many rural areas in the West.³

A third quality of our public lands system, is the role that federal public lands play as a reserve system: perhaps to an extent unmatched in the rest of the world the federal public lands system protects open space, amazing scenery, functioning ecosystems, wilderness, and endangered species.⁴

Federal public lands are unique in the United States because they are managed by the federal government for the benefit of both the local and regional inhabitants and the people of the United States as a whole. They are under the control of an alphabet soup of federal agencies: the National Park Service (NPS) which is responsible for world-renowned jewels such as Yosemite and Yellowstone; the U.S. Fish and Wildlife Service (FWS) which is responsible for National Wildlife Refuges that provide essential habitats for plants and animals throughout the West; the U.S. Forest Service (USFS) which is responsible for the National Forests, lands originally set aside for the production of timber and protection of watersheds; and the Bureau of Land Management (BLM), which manages the “leftover” lands not designated as Parks, Refuges, or National Forests, such as the red rock deserts of southern Utah or the Mojave Desert of southern California

Because of their status as government lands, federal land management decisions are made by a (sometimes complex) mix of bureaucratic expertise, legislative and executive branch guidance, and public participation.⁵ Legally, federal public lands lie at the intersection of administrative, constitutional, environmental, and property law.

It is therefore perhaps no surprise that the management of federal public lands has inspired tremendous passion among advocates on all sides. That passion has translated into contentious political debates and extensive litigation, reaching a fever pitch in the past eight years as the

3. See, e.g., J. Matthew Shumway & Samuel M. Otterstrom, *Spatial Patterns of Migration and Income Change in the Mountain West: The Dominance of Service-Based, Amenity-Rich Counties*, 53 PROFESSIONAL GEOGRAPHER 492 (2001) (describing the phenomenon of the “New West” that is built on environmental quality of life).

4. See Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 14–15 (1997) (noting the importance of federal public lands to biodiversity protection); see also DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW: CASES AND MATERIALS 1396 (2002) (“The national forests and grasslands constitute an extraordinary national legacy . . . These lands provide many and diverse benefits to the American people. Such benefits include: clean air and water, productive soils, biological diversity.” (quoting COMMITTEE OF SCIENTISTS, U.S. DEP’T OF AGRIC., SUSTAINING THE PEOPLE’S LANDS. RECOMMENDATIONS FOR STEWARDSHIP OF THE NATIONAL FORESTS AND GRASSLANDS INTO THE NEXT CENTURY (1999))).

5. See generally CHRISTINE A. KLEIN, ET AL., NATURAL RESOURCES LAW: A PLACE-BASED BOOK OF PROBLEMS AND CASES Ch. 3 (2005) (laying out the applicability of administrative law to public lands management).

Bush Administration aggressively pushed to expand the extraction of natural resources from public lands, particularly oil and gas.⁶

The new Administration has the opportunity to change the debate over the management of the federal public lands. It can move beyond the traditional clashes between environmentalists and industry, restore balance to the management of the federal public lands, and give a more powerful voice to the local communities that live near and depend upon the federal lands for far more than just their livelihood. In this short piece, we identify ten issues that the new Administration has to tackle if it wishes to be not just a good steward of our shared public lands heritage, but also to transform the debates and fights over those lands.

WHY THE PRESIDENT HAS AN IMPORTANT ROLE TO PLAY IN PUBLIC LAND
MANAGEMENT

The legal structure for public land management in the United States gives tremendous authority to the President. Most of the relevant statutes are extraordinarily vague, giving great discretion to the land management agencies.⁷ Accordingly, major decisions about the process and substance of the management of the federal public lands can be made by Executive Order, planning decisions, or rulemaking decisions.

For example, in the course of the past eight years the Bush Administration issued proposed or final regulations that fundamentally change the process and substance of almost every element of public land management.⁸ Through Executive Orders and planning documents, the Bush Administration also fundamentally reoriented how many federal land management agencies operate, in particular directing those agencies to focus on maximizing the output of fossil fuel production on the public lands.⁹

Given the tremendous leeway that the President has in public land management, the Obama Administration has an opportunity to dramatically change public land management from the prior Administration's course without any changes to the underlying statutory authorities. And given the likelihood that Congress will be fully absorbed with issues such as the current economic crisis, tax reform,

6. See, e.g., DAVID J. HAYES, PROGRESSIVE POLICY INSTITUTE, DIGGING A DEEP HOLE: THE BUSH ADMINISTRATION'S ASSAULT ON NATURAL RESOURCES, PROGRESSIVE POLICY INSTITUTE POLICY REPORT (Aug. 2008).

