

## NOTE

### THE BIRTH, DEATH, AND AFTERLIFE OF THE WILD LANDS POLICY: THE EVOLUTION OF THE BUREAU OF LAND MANAGEMENT'S AUTHORITY TO PROTECT WILDERNESS VALUES

BY

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*Since the enactment of the Federal Land Policy and Management Act (FLPMA) in 1976, the Bureau of Land Management (BLM) has had a troubled relationship with wild lands, the nation's last remaining places with wilderness characteristics. Although for twenty-five years BLM recognized wilderness values as resources it must balance and protect consistent with the agency's multiple use mandate, in 2003 BLM largely disclaimed that interpretation, potentially imperiling future protection of wild lands that were not designated as wilderness or wilderness study areas. Since then, the agency has made incremental—but potentially powerful—steps toward reclaiming a view of its authority that could afford more protection for yet-undesignated wild lands. Although BLM's current policy does not provide as strong of "default" protection for wild lands as it did before 2003, it does direct the agency to survey and consider wild lands in all land plans and project approvals.*

*This Note traces the evolution of BLM's interpretation of its duty and authority under FLPMA to manage lands with wilderness characteristics. The Note concludes that, although BLM's view of its responsibility toward yet-undesignated wilderness has narrowed, the recent controversial Wild Lands Policy and ensuing agency guidance re-*

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*acknowledge wilderness values as a legitimate FLPMA resource to be protected. However, whether and how the agency will use its reclaimed authority to meaningfully protect the nation's remaining vulnerable federal public wild lands remains uncertain.*

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## I. INTRODUCTION

When Congress passed the Wilderness Act in 1964,<sup>1</sup> it addressed only lands managed by the United States Forest Service, United States Fish & Wildlife Service, and National Park Service, not the 66% of all public land then managed by the Bureau of Land Management (BLM).<sup>2</sup> A dozen years later in 1976, Congress enacted the Federal Land Policy and Management

<sup>1</sup> Wilderness Act of 1964, 16 U.S.C. §§ 1131–1136 (2006).

<sup>2</sup> *Id.* § 1132 (providing for the designation of wilderness in national parks and forests but making no mention of BLM lands). In 1964 the U.S. Forest Service, U.S. Fish & Wildlife Service, and National Park Service combined managed 236,171,638 acres of federal land, while BLM managed 464,346,607 acres. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-96-40, LAND OWNERSHIP: INFORMATION ON THE ACREAGE, MANAGEMENT, AND USE OF FEDERAL AND OTHER LANDS 6 (1996).

Act (FLPMA),<sup>3</sup> creating BLM's authority to manage and protect wilderness. Section 603 of FLPMA directed BLM to identify its lands possessing wilderness values, then study and recommend to the President and Congress acres suitable for permanent wilderness preservation by 1991.<sup>4</sup> However, the statute did not clearly outline BLM's post deadline authority to evaluate its lands for wilderness values or describe how the agency should balance those values against other uses.<sup>5</sup> In the two decades since FLPMA's wilderness deadline, BLM has narrowed its interpretation of this ongoing authority.<sup>6</sup>

BLM completed its section 603 inventory in 1980, identifying wilderness characteristics on only about twenty-three million acres, or 13%, of the 174 million acres it managed outside Alaska and the Oregon & California Grant Lands.<sup>7</sup> BLM divided those acres into 919 wilderness study areas (WSAs), and as directed by section 603 of FLPMA, managed them "so as to not impair their suitability" for subsequent congressional wilderness designation.<sup>8</sup> After studying each WSA's wilderness characteristics, in 1991 BLM recommended to Congress that 9.6 million acres—only 5% of all BLM-managed land outside Alaska—were "suitable" for designation as wilderness areas.<sup>9</sup> Today, Congress has yet to act on thirteen million acres of WSAs.<sup>10</sup> Until Congress makes final decisions on the remaining WSAs, BLM must manage them under a "nonimpairment" standard.<sup>11</sup>

<sup>3</sup> Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2006).

<sup>4</sup> *Id.* § 1782(a) (requiring BLM to review lands within its jurisdiction and recommend suitable areas for wilderness preservation within a specified timeframe).

<sup>5</sup> *Id.* (directing BLM to evaluate its land within 15 years after October 21, 1976, but making no explicit mention of any requirement or authority to do so thereafter).

<sup>6</sup> *See infra* Part III.B.

<sup>7</sup> Wilderness Inventory Results for Public Lands Under Administration of the Bureau of Land Management in the Contiguous Western States, 45 Fed. Reg. 75,574 (Nov. 14, 1980). In contrast, the U.S. Forest Service found that almost half of its 190 million acres technically qualified for wilderness designation. George Cameron Coggins, *"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, 510 n. 251 (1990).

<sup>8</sup> Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,014, 72,015 n.1, 72,018 (Dec. 12, 1979); *see also* 43 U.S.C. § 1782(c) (2006).

<sup>9</sup> Letter from Gale Norton, Secretary of Interior, to Pete V. Domenici, U.S. Senator (2003).

<sup>10</sup> BLM, U.S. Dep't of Interior, *Wilderness Study Area List*, [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Law\\_Enforcement/nlcs/online\\_electronic.Par.20654.File.dat/WSA\\_Detailed%20Table\\_Updated\\_December2010.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Law_Enforcement/nlcs/online_electronic.Par.20654.File.dat/WSA_Detailed%20Table_Updated_December2010.pdf) (last visited Feb. 22, 2014) [hereinafter *BLM WSA Table*]. BLM does not publish statistics on the WSAs Congress has designated as wilderness or released from section 603(c)'s nonimpairment mandate. This is perhaps because sometimes Congress only designates portions of WSAs; once a WSA is released, the agency no longer tracks it a WSA. *See, e.g.*, Omnibus Public Land Management Act of 2009, Pub. L. No. 111-11, §§ 1702(a), 1703(a)–(b), 123 Stat. 991, 1044–46 (2009) (releasing parts of the Oregon Badlands WSA not protected as wilderness and declaring that BLM would manage released acres under a section 202 land use plan).

<sup>11</sup> 43 U.S.C. § 1782(c) (2006) (charging that BLM shall "manage such lands . . . in a manner so as not to impair the suitability of such areas for preservation as wilderness . . ."); U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT MANUAL 6330, MANAGEMENT OF BLM WILDERNESS STUDY AREAS, 1-1 (2012) [hereinafter 2012 WSA MANUAL], *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_manual.Par.31915.File.d at/6330.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.31915.File.d at/6330.pdf). The 2012 WSA Manual replaces BLM's prior Interim Management Policy, which

After completing the section 603 inventory in 1980, BLM continued to identify lands with wilderness characteristics in its general resource inventories required under section 201 of FLPMA.<sup>12</sup> Both during and after the section 603 wilderness review, BLM interpreted section 202 of FLPMA, its land use planning authority, to authorize WSA designation and protection on certain units of land with wilderness character smaller than 5,000 acres.<sup>13</sup> BLM managed these WSAs under a modified nonimpairment standard that the agency, not just Congress, could alter through land use planning.<sup>14</sup>

In 1996, during the Clinton Administration, BLM reinventoried 3.1 million acres of Utah public land that, during the original section 603 wilderness inventory, the agency had determined lacked wilderness character.<sup>15</sup> The state of Utah challenged BLM's authority to reinventoried and protect acres it had earlier found lacking wilderness character.<sup>16</sup> The litigation culminated in a 2003 settlement agreement in which BLM, now under management of new Interior Secretary Gale Norton, reversed its longstanding position regarding its authority to designate WSAs under section 202.<sup>17</sup> BLM agreed with the State that the agency's duty to identify and protect wilderness values expired with the 1993 deadline for presidential recommendations set by section 603.<sup>18</sup> The settlement

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described the agency's management of WSAs. See U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT. MANUAL H-8550-1, INTERIM MANAGEMENT POLICY FOR LANDS UNDER WILDERNESS REVIEW (1995) [hereinafter 1995 IMP], available at [http://www.blm.gov/ca/pa/wilderness/wilderness\\_pdfs/wsa/ManualTransmittalShe.pdf](http://www.blm.gov/ca/pa/wilderness/wilderness_pdfs/wsa/ManualTransmittalShe.pdf).

<sup>12</sup> The Wilderness Soc'y, 119 Interior Dec. 168, 170-72 (IBLA 1991) (noting how, after the section 603 inventory was complete, BLM inventoried wilderness characteristics on units of land less than 5,000 acres—especially acquired lands adjacent to federal land—using section 201 of FLPMA).

<sup>13</sup> See Tri-County Cattlemen's Ass'n, 60 Interior Dec. 305, 314-16, nn.11-13 (IBLA 1981) (noting that BLM "as a matter of policy" used its land use management authority under sections 302 and 202 of FLPMA to inventory some roadless areas smaller than 5,000 acres for wilderness characteristics; also noting that BLM may use its land management authority to manage areas smaller than 5,000 acres with wilderness characteristics "so as preserve, as much as practicable, those wilderness characteristics."); N.M. Natural History Inst., 78 Interior Dec. 133, 135 (IBLA 1983) ("with respect to an area of less than 5,000 acres BLM is 'not precluded from managing such an area in a manner consistent with wilderness objectives, nor is it prohibited from recommending such an area as wilderness.'") (quoting Tri-County Cattlemen's Ass'n, 60 Interior Dec. at 314); The Wilderness Soc'y, 81 Interior Dec. 181, 184 (IBLA 1984) (noting that, using its land use planning authority, BLM could manage units of land less than 5,000 acres "in a manner consistent with wilderness objectives") [hereinafter IBLA section 202 WSA decisions]. See also *infra* note 88 (explaining that 43 U.S.C. § 1982(c) authorizes continuation of existing mining, grazing, and mineral appropriation and leasing on lands pending review in the manner and to the extent that they occurred in October 1976, even if such uses might impair wilderness suitability).

<sup>14</sup> *Sierra Club v. Watt*, 608 F. Supp. 305, 311 (E.D. Cal. 1985) (describing BLM's management of lands with wilderness characteristics but less than 5,000 acres in size under a modified nonimpairment standard implemented through the land use planning process).

<sup>15</sup> *Utah v. Norton*, No. 2:96-CV-0870, 2006 U.S. Dist. LEXIS 73480, at \*8 (C.D. Utah Sept. 20, 2006). BLM increased the acreage of land it set aside as WSAs from 2.5 million acres in 1980 to 3.2 million acres in 1996, after challenges from wilderness groups. *Id.* at \*6-7.

<sup>16</sup> *Utah v. Babbitt*, 137 F.3d 1193, 1200 (10th Cir. 1998).

<sup>17</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*13.