7. See, e.g., the Federal Lands Policy and Management Act (FLPMA), 43 U.S.C. § 1732(a) (mandating that the Secretary of Interior manage BLM lands according to the "principles of multiple use and sustained yield"); *id.* § 1701(a)(8) (defining multiple use as including a wide range of development and conservation uses).

8. See Hayes, *supra* note 6, at 3 (noting Bush Administration's reversal of Clinton-era protections for National Forest roadless areas); *id.* (similar reversal of Clinton-era standards for grazing on public lands); *id.* at 3-4 (Bush Administration proposed changes to planning process for National Forest management).

9. See Exec. Order No. 13212, 2001 WL 535313 (2001).

climate change, health care reform, and wars in Iraq and Afghanistan, it seems very unlikely that Congress will have the time or energy to restructure the relevant public land management statutes in any case.

TEN IMPORTANT PUBLIC LANDS ISSUES THAT THE NEXT ADMINISTRATION CAN
AND SHOULD ADDRESS THROUGH EXECUTIVE ACTION

We identify here ten key public land issues that the next Administration could at least begin to address through Executive Orders, policy guidance, and regulatory changes. These are issues of either national or regional importance. The ten issues are not listed in any particular order—there are reasonable debates about the relative priority of each. We would suggest that they are each important, indeed crucial, to the public lands agenda of the next Administration.

*1. Management of Roadless and Wilderness-Quality National Forest and
BLM Lands.*

Approximately 60 million acres of National Forest lands are considered to be “unroaded” and relatively undeveloped.¹⁰ These lands, which constitute almost one-third of the total acreage of the entire National Forest system, provide important wildlife habitat, water quality protection, and recreational resources—resources that are threatened by ongoing USFS development and logging activity.¹¹ There are millions of acres of BLM lands that are roadless as well. There has been a major debate for well over a decade over whether those lands should be set aside from most major development (in particular oil and gas development, commercial logging, and associated road construction). With respect to the National Forest lands, the Clinton Administration issued a Roadless Rule prohibiting this type of development just before it left office;¹² the Bush Administration tried to replace the Rule with a new regulation that allowed states to “petition” for protective management of these areas.¹³ Both versions of the Rule have been subject to extensive litigation over the past eight years. Significantly, in the course of settling litigation with the State of Utah, the Bush Administration attempted to disclaim any power for BLM to protect its roadless lands.¹⁴ For National Forest lands, the new Administration might consider options ranging from implementing the Clinton Rule to adopting the Bush local control proposal to a return to the status quo which existed before the Clinton

10. See 66 Fed. Reg. 3244, at 3245 (Jan. 12, 2001).

11. See, e.g., *id.*; MIKE ANDERSON, A DECADE OF NATIONAL FOREST ROADLESS AREA CONSERVATION (The Wilderness Society, 2008), available at <http://wilderness.org/files/RoadlessBackground%20.pdf>.

12. See 66 Fed. Reg. at 3272.

13. See 70 Fed. Reg. 25,654 (May 13, 2005).

14. See *Utah v. Norton*, 2006 WL 2711798 (D. Utah 2006) (district court order reviewing the provisions of the settlement and approving the settlement).

Administration. For BLM lands, the agency could use its planning or regulatory process to make clear its authority to protect roadless areas from development.

2. R.S. 2477.

R.S. 2477 is an old public land-grant statute that gave rights-of-way across federal land to anyone who “constructed” a highway.¹⁵ While it was repealed in 1976, the repeal preserved existing rights to easements already established under the statute.¹⁶ Today, the main controversy arises when federal land management agencies attempt to restrict motorized vehicle access over federal lands (including parks, wilderness areas, etc.). Local governments (in concert with motorized recreation user groups) have frequently claimed that the closures are illegal because of pre-existing R.S. 2477 rights-of-way.¹⁷ The potential scope of these claims is vast, and could implicate management for almost every National Forest, Park, Wildlife Refuge and even military areas in the Western United States. The problem is complicated by the fact that there is no paper record of R.S. 2477 claims, there are few federal court cases articulating the relevant standards, and the land management agencies have not been able to develop a coherent process for making determinations about the existence of rights-of-way.¹⁸ At the moment, the issue appears to be headed to a long series of interminable court cases considering whether rights-of-way exist in particular circumstances. While the ultimate solution to the R.S. 2477 problem will likely require Congressional intervention, there is a substantial amount that the new Administration could do pending Congressional action. In particular, the new Administration could negotiate agreements with local and state governments to resolve R.S. 2477 disputes (including establishing a process by which the public can be involved in the development of those agreements), and it could also provide guidance articulating how federal agencies will consider and manage R.S. 2477 claims pending their resolution in court. The prior Administration made efforts on both of these fronts, but those efforts have yet to resolve the conflicts because of