<sup>18</sup> *Id.*

effectively closed the universe of land BLM protected under the “modified” nonimpairment standard, but left the scope of its remaining authority over non-WSA lands with wilderness characteristics largely undefined.<sup>19</sup>

Since 2003, the agency has struggled to define the scope of its authority to protect lands with wilderness characteristics that are neither designated as wilderness nor within an existing WSA.<sup>20</sup> District courts in Oregon, where conservation groups have been actively challenging BLM’s consideration of wilderness values in the land use planning process and when authorizing site-specific projects, concluded that the agency had no ongoing obligation under FLPMA to identify or consider wilderness character when undertaking land use planning, but that the National Environmental Policy Act (NEPA)<sup>21</sup> required it to consider new information showing the presence of wilderness values on affected lands.<sup>22</sup> In 2008, the Ninth Circuit reversed that trend, ruling that section 201 of FLPMA requires BLM to maintain an accurate inventory of wilderness values, and that section 202 vests it with broad authority to protect those values with different management tools in the land use planning process.<sup>23</sup> The court also clarified that NEPA requires BLM to disclose and discuss how planning decisions might affect those values.<sup>24</sup>

Consistent with the Ninth Circuit’s opinion, in 2010 Interior Secretary Ken Salazar issued a new policy acknowledging BLM’s ongoing duty to maintain an accurate inventory of wilderness values and to consider these areas in the land use planning process.<sup>25</sup> The policy authorized BLM to use its land use planning authority to prioritize wilderness values and designate “Wild Lands,” a new class of lands distinct from WSAs, which BLM would protect by “avoiding impairment” to their wilderness values.<sup>26</sup> Interest

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<sup>19</sup> *Id.* See also BLM, U.S. DEP’T OF THE INTERIOR, BLM WILD LANDS POLICY—QUESTIONS AND ANSWERS 2 (2011), available at [http://www.blm.gov/pgdata/etc/medialib/blm/nv/special\\_areas.Par.58761.File.dat/Wild.Lands.BLM.QandA.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nv/special_areas.Par.58761.File.dat/Wild.Lands.BLM.QandA.pdf) (noting the need for guidance on how to inventory and manage lands with wilderness characteristics after the Norton-Leavitt Settlement).

<sup>20</sup> See *infra* Section IV.

<sup>21</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4347 (2006). NEPA requires federal agencies to analyze the environmental effects of proposed federal actions. *Id.* § 4332.

<sup>22</sup> See *Or. Natural Desert Ass’n v. Rasmussen*, 451 F. Supp. 2d 1202, 1213 (D. Or. 2006); *Or. Natural Desert Ass’n v. Shuford*, No. 06-242-AA, 2007 U.S. Dist. LEXIS 42614, at \*10–15 (D. Or. June 8, 2007), *aff’d* 405 F. App’x 197 (9th Cir. 2010) (explaining that NEPA requires the agency to take a “hard look” at the environmental consequences of the proposed action based on accurate wilderness information).

<sup>23</sup> *Or. Natural Desert Ass’n v. BLM*, 625 F.3d 1092, 1113–16 (9th Cir. 2010) (as amended) (explaining that BLM has “broader management authority for lands with wilderness characteristics”).

<sup>24</sup> *Id.* at 1122.

<sup>25</sup> See SEC’Y OF THE INTERIOR, ORDER NO. 3310: PROTECTING WILDERNESS CHARACTERISTICS ON LANDS MANAGED BY THE BUREAU OF LAND MANAGEMENT (2010) [hereinafter WILD LANDS POLICY], available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications\\_Directorate/public\\_affairs/news\\_release\\_attachments.Par.26564.File.dat/sec\\_order\\_3310.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf).

<sup>26</sup> *Id.* at 2–3. BLM described its implementation of the policy in a series of manuals. See U.S. DEP’T OF THE INTERIOR BUREAU OF LAND MGMT. MANUAL 6301—WILDERNESS CHARACTERISTICS INVENTORY (2011), [hereinafter MANUAL 6301] available at <http://www.blm.gov>

groups with a stake in public land development protested the new Wild Lands Policy, claiming that it resurrected BLM's presettlement practice of designating section 202 WSAs and protecting them under the nonimpairment standard.<sup>27</sup> Sympathetic to these protests, Congress blocked funding to implement the Wild Lands policy,<sup>28</sup> and in 2011, the Secretary rescinded it.<sup>29</sup> In 2012, BLM tried again to define the scope of its FLPMA duty and authority by publishing new manuals<sup>30</sup> that eliminated the Wild Lands designation process but still acknowledged the agency's duty under section 201 of FLPMA to maintain accurate wilderness inventories and consider management options to protect wilderness values in the section 202 land use planning process.<sup>31</sup>

This Note traces the birth, death, and afterlife of the Wild Lands Policy, describing the evolution of BLM's interpretation of its FLPMA duty and authority regarding lands with wilderness characteristics. Part II reviews BLM's statutory authority regarding wilderness values and describes the agency's pre-2003 interpretation of that authority. Part III explains the Utah litigation and the effects of the 2003 settlement agreement. Part IV discusses judicial interpretations of BLM's authority after the settlement, including the Ninth Circuit's ruling clarifying the scope of the agency's obligations and authority regarding wilderness values under FLPMA and NEPA. Part V examines the effects of the 2010 Wild Lands Policy and its implementing guidance. Part VI describes the Policy's quick death, and the effects of BLM's

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/pgdata/etc/medialib/blm/wo/Information\_Resources\_Management/policy/blm\_manual.Par.3470.6.File.dat/6301.pdf; U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT., MANUAL 6302—CONSIDERATION OF LANDS WITH WILDERNESS CHARACTERISTICS IN THE LAND USE PLANNING PROCESS (2011), [hereinafter MANUAL 6302] *available at* <http://publiclands.council.org/CMDocs/PublicLandsCouncil/Treasured%20Landscapes/6302.pdf>; U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MGMT. 6303—CONSIDERATION OF LWCS FOR PROJECT-LEVEL DECISIONS IN AREAS NOT ANALYZED IN ACCORDANCE WITH BLM MANUAL 6302 (2011), [hereinafter MANUAL 6303] *available at* <http://publiclands.council.org/CMDocs/PublicLandsCouncil/Treasured%20Landscapes/6303.pdf>.

<sup>27</sup> Letter from Members of Congress, to Ken Salazar, Sec'y of the Interior (Aug. 2, 2012) (on file with author) [hereinafter 2012 Congressional Letter].

<sup>28</sup> Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1769, 125 Stat. 38, 155 (2011).

<sup>29</sup> Memorandum from Ken Salazar, Sec'y of Interior to BLM Director (June 1, 2011), [hereinafter 2011 Rescission Memo] *available at* <http://www.doi.gov/news/pres-releases/upload/Salazar-Wilderness-Memo-Final.pdf>. During the period between Secretary Salazar revoking the Wild Lands order and BLM issuing new manuals, BLM acted under an interim instruction memorandum. Instruction Memorandum No. 2011-154 from Robert V. Abbey, Director Bureau of Land Mgmt, to All Office and Field Office Officials (July 25, 2011), *available at* [http://www.blm.gov/wo/st/en/info/regulations/Instruction\\_Memos\\_and\\_Bulletins/national\\_instruction/2011/IM\\_2011-154.html](http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2011/IM_2011-154.html) [hereinafter 2011 Interim Guidance].

<sup>30</sup> BUREAU OF LAND MGMT., CONDUCTING WILDERNESS CHARACTERISTICS INVENTORY ON BLM LANDS 1 (2012), [hereinafter MANUAL 6310] *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_manual.Par.38337.File.dat/6310.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.38337.File.dat/6310.pdf).

<sup>31</sup> *Id.* at 1, 5; BUREAU OF LAND MGMT., CONSIDERING LANDS WITH WILDERNESS CHARACTERISTICS IN THE BLM LAND USE PLANNING PROCESS 3 (2012), [hereinafter MANUAL 6320] *available at* [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information\\_Resources\\_Management/policy/blm\\_manual.Par.52465.File.dat/6320.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.52465.File.dat/6320.pdf).

2012 guidance, which reacknowledged wilderness as a resource the agency must inventory and balance under FLPMA. This Note concludes that the Wild Lands Policy and 2012 guidance reflected a narrower interpretation of BLM's FLPMA authority than its presettlement position, yet still acknowledged the agency's statutory duty to balance wilderness values as a multiple-use resource, a potentially powerful tool for protection of wilderness values on the public lands.

## II. OVERVIEW AND HISTORICAL BACKGROUND

This Part explains Wilderness Act and FLPMA provisions relevant to BLM's identification and management of lands with wilderness characteristics. It also discusses BLM's pre-2003 interpretations of its authority to designate and manage WSAs under FLPMA.

### A. *The Wilderness Act*

Congress passed the Wilderness Act in 1964 to "preserv[e] and protect [lands with wilderness characteristics] in their natural condition," securing "the benefits of an enduring resource of wilderness" for generations of Americans.<sup>32</sup> The Wilderness Act defined wilderness, established protective standards for designated wilderness, and created a system for future wilderness designation: The National Wilderness Preservation System (NWPS).<sup>33</sup> It codified Congress's intent to make preservation of lands with wilderness characteristics a national priority.<sup>34</sup>

The Wilderness Act described wilderness as an area "untrammled by man" that "retain[s] its primeval character and influence, without permanent improvements or human habitation."<sup>35</sup> Section 2(c) specified that "wilderness" possesses three main characteristics. To constitute wilderness, an area must be 1) natural,<sup>36</sup> 2) with "outstanding opportunities" for solitude

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<sup>32</sup> *Id.* § 1131(a).

<sup>33</sup> *Id.* § 1131(a), (c). The Wilderness Act designated about 9.1 million acres of wilderness across lands managed by the U.S. Forest Service, U.S. Fish & Wildlife Service, and National Park Service. See The Wilderness Soc'y, *Wilderness Act*, <http://wilderness.org/article/wilderness-act> (last visited Feb. 22, 2014).

<sup>34</sup> See William G. Myers III & Jennifer D. Hill, *Along the Trammeled Road to Wilderness Policy on Federal Lands*, 56 ROCKY MTN. MIN. L. INST. 15-1, 15-3 (2010), available at <http://www.hollandhart.com/articles/CH15-Wilderness-Policy-on-Federal-Lands.pdf> (discussing the language in the Wilderness Act that expresses this Congressional intent).

<sup>35</sup> 16 U.S.C. § 1131(c) (2006). According to some legal scholars, Howard Zahniser, the original drafter of the Wilderness Act, "can claim credit for th[is] language, especially the use of the word 'untrammled,' meaning not bound or fettered (not 'untrampled,' as many thought it may have been)." Peter A. Appel, *Wilderness and the Courts*, 29 STAN. ENVTL. L.J. 62, 76 n.43 (2010) (citing Douglas W. Scott, "Untrammled," "Wilderness Character," and the Challenges of Wilderness Preservation, WILD EARTH, Fall/Winter 2001-2002, 72, 74 (distinguishing "untrammled" from "untrampled" in the wilderness context)).