15. See An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, Ch. CCLXII § 8, 14 Stat. 251, 253 (1866).

16. See Pub.L. No. 94-579, § 706(a), 90 Stat. 2743, 2793.

17. An example of such a claim by a local government is the ongoing litigation over the NPS's closure of Salt Creek in Canyonlands National Park to motor vehicle use. San Juan County claims the closure is illegal because the Creek falls within an R.S. 2477 easement. See *San Juan County v. United States*, 503 F.3d 1163, 1167–71 (10th Cir. 2007).

18. See, e.g., Tova Wolking, *From Blazing Trails to Building Highways: SUWA v. BLM & Ancient Easements Over Federal Public Lands*, 34 *ECOLOGY L.Q.* 1067, 1096–1107 (2007) (noting recent administrative efforts by BLM to resolve R.S. 2477 disputes, and their lack of success); Bret C. Birdsong, *Road Rage and R.S. 2477: Judicial and Administrative Responsibility for Resolving Road Claims on Public Lands*, 56 *HASTINGS L.J.* 523 (2005).

the lack of trust between the various stakeholders and the Bush Administration.

3. Planning for Federal Land Management.

The two statutes that guide decision-making by the BLM and the USFS both require those federal agencies to draft and regularly revise planning documents to guide on-the-ground activities.¹⁹ Building on recent Supreme Court case law, the Bush Administration sought to make these documents less mandatory and more advisory—in part to reduce the environmental review requirements for the planning process.²⁰ Because of the importance of plans for shaping federal land management decisions, the implications of changes to the planning process could be enormous. There is now tremendous uncertainty about the status and nature of the planning process for both BLM and USFS, and serious questions exist about the legality of the prior Administration's changes. Options open to the new Administration include: continuing on the current Administration's path of reducing the scope of planning documents; returning to the prior planning process; or attempting to improve the prior planning process to reduce its burden while still retaining some "teeth" for the plans.

4. Reforming Hard-Rock Mining on Federal Lands.

Hard-rock mining (mining for metallic ores such as gold, iron, silver, and copper) is an important issue for the West because of its significant environmental impacts, significant local economic impacts, and potential national importance for the production of strategic mineral resources. Because much of the federal land-base in the West is still open to mining, these issues can arise almost anywhere. The federal hard-rock mining statute has not been revised since its passage in the mid-nineteenth century.²¹ It has been the subject of sharp criticism in part because federal agencies have done little to restrict where mining occurs. This issue could be addressed using a separate law that already gives BLM the authority to regulate (but not prohibit) hard-rock mining on federal lands in order to protect environmental values (what the statute calls

19. See National Forest Management Act, Pub. L. No. 94-588, 16 U.S.C. § 1604 (requiring USFS to develop and maintain management plans for National Forests); Federal Land Policy and Management Act, 43 U.S.C. § 1712 (2006) (same for BLM).

20. See *Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 481 F. Supp. 2d 1059, 1064–69 (N.D. Cal. 2007) (describing the history of Bush Administration efforts to revise USFS planning regulations).

21. See 30 U.S.C. § 22 ("Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States.").

prevention of “unnecessary or undue degradation”).²² The Clinton Administration sought to use this regulatory authority to increase environmental protection, while the Bush Administration greatly weakened those efforts.²³ Other options include more restrictive administrative interpretations of the requirements that must be met before land ownership can be transferred to mining claimants, narrower interpretations of the ability of mine operators to use additional federal lands to support their mining operations, and stricter application of the administrative process by which compliance with the statute is reviewed. These latter changes could help address concerns that the mining act has been abused in areas with high land values (such as Utah and Colorado) in order to obtain low-cost second-home sites.