<sup>36</sup> 16 U.S.C. § 1131(c) (2006) (describing wilderness as "affected primarily by the forces of nature").

or primitive recreation on 3) at least 5,000 contiguous roadless acres.<sup>37</sup> However, these provisions leave many questions unanswered.<sup>38</sup> For example, what constitutes a “road”<sup>39</sup> or an “outstanding” opportunity for solitude or recreation? Case law has defined these criteria somewhat, but their application remains largely subjective.<sup>40</sup>

The Wilderness Act also outlined the wilderness designation process: Federal land management agencies review certain lands for wilderness character and recommend potential wilderness areas to the President, who makes recommendations to Congress, which officially designates wilderness.<sup>41</sup> To preserve congressional prerogative to designate wilderness, the Wilderness Act directed agencies to manage both areas under study and proposed candidate areas in the same manner as designated wilderness.<sup>42</sup> Legal disputes frequently challenge agency adherence to this interim protection.<sup>43</sup>

The Wilderness Act conferred the strictest level of protection available for federal land, requiring land management agencies administering wilderness to preserve wilderness character.<sup>44</sup> To achieve this standard, it

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<sup>37</sup> *Id.* This section noted that an area “of sufficient size as to make practicable its preservation and use in an unimpaired condition” may also satisfy this criterion. Though Congress did not explicitly describe “roadlessness” as a qualifying characteristic under section 2(c), a later provision of the Act effectively added “roadless” to the definition of wilderness by requiring the U.S. Fish & Wildlife Service and National Park Service to review and recommend “roadless” areas of 5,000 or more contiguous acres for wilderness designation. *Id.* §§ 1131(c), 1132(c).

<sup>38</sup> See 3 GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 25:3 (Thomson Reuters, 2d ed. 2012) (noting the subjectivity of the criteria in section 2(c)).

<sup>39</sup> BLM’s wilderness inventory handbooks use legislative history to define “roadless” as “the absence of roads which have been improved and maintained by mechanical means to insure relatively regular and continuous use. A way maintained solely by the passage of vehicles does not constitute a road.” BLM, WILDERNESS INVENTORY HANDBOOK 5 (1978), [hereinafter 1978 HANDBOOK] available at [http://www.blm.gov/ca/pa/wilderness/wilderness\\_pdfs/wsa/Wilderness\\_Inventory.pdf](http://www.blm.gov/ca/pa/wilderness/wilderness_pdfs/wsa/Wilderness_Inventory.pdf) (also adopting subdefinitions of the terms “improved and maintained,” “mechanical means,” and “relatively regular and continuous use” and acknowledging that the definition of a road is “subject to a variety of somewhat contradictory interpretations”). Conservation groups often challenge agency determinations of where roads exist because roads are integral to a finding of wilderness value. See, e.g., First Amended Complaint at 2–3, ONDA v. Suther, No. 09-862-PK (D. Or. Sept. 14, 2009).

<sup>40</sup> See COGGINS & GLICKSMAN, *supra* note 38, at § 25:3–4 (discussing the challenges inherent in interpreting section 2(c)’s objective and subjective wilderness characteristics).

<sup>41</sup> 16 U.S.C. § 1132(b) (2006) (“Each recommendation of the President for designation as ‘wilderness’ shall become effective only if so provided by an Act of Congress.”).

<sup>42</sup> *Id.* § 1132(b)–(c); 36 C.F.R. § 293.17 (2013) (describing Forest Service management of primitive areas pending agency review for suitability as designated wilderness); see also Parker v. United States, 448 F.2d 793 (10th Cir. 1971), cert. denied, 405 U.S. 989 (1972) (providing that the Wilderness Act prohibits use of wilderness study areas in national forests in ways that would preclude wilderness designation).

<sup>43</sup> See COGGINS AND GLICKSMAN, *supra* note 38, § 25:1.4 (describing legal battles resulting from resource management disputes on WSAs).

<sup>44</sup> 16 U.S.C. § 1133(b) (2006) (requiring agencies administering wilderness areas to “be responsible for preserving the wilderness character of the area and shall so administer such



prohibited uses that could impair future use and enjoyment of the land as wilderness,<sup>45</sup> including commercial enterprise, permanent roads, motorized vehicles and other equipment, and other structures or installations.<sup>46</sup> However, the Wilderness Act also authorized exceptions for safety and emergencies, existing grazing, limited recreation-related commercial uses, and certain mechanized transport, prospecting, and water and power projects.<sup>47</sup> As noted above, however, none of these restrictions were applicable to BLM land until Congress enacted FLPMA a decade later.<sup>48</sup>

### *B. The Federal Land Policy and Management Act*

In 1976, Congress passed FLPMA to retain public lands in federal ownership and provide for protection and management of their multiple resource values and uses.<sup>49</sup> FLPMA required BLM to periodically and systematically inventory lands and resources within its jurisdiction, and then evaluate “their present and future use” through a land use planning process.<sup>50</sup> FLPMA gave the agency discretion to balance those uses through land use planning.<sup>51</sup> BLM’s interpretation of how lands with wilderness character fit into the multiple-use mandate has evolved since 1976 as the agency, presidential administrations, and the public have struggled to interpret the directives contained in four key sections of FLPMA.<sup>52</sup>

First, section 102 of FLPMA required BLM to weigh various resources on its public lands under a “multiple-use” mandate, making “the most judicious use of the land for some or all” of its resources.<sup>53</sup> This provision also directed the agency to manage its lands to protect scenic, ecological,

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area for such other purposes for which it may have been established as also to preserve its wilderness character”).

<sup>45</sup> *Id.* § 1131(a).

<sup>46</sup> *Id.* § 1133(c) (“[S]ubject to existing private rights, there shall be no commercial enterprise and no permanent road within any wilderness area.”). That section also prohibits temporary roads, use of motor vehicles, motorized equipment, or motorboats, landing of aircraft, other forms of mechanical transport, and structures or installations “except as necessary to meet minimum requirements for the administration of the [wilderness] area.” *Id.*

<sup>47</sup> *Id.* § 1133(d).

<sup>48</sup> *See supra* text accompanying notes 3–4.

<sup>49</sup> *See generally* 43 U.S.C. § 1701(a) (declaring “it is the policy of the United States that . . . the public lands be retained in Federal ownership” and that “management be on the basis of multiple use and sustained yield unless otherwise specified by law”).

<sup>50</sup> *Id.* §§ 1702(c), 1701(a)(2).

<sup>51</sup> *Id.* § 1701(a)(2).

<sup>52</sup> *See generally* Ward A. Shanahan & Alan L. Jocelyn, *Philosophies in Contention: A Perspective of FLPMA*, 9 PUB. LAND & RESOURCES L. REV. 59, 63 (1988) (expounding FLPMA’s “seeds of internal conflict,” describing that FLPMA has “provided [an] arena for continuing debate,” and explaining that FLPMA’s key sections “produced controversy from the date of enactment”).

<sup>53</sup> 43 U.S.C. § 1701(a)(7) (2006) (declaring that BLM will manage the public lands through land use planning on the basis of multiple use and sustained yield). *See also id.* § 1702(c) (requiring BLM to manage various resources, including “recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific, and historical values” under the “multiple use” mandate).

environmental, and other values in a manner that, where appropriate, allowed it to “preserve and protect certain public lands in their natural condition.”<sup>54</sup>

Second, section 201 of FLPMA required BLM to maintain an inventory of its lands and resource values.<sup>55</sup> BLM must keep this inventory current to reflect changes in conditions “and to identify new and emerging resource and other values.”<sup>56</sup> However, FLPMA also directed BLM to affirmatively decide how to manage land within its jurisdiction; the inventory or identification of areas of critical environmental concern does not alone change management.<sup>57</sup>

Third, accordingly, section 202 of FLPMA instructed BLM to create land use plans (called resource management plans or RMPs) to govern all lands and resources within its jurisdiction.<sup>58</sup> RMPs provide longterm,<sup>59</sup> broad direction to the agency in managing public lands.<sup>60</sup> BLM relies on its section 201 inventories to identify the resource values it must balance within RMPs.<sup>61</sup> All BLM management decisions must conform to the land use plans.<sup>62</sup>

Fourth, section 603 of FLPMA directed BLM to review roadless areas spanning over 5,000 acres on which the agency identified wilderness characteristics in its section 201 inventory.<sup>63</sup> The Interior Secretary was to

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<sup>54</sup> *Id.* § 1701(a)(8).

<sup>55</sup> *Id.* § 1711(a) (“The Secretary shall prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values.”).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* (noting that inventories of areas of critical environmental concern will not change management of public lands).

<sup>58</sup> *Id.* § 1712(a) (“The Secretary shall, with public involvement . . . develop, maintain, and, when appropriate, revise land use plans . . . for the use of the public lands.”).

<sup>59</sup> *See, e.g.,* BLM, *Southeastern Oregon Resource Management Plan and Record of Decision*, <http://www.blm.gov/or/districts/vale/plans/seoromp.php> (last visited Feb. 22, 2014) (describing BLM’s plan to manage certain public lands within southeastern Oregon “during the next 20 years and beyond”).

<sup>60</sup> *See* 43 U.S.C. § 1712(c) (2006) (directing BLM to consider present and potential uses of the public lands). *See also* 43 C.F.R. § 1601.0-5(n) (2012) (defining an RMP as a land use plan that generally establishes: 1) land areas for limited, restricted, or exclusive use or special designation; 2) allowable resource uses; 3) resource condition goals and objectives; 4) programmatic and management constraints to achieve those goals and objectives; 5) need for more specific plans; 6) support actions to achieve those goals and objectives; 7) general implementation sequences; and 8) intervals and standards for monitoring plan effectiveness); *id.* § 1610.5-3(a) (noting that all future resource management actions must conform to approved RMPs).

<sup>61</sup> *Id.* § 1712(c)(4). *See id.* § 1702(c) (citing the statute’s list of resource values).

<sup>62</sup> *Id.* § 1732(a) (requiring BLM to manage its lands in accordance with land use plans). *See also* 43 C.F.R. § 1610.5-3(a) (2012) (requiring management decisions to conform to the land use plans).

<sup>63</sup> 43 U.S.C. § 1782(a) (1976). Scholars have noted that section 603 required BLM to take a “snapshot of the section 201 inventory,” capturing the wilderness values present on BLM lands at one moment “frozen in time” and inevitably missing some areas. Letter from Law Professors to Ken Salazar, Sec’y of the Interior 2 (Sept. 30, 2009), *available at* [http://action.suwa.org/site/DocServer/Law\\_Teachers\\_Letter\\_September\\_2009-FINAL.pdf?docID=10861](http://action.suwa.org/site/DocServer/Law_Teachers_Letter_September_2009-FINAL.pdf?docID=10861).

complete this review by 1991,<sup>64</sup> and then recommend to the President areas suitable and unsuitable for wilderness preservation.<sup>65</sup> Section 603 also required the President to give his recommendation to Congress in 1993, reiterating that Congress alone had authority to designate wilderness.<sup>66</sup> Finally, section 603 required BLM to preserve existing wilderness values on all lands under study by managing them “so as not to impair” their suitability for wilderness designation pending congressional review.<sup>67</sup>

### *C. BLM's Section 603 Inventory and WSA Recommendations*

BLM undertook the section 603 wilderness review state-by-state in three phases: inventory, study, and reporting.<sup>68</sup> In 1978, BLM adopted a Wilderness Inventory Handbook to guide agency officials through the section 603 inventory.<sup>69</sup> Under the handbook, BLM officials first evaluated the agency's section 201 inventory of public lands outside Alaska and the Oregon & California Grant Lands to identify those roadless<sup>70</sup> areas of at least 5,000 acres with the wilderness characteristics defined in section 2(c) of the Wilderness Act.<sup>71</sup> BLM next assessed each area's naturalness, opportunities for solitude or primitive recreation, and supplemental values<sup>72</sup> to determine its suitability for further study as a wilderness study area, or WSA, a term BLM created in the handbook.<sup>73</sup> The handbook instructed BLM officials to manage all potential study areas under the nonimpairment standard until the agency decided whether to designate them as WSAs.<sup>74</sup> Following a NEPA review,<sup>75</sup> state directors designated certain inventoried areas as WSAs to study and recommend as suitable or unsuitable for wilderness

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<sup>64</sup> 43 U.S.C. § 1782(a) (2006) (requiring review “[w]ithin fifteen years after October 21, 1976”).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* § 1782(b); *see also* 16 U.S.C. § 1132(b) (2006).

<sup>67</sup> 43 U.S.C. § 1782(c) (2006) (requiring BLM to manage “lands during [the] period of review and determination,” “so as not to impair the suitability of such areas for preservation as wilderness”).

<sup>68</sup> *Sierra Club v. Watt*, 608 F. Supp. 305, 310 (E.D. Cal. 1985). *See also* 1978 HANDBOOK, *supra* note 39, at 3.

<sup>69</sup> *See* 1978 HANDBOOK, *supra* note 39, at 2.

<sup>70</sup> *See id.* at 5–6 (describing the importance of the “roadless” determination).

<sup>71</sup> *Id.* at 11–12.

<sup>72</sup> Supplemental values include “ecological, geological, or other features of scientific, educational, scenic, or historical value.” *Id.* at 14.

<sup>73</sup> *Id.* at 7, 11–12 (directing how BLM officials should assess the wilderness characteristics of each inventory unit not eliminated from consideration in the initial inventory).

<sup>74</sup> *Id.* at 15 (“Management limitations imposed by Section 603 of FLPMA will remain in effect on all inventory units undergoing intensive inventory until the end of the NEPA public comment period for the state director's WSA designation decision.”).

<sup>75</sup> *See, e.g.*, BLM U.S. DEP'T OF INTERIOR, OREGON WILDERNESS FINAL ENVIRONMENTAL IMPACT STATEMENT VOL. 4 (1989), [hereinafter OREGON WILDERNESS EIS] *available at* <http://ia601608.us.archive.org/12/items/oregonwilderness17unit/oregonwilderness17unit.pdf> (environmental impact statement for proposed WSA areas in Oregon).

designation.<sup>76</sup> BLM completed this inventory in 1980, identifying 919 WSAs on twenty-three million acres—13% of its 174 million acres outside of Alaska.<sup>77</sup>

The agency then studied those WSAs to determine which were suitable for wilderness designation, eventually publishing the study results in state-specific Wilderness Study Reports.<sup>78</sup> In 1991, Interior Secretary Manuel Lujan recommended to President George H. W. Bush that 9.6 million acres of WSAs, just 5% of BLM's land outside Alaska, be designated as wilderness.<sup>79</sup> To date, Congress has designated a total of 8.7 million acres as wilderness.<sup>80</sup> About 12.8 million acres or 545 units of the original twenty-three million acres remain as WSAs, awaiting final congressional resolution.<sup>81</sup>

#### *D. Section 603 WSA Management: Nonimpairment*

WSA designation and integration into land use plans is important and controversial because of the strict management standard that governs those areas.<sup>82</sup> BLM manages all lands designated as section 603 WSAs under the nonimpairment standard, even those that BLM deemed unsuitable for permanent preservation.<sup>83</sup> Under section 603 of FLPMA, BLM manages WSAs

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<sup>76</sup> See 1978 HANDBOOK, *supra* note 39, at 9, 14–15. See, e.g., BLM U.S. DEP'T OF INTERIOR, OREGON WILDERNESS STUDY REPORT 1, 4–5 (1991) [hereinafter OREGON WILDERNESS STUDY REPORT] (describing BLM's inventory process, and subsequent recommendations, in the state of Oregon).

<sup>77</sup> Status of Wilderness Review of Public Lands, 45 Fed. Reg. 75,574, 75,575 (Nov. 14, 1980).

<sup>78</sup> The agency analyzed all values, resources, and uses occurring within WSAs using environmental impact statements prepared pursuant to NEPA. 2012 WSA MANUAL, *supra* note 11, at 1–5. See, e.g., OREGON WILDERNESS STUDY REPORT, *supra* note 76, at 1. In Oregon, BLM officials conducted the wilderness study by comparing the benefits of wilderness and nonwilderness management in a series of land use plans. Agency officials developed preliminary wilderness suitability and nonsuitability recommendations and analyzed them in a statewide Wilderness Environmental Impact Statement (EIS). See OREGON WILDERNESS EIS, *supra* note 75. BLM officially recommended that 1.2 million acres were suitable for wilderness preservation, about half of its WSAs and 10% of the inventoried public land in Oregon. See OREGON WILDERNESS STUDY REPORT, *supra* note 76.

<sup>79</sup> See Letter from Gale Norton, Secretary of Interior, *supra* note 9, at 1. Note that some of this acreage included WSAs studied under section 202 of FLPMA, as discussed below. See *infra* note 102.

<sup>80</sup> BLM manages a total of 247.9 million acres including Alaska; 8.7 million acres comprises just 3.8% of BLM's total land. BLM U.S. DEP'T OF INTERIOR, 2011 PUBLIC LAND STATISTICS 220 (2012), available at [http://www.blm.gov/public\\_land\\_statistics/pls11/pls2011.pdf](http://www.blm.gov/public_land_statistics/pls11/pls2011.pdf).

<sup>81</sup> *Wilderness and Roadless Area Release Act of 2011: Hearing on H.R. 1581 Before the H. Nat. Res. S. Comm. on National Parks, Forests and Public Lands*, 112th Cong. 1 (2011) (statement of Robert Abbey, Director, BLM), available at [http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications\\_Directorate/2011\\_congressional.Par.89092.File.dat/H.R.%201581%20Wilderness%20and%20Roadless%20Area%20Release%20Act%20of%202011.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/2011_congressional.Par.89092.File.dat/H.R.%201581%20Wilderness%20and%20Roadless%20Area%20Release%20Act%20of%202011.pdf).

<sup>82</sup> See 1995 IMP, *supra* note 11, at 1–2.

<sup>83</sup> See *id.* See also COGGINS & GLICKSMAN, *supra* note 38, at § 25:16, 25–52 (explaining that the nonimpairment standard applies to WSAs “even . . . if the Interior Department and the President have recommended that a WSA not be preserved as wilderness, as long as Congress has not yet acted on the recommendation.”).

“so as not to impair” their suitability for wilderness designation.<sup>84</sup> The purpose of the nonimpairment standard was to preserve Congress’ prerogative to eventually designate the area as wilderness.<sup>85</sup> The standard applies to WSAs only until congressional resolution; its protection terminates if Congress decides to “release” an area to multiple-use management.<sup>86</sup>

Although Congress intended the nonimpairment standard to prioritize preservation of wilderness character, it did not intend to prohibit all other uses on lands pending BLM’s wilderness review and eventual congressional resolution (via designation as wilderness or release from WSA status).<sup>87</sup> Section 603 of FLPMA prescribed limited exceptions to the nonimpairment mandate by authorizing some grandfathered uses.<sup>88</sup> Congress directed BLM to regulate those uses on WSAs to avoid “unnecessary or undue degradation” of land and its resources.<sup>89</sup>

BLM’s 1995 interpretation of the nonimpairment standard, articulated in what was called the Interim Management Policy (IMP), described nonimpairing uses as temporary activities that create no surface disturbance or do not involve permanent structures.<sup>90</sup> The IMP instructed BLM to ensure that any such proposed uses would not degrade wilderness values.<sup>91</sup> It also authorized exceptions for emergency and reclamation activities, valid existing rights, and activities to enhance wilderness values or that were the minimum necessary to ensure public health and safety.<sup>92</sup> The exceptions also allowed some wildlife-related structures and limited motor vehicle use.<sup>93</sup> BLM continues to apply this standard to section 603 WSAs under its newest guidance, issued in 2012.<sup>94</sup> By applying the nonimpairment standard to section 603 WSAs, BLM prioritizes protection of wilderness values over other uses, to the frustration of mining, range, energy, and other commodity interest groups.<sup>95</sup>

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<sup>84</sup> 43 U.S.C. § 1782(c) (2006).

<sup>85</sup> See 1995 IMP, *supra* note 11, at 5. See also 2012 WSA MANUAL, *supra* note 11, at 1-1. (“[T]he policy applies during the time an area is under wilderness review, which ends when Congress acts on the WSA by either designating the area as wilderness or releasing it for other purposes.”).

<sup>86</sup> 43 U.S.C. § 1782(c) (2006). See also 1995 IMP, *supra* note 11, at .05.

<sup>87</sup> See 1995 IMP, *supra* note 11, at .05.

<sup>88</sup> 43 U.S.C. § 1782(c) (2006) (authorizing continuation of existing mining, grazing, and mineral appropriation and leasing on lands pending review in the manner and to the extent that they occurred in October 1976, even if such uses might impair wilderness suitability).

<sup>89</sup> *Id.*

<sup>90</sup> See 1995 IMP, *supra* note 11, at .06. BLM issued earlier, similar iterations of the IMP in 1979, 1983, and 1987. See, e.g., Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,014, 72,014 (Dec. 12, 1979). See also 2012 WSA MANUAL, *supra* note 11.

<sup>91</sup> See 1995 IMP, *supra* note 11, at 9.

<sup>92</sup> *Id.* See also 2012 WSA MANUAL, *supra* note 11, at 1-11 to 1-13.

<sup>93</sup> See 1995 IMP, *supra* note 11, at 10. See also 2012 WSA MANUAL, *supra* note 11, at 1-38 to 1-39.

<sup>94</sup> See 2012 WSA MANUAL, *supra* note 11, at 1-1.