5. Allowing a Greater Local Voice in Oil and Gas Development on Federal Lands.

Oil and gas development exploded on federal lands under the Bush Administration.²⁴ That development, at times, had a significant negative impact on the environment and quality of life in many local communities.²⁵ State and local governments have felt that they have had little say in shaping this development or guiding its impacts. Current case law holds that state and local governments have a limited role in guiding and restricting development on federal lands (because federal law in some circumstances preempts conflicting state and local law that prohibits development).²⁶ However, the new Administration has the ability to amend the regulations that guide the BLM oil and gas leasing process to require the agency to consider local views and/or get state or local approval before it grants access to additional lands under oil and gas leases.

22. See 43 U.S.C. § 1732(b) (requiring BLM to restrict mining activity to “prevent unnecessary or undue degradation”).

23. See *Mineral Policy Center v. Norton*, 292 F. Supp. 2d 30, 31–36 (D.D.C. 2003) (outlining the history of the regulatory changes).

24. See Hayes, *supra* note 6 at 7 (stating that oil and gas leasing on federal lands has increased from eighteen million acres to forty-four million acres under the Bush Administration).

25. See, e.g., Brian Maffly, *Where the Antelope (and the Oil Companies) Play*, HIGH COUNTRY NEWS (Aug. 18, 2003) (describing the conflict over the impact on wildlife from expanded oil and gas drilling in western Wyoming); Ray Ring, *Oil and Gas Drilling Clouds West's Air*, HIGH COUNTRY NEWS (Oct. 31, 2005) (describing air pollution impacts from oil and gas drilling, and conflict over those impacts).

26. See *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987) (holding that state prohibition of federally permitted activities on federal lands is preempted by federal law, but that states may undertake reasonable environmental regulation of those activities).

6. Accelerating the Development of Alternative Energy Sources on Federal Lands.

In contrast to oil and gas development, the outgoing Administration was slow to encourage alternative energy development on federal lands.²⁷ This includes both the siting of alternative energy production facilities on federal lands (e.g., solar and wind farms) and access across federal lands for transmission facilities to aid in the development of alternative energy throughout the West. If the new Administration wishes to fulfill its campaign promises to emphasize alternative energy, there are tremendous opportunities to advance that agenda on the public lands. While much could be accomplished by making it clear to agency personnel that they should make approval of these types of projects a high priority in their day-to-day activities, there could be broader, systematic efforts to make the regulatory process more effective and efficient, without sacrificing important environmental values.

7. Managing Public Lands for Climate Change.

Climate change poses significant challenges for the managers of federal public lands. Forests, for example, are already under tremendous stress as temperature shifts result in increases in disease, pests, and mortality.²⁸ Forests are also being seen as important potential resources for offsetting the emission of greenhouse gases. The Bush Administration put little emphasis on considering the implications of climate change for public land management, and how management should change as a result of those implications.²⁹ The next Administration will likely have no choice but to consider how public lands management will respond to climate change. As the beginning of such a process, it could bring public land managers and other stakeholders together to develop guidance about how federal land management agencies should respond to climate change.

8. Grazing Management.

One of the uses of federal public lands that has inspired much controversy over the past few decades has been the leasing of USFS and BLM lands for grazing—environmentalists have expressed concern that grazing has led to substantial harm to native ecosystems and riparian

27. See Hayes, *supra* note 6 at 6-7.

28. See, e.g., M. Martin Smith and Fiona Gow, *Unnatural Preservation*, HIGH COUNTRY NEWS, Feb. 4, 2008; Paul VanDevellder, *West's Forests Will Never Be the Same*, HIGH COUNTRY NEWS, July 16, 2008.

29. See U.S. GOV. ACCOUNTABILITY OFFICE, Report GAO 07-863, CLIMATE CHANGE: AGENCIES SHOULD DEVELOP GUIDANCE FOR ADDRESSING THE EFFECTS ON FEDERAL LAND AND WATER RESOURCES (Aug. 2007); Hayes, *supra* note 6, at 7.

areas, while grazers contest whether their actions have caused environmental harm and point to the substantial economic and social importance of grazing for many local communities.³⁰ The Clinton Administration attempted to address concerns over the impacts of grazing on federal public lands in two ways: (a) setting minimum standards for environmental quality for grazing lands; and (b) allowing conservation groups to purchase and retire grazing permits.³¹ Those efforts were either struck down in litigation or substantially weakened in subsequent revisions by the Bush Administration.³² The next Administration may be able to address at least some of these issues through regulatory changes, while others (in particular allowing conservation groups to retire permits) may require changes to the underlying statutes by Congress.