<sup>95</sup> See COGGINS & GLICKSMAN, *supra* note 38, at § 25:16, §§ 25-50 to 25-51 (discussing industry challenges to the application of the nonimpairment standard on WSAs, especially due

*E. Section 202 WSAs*

After FLPMA passed in 1976,<sup>96</sup> BLM interpreted section 201 to authorize wilderness inventories independent of section 603.<sup>97</sup> BLM also interpreted section 202 to authorize discretionary protective management of wilderness values outside of section 603 WSAs<sup>98</sup>—an interpretation upheld by the Interior Board of Land Appeals<sup>99</sup> in 1981 and by the Eastern District of California in 1985.<sup>100</sup> Accordingly, BLM's section 603 wilderness review included some areas with wilderness characteristics—generally smaller than the 5,000 acres required by section 603 and often adjacent to them—which BLM proposed to protect under section 202 of FLPMA and thus included in its 1991 Wilderness Study Reports.<sup>101</sup> BLM did not track the exact number or acreage of section 202 WSAs it established by the 1993 deadline, and multiple sources give different and somewhat conflicting data on the

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to the fact that all road construction within a WSA automatically constitutes a violation of the nonimpairment standard since, by definition, all WSAs must be roadless). Wilderness advocates closely track BLM's actions that might impair wilderness characteristics on WSAs. *See, e.g.,* *W. Watersheds Project v. Rosenkrance*, 736 F. Supp. 2d 1276, 1283 (D. Idaho 2010) (finding unlawful BLM's decision to issue a grazing permit on an allotment within a WSA because BLM failed to analyze whether grazing would impair the WSA's inventoried wilderness characteristics, as required by the IMP).

<sup>96</sup> Federal Land Policy and Management Act, 43 U.S.C. §§ 1701–1785 (2006).

<sup>97</sup> *See* 1978 HANDBOOK, *supra* note 39, at 6, 12 (recognizing BLM's authority under section 201 to inventory less than 5,000 acres areas not eligible for designation as section 603 WSAs because of section 603's 5,000 acre minimum requirement); Interim Management Policy and Guidelines for Land Under Wilderness Review, 44 Fed. Reg. 72,014, 72,015 n.1, 72,018 (“BLM as a matter of policy has used its general management authority under sections 302 and 202 of FLPMA to include in the wilderness review some roadless areas smaller than 5,000 acres.”). *See also* Michael Huddleston, 76 Interior Dec. 116, 120 (IBLA 1983) (section 201 “required [BLM] to identify, during the inventory process, areas of the public lands which exhibit wilderness characteristics . . .”).

<sup>98</sup> 44 Fed. Reg. at 72,015.

<sup>99</sup> The Interior Board of Land Appeals (IBLA) is an appellate review body that exercises delegated authority of the Secretary of the Interior to issue administrative decisions on behalf of the Department of the Interior. *See* U.S. Dep't of Interior Office of Hearings and Appeals, *About the Interior Board of Land Appeals*, <http://www.doi.gov/oha/ibla/index.cfm> (last visited Feb. 22, 2014).

<sup>100</sup> *Tri-County Cattlemen's Ass'n*, 60 Interior Dec. 305, 314 (IBLA 1981) (“Although an area of less than 5,000 contiguous acres would not qualify as a WSA under section 603(a), BLM is not precluded from managing such an area in a manner consistent with wilderness objectives, nor is it prohibited from recommending such an area as wilderness.”); *Sierra Club v. Watt*, 608 F. Supp. 305, 340–42 (D.C. Cal. 1985) (discussing with approval Interior Secretary Andrus' interpretation that BLM's land management authority permitted the agency to protect split estates and areas less than 5,000 acres as section 202 WSAs). *See also* 2012 WSA MANUAL, *supra* note 11, at 1-1; *The Wilderness Soc'y*, 119 Interior Dec. 168, 170–72 (IBLA 1991); *Or. Natural Desert Ass'n*, 173 Interior Dec. 348, 351 n.3 (IBLA 2008) (“BLM may . . . exercise its general inventory, land use planning, and management authority under FLPMA to assess and protect wilderness characteristics.”).

<sup>101</sup> Of the 23,824,615 total acres of WSAs BLM studied under section 603's review mandate, BLM studied 22,437,930 of those under section 603 and 146,449 under section 202. *List of Wilderness Study Areas and Study Schedule*, 48 Fed. Reg. 57,060, 57,061 (Dec. 27, 1983).

totals.<sup>102</sup> Today, BLM manages ninety-two section 202 WSAs on about 245,000 acres, less than 2% of its total thirteen million acres of WSAs.<sup>103</sup>

After the section 603 wilderness review and recommendations, BLM continued to establish section 202 WSAs through RMPs, particularly on lands the agency acquired after it issued its Wilderness Study Reports in 1991.<sup>104</sup> In 2001, at the end of the Clinton Administration, BLM adopted a new handbook that articulated this interpretation, explicitly directing the agency to include wilderness characteristics in its section 201 inventories and recognizing its authority to designate WSAs using section 202.<sup>105</sup> It also instructed agency officials to use the land use planning process to evaluate the quality of the area's wilderness values,<sup>106</sup> whether BLM could manage the selected areas as WSAs,<sup>107</sup> and competition with other competing uses.<sup>108</sup> BLM would use this evaluation to determine whether to designate land as a WSA as part of its land planning process.<sup>109</sup>

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<sup>102</sup> One U.S. General Accounting Office report indicates that by 1993, BLM had designated 148 section 202 WSAs, but fails to denote total acreage. See U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO/RCED-93-151, 16 FEDERAL LAND MANAGEMENT: STATUS AND USES OF WILDERNESS STUDY AREAS (1993). However, a BLM report from 1985 shows that the E.D. California decision in *Sierra Club v. Watt* restored at least 296 section 202 WSAs on 1,618,971 acres of split estate, under 5,000 total acres, or contiguous acres. See BLM, U.S. DEPT. OF INTERIOR, WSAs RESTORED DUE TO KARLTON DECISION 7 (1985) (on file with author).

<sup>103</sup> See *BLM WSA Table*, *supra* note 10.

<sup>104</sup> See, e.g., BLM, FINAL EIS, JOHN DAY BASIN PROPOSED RESOURCE MANAGEMENT PLAN 85 (U.S. Dep't of Interior 2012), available at [http://www.blm.gov/or/districts/prineville/plans/johndayrmp/files/pdo\\_JDB\\_PRMP\\_FEIS\\_Ch2.pdf](http://www.blm.gov/or/districts/prineville/plans/johndayrmp/files/pdo_JDB_PRMP_FEIS_Ch2.pdf) (describing how BLM's Prineville District in Oregon inventoried lands acquired after 1991 for wilderness characteristics, designating as WSAs units it found to meet the WSA criteria, including Sutton Mountain and Pat's Cabin areas). See also BLM, RECORD OF DECISION AND ENVIRONMENTAL ASSESSMENT, SUTTON MOUNTAIN COORDINATED RESOURCE MANAGEMENT PLAN, 152-53 (1995) (on file with author) (noting designation of Sutton Mountain and Pat's Cabin WSAs). As the John Day EIS notes, BLM has not necessarily recommended to Congress that all post-1991 WSAs designated under section 202 be protected as permanent wilderness. *Id.* (noting that "the study process for Sutton Mountain and Pat's Cabin WSAs is not complete, and study reports with recommendations have not been forwarded to Congress.").

<sup>105</sup> BLM, H-6310-1, WILDERNESS INVENTORY AND STUDY PROCEDURES, .01, .06, .1 - .14 (2001) (on file with author) [hereinafter 2001 Handbook]. According to the Tenth Circuit, "it is unclear if the [2001 Handbook] marked a change of course for BLM or simply a memorialization of then-existing practices . . ." *Utah v. Dep't of Interior*, 535 F.3d 1184, 1189 n.2 (10th Cir. 2008).

<sup>106</sup> 2001 Handbook, *supra* note 105, at .22A (instructing BLM to review "mandatory" values—naturalness and opportunities for solitude and recreation—then any supplemental values described in section 2(c)).

<sup>107</sup> *Id.* at .22B (instructing BLM to consider managing the area under the IMP's nonimpairment standard, given its land status and impacts to access to state or private inholdings).

<sup>108</sup> *Id.* at .22C (instructing BLM to analyze under NEPA both positive and negative impacts of WSA designation on other resource values or uses in the area).

<sup>109</sup> *Id.* at .23 ("The information should be integrated into the planning process to document the rationale for the WSA recommendations.").

*F. Section 202 WSA Management: Modified Nonimpairment and Revocable Protection*

The IMP made a slight distinction in how BLM should manage section 603 and section 202 WSAs, echoed in the 2012 WSA manual update. The IMP and new manual both instruct BLM to apply a modified version of the section 603 WSA nonimpairment standard to WSAs designated under section 202.<sup>110</sup> The main differences between the section 603 nonimpairment standard and section 202 modified nonimpairment standard are twofold. First, although new mining activities in section 603 WSAs must meet the nonimpairment criteria, valid existing operations can continue, even if they impair wilderness values, if nonimpairment “would unreasonably interfere with the enjoyment of the benefit of the rights.”<sup>111</sup> In contrast, the IMP instructed BLM to regulate mining operations in section 202 WSAs only to prevent unnecessary and undue degradation of the lands, not “to prevent impairment of wilderness suitability,” a more rigorous standard.<sup>112</sup> Second, and perhaps most significantly, BLM could establish, change, or eliminate section 202 WSAs and their management criteria through the land use planning process.<sup>113</sup> Distinctly, only Congress can remove section 603 WSAs from the nonimpairment protection by releasing them from wilderness review.<sup>114</sup> Thus, BLM’s nonimpairment standard for section 202 WSAs was of a slightly different scope and potentially drastically different duration than the standard for section 603 WSAs.<sup>115</sup>

### III. THE UTAH LITIGATION

This Part discusses BLM’s reinventory of wilderness characteristics in Utah, the State’s subsequent 1996 legal challenge, and BLM’s pivotal settlement of that case in 2003.

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<sup>110</sup> See 1995 IMP, *supra* note 11, at .01 (applying the nonimpairment standard, as interpreted by BLM, to WSAs designated using section 202); *id.* at .06c (explaining that while FLPMA does not require BLM to give section 202 WSAs nonimpairment protection, BLM has authority under its land use planning provisions to “manage these lands similarly”).

<sup>111</sup> *Id.* at 13. See also 2012 WSA MANUAL, *supra* note 11, at 1-21 (“All reasonable efforts to meet the nonimpairment criteria will be made as long as doing so does not unreasonably interfere with [valid existing mineral rights].”).

<sup>112</sup> 1995 IMP, *supra* note 11, at 7. See also 2012 WSA MANUAL, *supra* note 11, at 1-24 (“For WSAs established under . . . [s]ection 202 of FLPMA, location, subsequent assessment, and mining operations under the 1872 Mining Law are exempt from the nonimpairment standard, but still must satisfy the BLM’s standard of preventing unnecessary or undue degradation.”).

<sup>113</sup> 1995 IMP, *supra* note 11, at 7 (“WSAs studied under Section 202 of FLPMA and subsequently found to be nonsuitable for wilderness designation may be released from interim management by the BLM . . .”). See also *Utah v. Dep’t of the Interior*, 535 F.3d 1184, 1188 (10th Cir. 2008). See also 2012 WSA MANUAL, *supra* note 11, at 1-5 to 1-6 (noting that BLM may, through land use planning, “adjust the status of and management standards associated with” those section 202 WSAs created after the 1993 Report to Congress).

<sup>114</sup> 43 U.S.C. § 1782(c) (2006).

<sup>115</sup> *Utah v. Dep’t of the Interior*, 535 F.3d at 1188.



*A. Reinventory*

BLM's newly-articulated interpretation of its section 201 and land use planning authority regarding lands with wilderness characteristics sparked major conflict in Utah.<sup>116</sup> The State balked at the notion that BLM would designate post section 603 WSAs and manage them under the IMP.<sup>117</sup> To this day, BLM and the public continue to navigate how this conflict altered BLM's interpretation of its authority and obligations to identify and manage wilderness characteristics.<sup>118</sup>

In 1980, BLM designated 3.2 million acres of Utah WSAs under the section 603 review process.<sup>119</sup> Under section 603's deadline, in 1991 then-Interior Secretary Manuel Lujan recommended to President George H. W. Bush that 1.9 million of those acres were suitable for wilderness designation.<sup>120</sup> In 1993, President Bush made an identical 1.9 million acre recommendation to Congress.<sup>121</sup> To date, despite numerous appeals from environmental groups, Congress has failed to act on those recommendations, and today BLM manages those 3.2 million acres of WSAs under the IMP.<sup>122</sup>

Alleging that BLM's inventory had overlooked wilderness values, the Southern Utah Wilderness Alliance (SUWA) urged BLM to increase its recommendation to 5.7 million acres.<sup>123</sup> SUWA lobbied Interior to support H.R. 1500, federal legislation that would add 2.7 additional acres of federal and state land<sup>124</sup> to the 3.2 million acres of BLM WSAs.<sup>125</sup> Utah's congressional delegation supported a competing bill designating only 2.1

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<sup>116</sup> This controversy has been well documented; this Note provides only a brief overview. See, e.g., Kevin Hayes, *History and Future of the Conflict Over Wilderness Designations of BLM Land*, 16 J. ENVTL. L. & LITIG. 203, 204 (2001) (discussing the conflict over the potential Congressional designation of wilderness areas in Utah); Jason Hardin, *Tenth Circuit Rejects Bid to Stop 1996 Re-inventory of Public Lands in Utah*, 19 J. LAND RESOURCES & ENVTL. L. 156, 156 (1999) (examining the background and implications of Tenth Circuit Court of Appeals decision regarding challenges to a 1996 reinventory of public lands in Utah for wilderness characteristics).

<sup>117</sup> *Utah v. Norton*, No. 2:96-CV-0870, 2006 U.S. Dist. LEXIS 73480, at \*9–12 (D. Utah Sept. 20, 2006).

<sup>118</sup> Hayes, *supra* note 116, at 246.

<sup>119</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*6–7. BLM also determined that 14.5 million acres lacked wilderness characteristics, eliminating them from further review as WSAs and management under the nonimpairment standard. *Utah v. Babbitt*, 137 F.3d 1193, 1198 (10th Cir. 1998).

<sup>120</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*7.

<sup>121</sup> *Id.*; *Babbitt*, 137 F.3d at 1199.

<sup>122</sup> *Utah v. Dep't of the Interior*, 535 F.3d 1184, 1188 (10th Cir. 2008) (discussing congressional inaction and BLM's management of 3.2 million acres under the IMP). See also *W. Watersheds Project v. Rosenkrance*, 736 F. Supp. 2d 1276, 1283 (D. Idaho 2010).

<sup>123</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*7–8.

<sup>124</sup> *Id.* at \*8. This bill also included state trust land surrounded by federal land that BLM could incorporate into a WSA via land exchange. *Babbitt*, 137 F.3d at 1211.

<sup>125</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*7–8. Wilderness advocates have introduced this bill or bills like it annually since 1989. *Babbitt*, 137 F.3d at 1199 n.4. See, e.g., America's Red Rock Wilderness Act of 2011, H.R. 1916, 112th Cong. (enacted), available at <http://www.govtrack.us/congress/bills/112/hr1916/text>.

million acres.<sup>126</sup> Spurred by the political and congressional stalemate,<sup>127</sup> Interior Secretary Bruce Babbitt directed BLM's Utah State Director to give "careful attention" to agency management decisions affecting potential wilderness "whether within formally designated WSA's or not"<sup>128</sup> and, using authority under section 201, ordered BLM to reinventory H.R. 1500's 5.7 million acres for the presence of wilderness characteristics.<sup>129</sup> Consequently, in 1996 BLM re-evaluated 3.1 million acres of federal land the agency found to lack wilderness characteristics in the 1980 inventory, but which were included in the pending wilderness bills before Congress.<sup>130</sup> BLM arranged these acres into wilderness inventory areas or units (WIAs).<sup>131</sup> Consistent with Secretary Babbitt's directive, during the reinventory BLM managed WIAs under the nonimpairment standard, though it did not designate them as WSAs.<sup>132</sup>

### B. Litigation and Settlement

The State of Utah sued, alleging that BLM lacked authority under FLPMA to conduct the reinventory, and that the agency protected WIAs as de facto wilderness by applying the IMP's nonimpairment standard without formally designating the lands as WSAs.<sup>133</sup> The State contended that BLM's authority to conduct wilderness review and establish new WSAs expired at section 603's deadline in 1993.<sup>134</sup> The district court agreed with the State, issuing a preliminary injunction that enjoined the reinventory.<sup>135</sup> BLM

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<sup>126</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*8.

<sup>127</sup> BLM described the conflict as "the most intractable controversy over any resource inventory since the passage of FLPMA." BLM, U.S. DEP'T OF THE INTERIOR, UTAH WILDERNESS INVENTORY vii (1999), [hereinafter UTAH WILDERNESS INVENTORY] available at [www.access.gpo.gov/blm/utah/pdf/intro.pdf](http://www.access.gpo.gov/blm/utah/pdf/intro.pdf).

<sup>128</sup> *Babbitt*, 137 F.3d at 1210–11 n.28.

<sup>129</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*8; *Babbitt*, 137 F.3d at 1198–99. Secretary Babbitt informed Utah Congressman James Hansen that BLM would use section 201 to "take a careful look at the lands identified in the 5.7 million acre bill that have not been identified by the BLM as wilderness study areas, and report their findings." *Id.* at 1199.

<sup>130</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*8–9. BLM re-inventoried the 3.1 million acres included in both H.R. 1500 and H.R. 1745 (another pending Utah wilderness bill), and additional federal lands the agency added. *Babbitt*, 137 F.3d at 1211 n.27. BLM also inventoried over 3,000 acres of state school trust lands surrounded by or adjacent to federal WIAs, assessing land exchange opportunities. *See, e.g.*, UTAH WILDERNESS INVENTORY, *supra* note 127, at viii, xv.

<sup>131</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*8. *See also* UTAH WILDERNESS INVENTORY, *supra* note 127, at A5 (defining "wilderness inventory unit" as "a portion of public land evaluated to determine its roadless character and the presence of wilderness characteristics as defined in Section 2(c) of the Wilderness Act of 1964.").

<sup>132</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*7–9.

<sup>133</sup> *Babbitt*, 137 F.3d at 1211.

<sup>134</sup> *Id.* at 1200; *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*9.

<sup>135</sup> *Babbitt*, 137 F.3d at 1201.

appealed to the Tenth Circuit, which vacated the preliminary injunction in 1998, concluding that Utah lacked standing to challenge the reinventory.<sup>136</sup>

BLM resumed its reinventory and, in 1999, released a report classifying an additional 2.6 million acres as possessing wilderness characteristics.<sup>137</sup> Consistent with the Secretary's instructions to give "careful attention" to potential wilderness, BLM took actions to protect wilderness resources in the WIAs, including refusing to approve mineral leases and delaying related development actions, but did not designate them as WSAs in land use plans.<sup>138</sup> After BLM adopted the 2001 Handbook, BLM's Utah State Office confirmed that it would manage Utah WIAs under the IMP's nonimpairment standard and pledged to consider the establishment of section 202 WSAs during Utah RMP revisions.<sup>139</sup> In 2003 the State amended its suit, alleging that BLM exceeded its authority by establishing new WSAs after the section 603 deadline and managing WIAs under the IMP, contending that "the multiple-use and sustained-yield standard should have governed."<sup>140</sup>

In 2003, President George W. Bush's Interior Secretary Gale Norton reached a settlement<sup>141</sup> with the state of Utah that ended BLM's authority to establish and manage new WSAs.<sup>142</sup> In the settlement, BLM conceded that its authority to conduct wilderness reviews and establish WSAs expired with section 603's 1993 deadline,<sup>143</sup> and that it lacked authority to create new WSAs under sections 603 or 202 after that date—a result that overturned its pre-2003 interpretation.<sup>144</sup> BLM also agreed to withdraw the 2001 Handbook, refrain from applying the IMP to any land other than existing section 603 and 202 WSAs, and manage its lands only as specified in governing land use plans.<sup>145</sup> The Utah District Court upheld the agreement in a later challenge,<sup>146</sup> finding that it neither limited BLM's authority to conduct and maintain section 201 inventories, nor interfered with the agency's discretion under

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<sup>136</sup> *Id.* at 1214–15. The court determined that the State failed to identify an injury-in-fact that was fairly traceable to the 1996 inventory, in part because "Plaintiffs . . . have no right under section 201 to participate in the inventory process." *Id.* at 1213–14.

<sup>137</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*10. *See, e.g.*, UTAH WILDERNESS INVENTORY, *supra* note 127, at 9. BLM also identified wilderness values on over 400,000 acres of state trust land. *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*10.

<sup>138</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*11.

<sup>139</sup> *Id.* at \*11–12.

<sup>140</sup> *Id.* at \*12.

<sup>141</sup> *See id.* at \*12–13. The parties first entered the agreement as a consent decree, but later removed the elements that made it judicially enforceable. *Id.* at \*15–16.

<sup>142</sup> *Id.* at \*13.

<sup>143</sup> *Id.*

<sup>144</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*13. The settlement agreement allowed to stand all section 202 WSAs established through a completed RMP process, *id.*, such as the Sutton Mountain and Pats Cabin WSAs in Oregon's Prineville District. *See supra* note 104 (discussing the Prineville WSA additions). However, BLM agreed to drop all potential section 202 WSAs from pending incomplete RMPs. *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*13.