9. Park and Refuge Management.

The Bush Administration made a number of efforts to alter existing policy documents for the management of National Parks and Wildlife Refuges in order to allow more development and motorized recreation.³³ Those efforts have largely been rebuffed, either through political pressure or litigation.³⁴ National parks and wildlife refuges provide essential protection for endangered species and native ecosystems, as well as invaluable recreational resources for local communities and the American public as a whole. Accordingly, decisions about the appropriate level of development and motorized recreation in these areas are vitally important. To the extent that the next Administration wishes to prevent additional development and motorized recreation in our National Parks and Refuges, codification of important elements of those

30. Compare DEBORAH L. DONAHUE, *THE WESTERN RANGE REVISITED: REMOVING LIVESTOCK FROM PUBLIC LANDS TO CONSERVE NATIVE BIODIVERSITY* (1999), and Wild Earth Guardians: Retiring Grazing Permits, <http://www.wildearthguardians.org/WildPlaces/PublicLandsPolicyReform/RetiringGrazingPermits/tabid/131/Default.aspx> (environmental group calling for buy-outs of grazing permits to reduce environmental harm from grazing), with National Cattlemen's Beef Association: Grazing Programs, <http://www.beefusa.org/goveGrazingPrograms.aspx> (rancher trade association supporting grazing on public lands), and Public Lands Council, <http://www.thepubliclandscouncil.org> (same).

31. See *Pub. Lands Council v. Babbitt*, 529 U.S. 728 (2000) for a discussion of the history of the Clinton-era regulatory efforts.

32. See *id.* at 739. (noting lower court decision striking down elements of regulatory changes); 71 Fed. Reg. 39402 (July 12, 2006) (Bush administration changes to the regulations).

33. See, e.g., Editorial, *Destroying the National Parks*, N.Y. TIMES, Aug. 29, 2005, at A14 (criticizing leaked drafts of revisions to NPS policy guidance that might allow more development in parks); *Fund for Animals v. Norton*, 294 F. Supp. 2d 92 (D.D.C. 2003) (litigation over expansion of snowmobile access in Yellowstone National Park).

34. See, e.g., Editorial, *Drafting the Future of the Parks*, N.Y. TIMES, July 16, 2006, at A16 (noting that public pressure had forced NPS to revise plans to potentially allow more development in parks); *Greater Yellowstone Coal v. Kempthorne*, 577 F. Supp. 2d 183 (D.D.C. 2008) (latest round in litigation over snowmobile access in Yellowstone, striking down most recent Bush Administration proposal regarding snowmobile access).

existing policy documents through formal regulations would make future revision more difficult (albeit potentially at the cost of greater inertia and inflexibility for agency management).

10. Fire Management.

Every fire season in the West brings more political and media attention to how the federal public land management agencies are addressing fire risks. In response to a historic fire season in 2002, Congress passed the Healthy Forests Restoration Act, which gave greater discretion and freedom from environmental review to federal agencies for a significant number of fire management projects, including logging in certain areas.³⁵ There is no question that fire continues to be a serious problem for the Western United States. The causes are numerous, including decades of fire suppression that has allowed a build-up of fuel, climate change effects leading to disease and death for millions of trees, and the increased development of residential homes in high-risk fire areas.³⁶ However, there continues to be tremendous debate about how to address the problem—whether the solution is more active management, changes in fire fighting and suppression techniques, reduction of fire risk through land-use planning, etc. Fire management will present a daunting challenge to the next Administration, but it is a challenge that the Administration will likely have no choice but to address. At the very least, the Obama Administration might consider convening high-level groups to develop possible solutions, and building on pre-existing policy documents and assessments to update policy guidance within federal agencies. More far reaching changes to the existing fire policy structure might require revamping the existing policy documents or even the issuance of regulations to codify those changes.

35. Healthy Forests Restoration Act of 2003, Pub. L. No. 108-148, 16 U.S.C. §§ 6501, 6511, 6512, 6514-16.

36. See, e.g., Adam Burke, *As Fire Season Ignites, Smokey Bear's Legacy Lingers*, HIGH COUNTRY NEWS, June 21, 2004; Kirk Johnson, *As Costs of Wildfires Grow, So Does a Question: Who Should Pay?*, N.Y. TIMES, Jan. 3, 2007; Jesse McKinley and Kirk Johnson, *On Fringe of Forests, Homes and Fires Meet*, N.Y. TIMES, June 26, 2007; Kathie Durbin, *The War on Wildfire*, HIGH COUNTRY NEWS, Apr. 17, 2006.