<sup>145</sup> *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*13–14. BLM also agreed not to use the reinventory to create new WSAs on WIAs. *Id.*

<sup>146</sup> *Id.* at \*73. Intervenor SUWA moved to vacate the agreement, alleging that this interpretation violated FLPMA by failing to recognize the validity of section 202 WSAs. *Id.* at \*15, \*40.

section 202 to prioritize protection of lands with wilderness characteristics in land use plans without designating new WSAs.<sup>147</sup>

The 2003 “No More Wilderness” agreement<sup>148</sup> effectively terminated BLM’s authority to use section 202 to designate and protect new areas under section 603’s nonimpairment standard, as interpreted in the IMP.<sup>149</sup> In effect, the settlement created a finite universe of WSAs designated under section 603 or 202, leaving the agency no post settlement means to afford nonimpairment protection to lands with wilderness characteristics that it overlooked in the section 603 inventory or acquired via land exchange.<sup>150</sup> However, as the Utah District Court noted—and BLM agreed—the settlement agreement did not diminish BLM’s authority to include wilderness characteristics in its section 201 inventories, nor did it prohibit the agency from protecting lands with wilderness characteristics under non-IMP protection in section 202’s land use planning process.<sup>151</sup> BLM and the wilderness advocacy community have been trying to define the scope of that remaining authority ever since.<sup>152</sup>

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<sup>147</sup> *Id.* at \*60 (finding that the settlement did “not preclude BLM from taking an inventory of its wilderness-type lands for purposes other than section 603 wilderness reviews, such as evaluating land for its wilderness characteristics under section 202”); *id.* at \*71 n.9 (“section 202 still provides the BLM with the authority to protect and prevent irreparable damage to areas with wilderness characteristics.”). See also *Utah v. Dep’t of the Interior*, 535 F.3d 1184, 1186 (10th Cir. 2008) (agreeing with the district court that SUWA’s suit facially challenging the settlement agreement as violative of FLPMA and NEPA was not ripe because BLM had not yet applied the settlement directives in the context of a specific land management decision).

<sup>148</sup> See Editorial, No ‘No More Wilderness,’ N.Y. TIMES, Nov. 23, 2009, [http://www.nytimes.com/2009/11/24/opinion/24tue3.html?\\_r=0](http://www.nytimes.com/2009/11/24/opinion/24tue3.html?_r=0) (last visited Feb. 22, 2014). Legal scholar Michael Blumm refers to the agreement as a “sweetheart deal” that effectively eliminated WSA status for roadless lands across the country. Michael C. Blumm, *The Bush Administration’s Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 ENVTL. L. REP., 10,397, 10,406 (2004).

<sup>149</sup> See *Norton*, 2006 WL 2711798, at \*21.

<sup>150</sup> See BLM, U.S. DEP’T OF THE INTERIOR, INSTRUCTION MEMORANDUM NO. 2003-275 – CHANGE 1 (2003). See also *Norton*, 2006 WL 2711798, at \*27 (noting that the settlement agreement did not eliminate section 202 WSAs established as part of complete RMPs).

<sup>151</sup> *Norton*, 2006 WL 2711798 at \*4, \*15 (noting that the settlement had no binding effect on BLM’s duty and authority under sections 201 and 202, and that consequently BLM “remains free to inventory land for wilderness characteristics pursuant to § 201 and to protect land so as to leave wilderness character unimpaired under § 202[,]” but without applying section 603’s nonimpairment standard). See also Brief of the Federal Appellees at 19, 36, 41, *Utah v. Kempthorne*, No. 06-4240 (10th Cir.) (filed Feb. 2007) (arguing that the settlement restricts neither BLM’s authority to gather information pursuant to section 201, “including information about wilderness-associated characteristics,” nor BLM’s authority under FLPMA section 202 to “protect and preserve public lands in other ways [than under section 603’s nonimpairment standard].”).

<sup>152</sup> See, e.g., *Or. Natural Desert Ass’n v. Rasmussen*, 451 F. Supp. 2d 1202, 1215 (D. Or. 2006) (challenging BLM’s assessment of wilderness values and alleged violation of its section 201 duty).

## IV. POST-SETTLEMENT CASE LAW

After the 2003 settlement agreement, wilderness advocates, including SUWA and the Oregon Natural Desert Association (ONDA), sought to ensure that BLM used its existing authority to identify and protect lands with wilderness characteristics outside WSAs and designated wilderness areas.<sup>153</sup> Those groups challenged BLM's decisions at both the RMP and project-specific levels, reminding the agency that sections 201 and 202 of FLPMA required it to inventory and balance wilderness values as resources in the land use planning process.<sup>154</sup> They also argued that NEPA required the agency to use current, accurate data when making decisions that could affect areas with unprotected wilderness characteristics.<sup>155</sup> Their suits garnered limited success at the district court level, where courts concluded that BLM could not ignore available information but that it had no duty to inventory for wilderness values under section 201 of FLPMA.<sup>156</sup> Finally, in 2008 the Ninth Circuit reversed that trend, giving new life to BLM's statutory responsibilities toward wilderness characteristics.<sup>157</sup>

*A. District Court Decisions*

Much of the post-settlement litigation concerning wilderness characteristics occurred in Oregon.<sup>158</sup> Hearing frequent ONDA challenges to BLM decisions, the Oregon District Court repeatedly held that FLPMA did not require BLM to maintain a current inventory of non-WSA wilderness values on its lands, but that NEPA did require the agency to take into account available information regarding wilderness values.<sup>159</sup> In particular, BLM had no statutory obligation to update its wilderness inventory when deciding to issue an RMP.<sup>160</sup> However, the district court did interpret NEPA

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<sup>153</sup> See, e.g., *Rasmussen*, 451 F. Supp. 2d at 1214; *S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d 1253, 1259 (D. Utah 2006).

<sup>154</sup> See, e.g., *Or. Natural Desert Ass'n v. Shuford*, Civ. No. 06-242-AA, 2007 U.S. Dist. LEXIS 42614, at \*16 (D. Or. June 8, 2007); *Or. Natural Desert Ass'n v. Bureau of Land Mgmt. (ONDA v. BLM)*, Civ. No. 03-1017-JE, 2005 U.S. Dist. LEXIS 43518, at \*14 (D. Or. Mar. 29, 2005).

<sup>155</sup> See *Rasmussen*, 451 F. Supp. 2d at 1215.

<sup>156</sup> See, e.g., *Shuford*, 2007 U.S. Dist. LEXIS 42614, at \*16-17.

<sup>157</sup> *ONDA v. BLM*, 625 F.3d 1092, 1111 (9th Cir. 2008).

<sup>158</sup> See *supra* notes 154-58.

<sup>159</sup> See *ONDA v. BLM*, Civ. No. 03-1017-JE, 2005 U.S. Dist. LEXIS 43518, at \*12 (finding that BLM was not required to conduct a wilderness inventory); *Rasmussen*, 451 F. Supp. 2d at 1215; *Shuford*, 2007 U.S. Dist. LEXIS 42614, at \*16-17 (finding BLM obligated to use an adequate baseline of environmental resources, but not to conduct a new wilderness inventory).

<sup>160</sup> See *ONDA v. BLM*, 2005 U.S. Dist. LEXIS 43518, at \*12. In that case, ONDA alleged that, in issuing an RMP for southeastern Oregon, BLM had failed to adequately take into account how wilderness values had materially changed since the agency's section 603 analysis of the area's WSAs in 1989. *Id.* at \*11. Using the procedures in BLM's 2001 Wilderness Inventory Handbook, ONDA conducted its own inventory of the planning area, concluding that 1.3 million acres of land outside existing WSAs had reverted to a more natural state and now possessed wilderness characteristics. *ONDA v. BLM*, 625 F.3d 1092, 1106-08 (9th Cir. 2010) (as amended). ONDA claimed that BLM violated FLPMA by failing to maintain a current inventory of wilderness resources, and that BLM violated NEPA when it issued the RMP without collecting, evaluating,

to require that, when making project-level decisions, the agency must actively evaluate all available information—including citizen wilderness inventories—concerning the presence of wilderness values.<sup>161</sup> Accordingly, as long as BLM did not ignore available information,<sup>162</sup> it need not do more than disclose and discuss that information in a NEPA review.<sup>163</sup> Further, the district court did not interpret either statute to define or require any

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and publicly disclosing information concerning these newly-developed wilderness values. The court disagreed, deciding that despite section 201, BLM had no legal obligation under FLPMA or NEPA to perform a new wilderness inventory. *ONDA v. BLM*, 2005 U.S. Dist. LEXIS 43518, at \*11–12. Thus, the court upheld BLM’s NEPA analysis and did not require the agency to revisit its 1989 WSA study before adopting the new RMP. *Id.* at \*16.

<sup>161</sup> See *Rasmussen*, 451 F. Supp. 2d at 1215. In that case, ONDA alleged that BLM authorized range rehabilitation projects on a BLM-managed grazing allotment in southeastern Oregon without taking into account how wilderness values had changed since the 1989 section 603 inventory and analysis. *Id.* at 1207. Thus, BLM had allegedly violated its duty under section 201 to maintain a current inventory of wilderness values, and its NEPA analysis based on that inventory was fundamentally deficient. *Id.* at 1207, 1211. ONDA submitted a citizen inventory, identifying areas which allegedly deserved protection as new WSAs, but BLM merely reviewed and critiqued the sufficiency of that information without using it to consider whether wilderness values had changed in the allotment. *Id.* at 1211. The district court agreed with ONDA on this issue, deciding that BLM’s cursory dismissal of ONDA’s inventory failed to satisfy the agency’s NEPA duty to “take a hard look at the wilderness issue” with “sufficient current information . . . to make a reasoned decision regarding environmental impacts” from the proposed projects, and that such flawed analysis made BLM’s decision to implement the projects arbitrary and capricious. *Id.* at 1212, 1215 (citing *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 422 F. Supp. 2d 1115, 1167 (N.D. Cal. 2006)). However, the court agreed with BLM that section 201 of FLPMA did not require the agency to maintain its own current inventory of wilderness resources; rather the agency could not cursorily dismiss other available data and fail to consider it as part of the NEPA analysis. *Id.* at 1215. See also *Oregon Natural Desert Ass’n*, 176 Interior Dec. 371, at \*8, 20 (IBLA 2009) (discussing ONDA’s use of citizen wilderness inventory to show that roads BLM previously identified on certain parcels of land had been overgrown, and that now the lands met the wilderness criteria).

<sup>162</sup> See *S. Utah Wilderness Alliance v. Norton*, 457 F. Supp. 2d, 1253, 1264 (D. Utah 2006) (holding that BLM violated NEPA when it “ignored” significant inventory information—from both BLM’s own reinventory and a citizen inventory—concerning the presence of wilderness characteristics in areas proposed for oil and gas leasing, and failed to prepare a supplemental environmental analysis discussing effects on those resources from the proposed leasing).

<sup>163</sup> See *Shuford*, 2007 U.S. Dist LEXIS 42614 at \*10, 21. In that case, ONDA challenged BLM’s issuance of an RMP for the Andrews-Steens Cooperative Management and Protection Area in southeastern Oregon, alleging that the agency violated FLPMA by failing to maintain a current inventory and overlooking existing or newly developed wilderness values in the area. *Id.* at \*6. ONDA also claimed that BLM violated NEPA by failing to adequately consider the RMP’s effects on non-WSA wilderness resources. *Id.* This time, BLM analyzed both ONDA’s citizen inventory as well as additional resources, eventually concluding that one of ONDA’s proposed WSAs possessed wilderness values, and proposing, in the EIS, management protections for that and other parcels with wilderness character outside of existing WSAs. *Id.* at \*20. The district court agreed that NEPA instructed BLM to evaluate the effects of its proposed actions against an environmental baseline, but as long as the baseline was “accurate and complete” and BLM considered all available information, NEPA mandated no more. *Id.* at \*12–13. The court upheld the EIS, concluding that, at bottom, neither NEPA nor FLPMA required the agency to perform a new wilderness inventory every time it developed a new RMP, and here, BLM had satisfied its NEPA “hard look” duty. *Id.* at \*32–33.

substantive protection of identified wilderness values.<sup>164</sup> Such decisions painted wilderness values as secondary resources that BLM had to evaluate, but had no ongoing duty to prioritize.<sup>165</sup>

### *B. The Ninth Circuit Ushers in a New Era*

In 2008, the Ninth Circuit ended the trend set by the lower courts when it issued a landmark decision in ONDA's appeal of the district court's ruling in favor of BLM in a case involving the southeastern Oregon RMP.<sup>166</sup> The Ninth Circuit fundamentally disagreed with the lower courts, confirming that Congress intended BLM to treat wilderness as it would any other resource specifically enumerated in FLPMA.<sup>167</sup> Thus, BLM must identify wilderness values in its section 201 inventories, and, if the agency—or anyone else—documented those values within a planning area, section 202 of FLPMA required BLM to address how it would manage them and NEPA required disclosure and discussion of how planning options would affect them.<sup>168</sup>

The court reasoned that BLM's land use planning process involved longterm management of resource values, governed by the principles of multiple use and sustained yield to ensure the "sustainability of healthy and productive land."<sup>169</sup> When Congress gave BLM distinct obligations under section 603 to consider wilderness as a management resource, it contemplated that the agency's section 201 inventory would include wilderness values, and it intended for the agency to consider longterm management of wilderness values on its lands.<sup>170</sup> Thus, although BLM's obligations under section 603 ended in 1991, section 202 of FLPMA gave the agency broad authority to balance and manage the wilderness resource through land use planning.<sup>171</sup>

The court concluded that, under section 202, BLM could decide to manage lands with wilderness characteristics—even newly discovered ones—by protecting them from extractive or destructive uses like mineral entry, grazing, or vehicle use without requiring permanent nonimpairment

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<sup>164</sup> See *id.* at \*32, 38 (finding that the management goals and duties imposed by the statutes do not require specific wilderness protections sought by ONDA).

<sup>165</sup> See, e.g., *ONDA v. BLM*, 2005 U.S. Dist. LEXIS 43518, at \*11–12 (finding that even where a million additional acres might have qualified for BLM wilderness designation, ONDA could not show BLM had any legal obligation to conduct a wilderness inventory).

<sup>166</sup> See *ONDA v. BLM*, 625 F.3d 1092 (9th Cir. 2010) (as amended).

<sup>167</sup> See *id.* at 1112 ("FLPMA makes clear that wilderness characteristics are among the values which the BLM can address in its land use plans, and hence, needs to address in the NEPA analysis.")

<sup>168</sup> *Id.* at 1112–13 ("[W]ilderness characteristics are among the 'resource and other values recognized under . . . FLPMA, they are to be managed as part of the complex task of managing 'the various resources without permanent impairment of . . . the quality of the environment.'")

<sup>169</sup> *Id.* at 1110 (citing 43 U.S.C. §§ 1732(a), 1712(c) (2006)).

<sup>170</sup> *Id.* at 1113 (section 603 of FLPMA "contemplates a 'review' of areas *already* so 'identified [as having wilderness values]' . . . in the course of the general BLM 'inventory of all public lands and their resource and other values [under section 201].'" (emphasis in original)).

<sup>171</sup> *Id.* at 1114 (citing 43 U.S.C. §§ 1712, 1732 (2006)).

protection revocable only by Congress.<sup>172</sup> For example, BLM could place limits on grazing leases or restrict ORV use to “minimize damage to soil, watershed, vegetation, air, or other resources.”<sup>173</sup> Alternately, the court reasoned that BLM could decide to designate the land with wilderness character within a special management category, such as an area of critical environmental concern or a “research natural area.”<sup>174</sup> Or, BLM could prioritize and protect wilderness uses in RMPs.<sup>175</sup> To accomplish this protection, the court opined that BLM could adopt a temporary “modified nonimpairment” policy, distinct from the permanent nonimpairment policy that FLPMA section 603 imposed on existing WSAs because it was changeable through the land use planning process.<sup>176</sup> According to the court, BLM’s final option was to decide, through the land use planning process, to prioritize lands with wilderness characteristics for other uses incompatible with protection of wilderness values.<sup>177</sup> Regardless of how BLM chose to manage inventoried wilderness values in its RMPs, NEPA required full disclosure and discussion of the effects an agency decision could have on those values.<sup>178</sup>

The Ninth Circuit’s decision in *ONDA v. BLM* was lauded by environmental groups like ONDA which, following the setback of the 2003 settlement agreement, fought for BLM recognition of wilderness as a FLPMA resource.<sup>179</sup> The 2003 settlement ended the agency’s practice of designating

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<sup>172</sup> *Id.* (citing 43 C.F.R. § 4130.3(a) (2012)).

<sup>173</sup> *ONDA v. BLM*, 625 F.3d at 1114 (citing 43 C.F.R. § 8342.1(a) (2012)).

<sup>174</sup> *Id.* (citing 43 C.F.R. §§ 1610.7-2, 8200.0-1 to 8223.1 (2012)) (defining areas of critical environmental concern and research natural areas). *See also* 43 U.S.C. § 1702(a) (2006) (defining areas of critical environmental concern); *id.* §§ 1711(a), 1712(c)(3) (2006) (discussing how BLM should give priority to areas of critical environmental concern in conducting its inventory and developing land use plans, respectively).

<sup>175</sup> *ONDA v. BLM*, 625 F.3d at 1114. BLM conceded that it possessed such authority in the Utah litigation. *See* Brief of the Federal Appellees at 41, *State of Utah v. U.S. Dep’t of the Interior*, 535 F.3d 1184 (2008) (No. 06-4240) (“[BLM] has the authority under [section 202] to manage lands in a manner that is similar to the nonimpairment standard that applies to wilderness study areas under [section 603], by emphasizing the protection of wilderness-associated characteristics as a priority over other potential uses.”); *State of Utah v. Norton*, No. 2:96-CV-0870, 2006 WL 2711798, at \*17 (D. Utah Sept. 20, 2006) (“BLM acknowledge[s] [its] discretion to manage lands in a manner that is similar to the nonimpairment standard by emphasizing the protection of wilderness characteristics.”).

<sup>176</sup> *ONDA v. BLM*, 625 F.3d at 1114. In effect, this would be much like the modified nonimpairment standard that BLM imposed on section 202 WSAs before the 2003 settlement agreement, only BLM would not refer to protected areas as “WSAs.”

<sup>177</sup> *Id.* at 1115.

<sup>178</sup> *Id.* The Ninth Circuit noted that this result was consistent with prior district court decisions which acknowledged that BLM must generally consider a landscape’s wilderness characteristics in NEPA documents prepared for RMPs concerning that landscape. *Id.* at 1117 n.22 (citing *Oregon Natural Desert Ass’n v. Shuford*, Civ No. 06-242-AA, 2007 WL 1695162, at \*6 (D. Or. June 8, 2007); *Oregon Natural Desert Ass’n v. Rasmussen*, 451 F. Supp. 2d 1202, 1212–13 (D. Or. 2006)).

<sup>179</sup> Mac Lacy, *Court Orders BLM To Evaluate Wilderness Values on Public Lands*, DESERT RAMBLINGS, Summer 2008, at 1 (referring to the ruling as a “landmark decision” that “will have a profound impact on BLM’s management of the public lands it is charged with protecting.”). Bill Marlett, ONDA’s former Executive Director, called the decision “hands-down one of the most



WSAs using section 202 and protecting them under the nonimpairment standard.<sup>180</sup> This impasse left the agency without a mechanism to impose nonimpairment protection on lands with wilderness values outside existing WSAs.<sup>181</sup> However, the Ninth Circuit's opinion confirmed that BLM had an ongoing duty to inventory and analyze wilderness characteristics under sections 201 and 202, and that the agency could protect these inventoried wilderness values in RMPs, although the 2003 settlement precluded labeling them as WSAs.<sup>182</sup> The court's recognition of this authority provided BLM with an opportunity to reinterpret its FLPMA obligations and authority in this area, which the agency had not acted on since 2003.<sup>183</sup>

#### V. THE WILD LANDS POLICY

On December 22, 2010, Secretary of the Interior Ken Salazar issued a secretarial order announcing a new policy on BLM's consideration and management of non-WSA lands with wilderness characteristics.<sup>184</sup> Secretary Salazar's new "Wild Lands Policy" constituted BLM's first comprehensive national wilderness policy since the 2003 settlement agreement.<sup>185</sup> Its directives renewed BLM's focus on wilderness as a "high priority" FLPMA resource,<sup>186</sup> invoking the FLPMA authority the agency had acknowledged and used before 2003, and had not disclaimed in the settlement.<sup>187</sup>

The Policy accomplished this refocusing effect in three ways. First, it affirmed that the agency should consider wilderness values as an "integral component" of its multiple-use mission, identifying lands with wilderness characteristics (LWC) in its mandatory section 201 inventories.<sup>188</sup> Second, the Policy directed BLM to use its section 202 land use planning authority to

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enduring victories" in the organization's history, with an impact reaching beyond Oregon to "BLM lands across the West." *Id.* at 8.

<sup>180</sup> See BLM, U.S. DEP'T OF THE INTERIOR, INSTRUCTION MEMORANDUM NO. 2003-274, at 2 (2003), [hereinafter INSTRUCTION MEMORANDUM NO. 2003-274] available at <http://nwcoss.org/05-18-05/im2003-274%20Utah%20v%20Norton.pdf>.

<sup>181</sup> *Id.*

<sup>182</sup> *ONDA v. BLM*, 625 F.3d at 1115.

<sup>183</sup> See INSTRUCTION MEMORANDUM NO. 2003-274, *supra* note 180 (interpreting BLM's settlement obligations as precluding management of non-WSAs under a nonimpairment standard).

<sup>184</sup> See generally WILD LANDS POLICY, *supra* note 25 (implementing a policy that described BLM's authority to inventory and protect areas with wilderness characteristics outside of designated Wilderness Study Areas).

<sup>185</sup> BLM, U.S. Dep't of Interior, *Salazar, Abbey Restore Protections for America's Wild Lands*, [http://www.blm.gov/wo/st/en/info/newsroom/2010/december/NR\\_12\\_23\\_2010.html](http://www.blm.gov/wo/st/en/info/newsroom/2010/december/NR_12_23_2010.html) (last visited Feb. 22, 2014) (noting that BLM had been without such guidance since the agency revoked its 2001 Wilderness Inventory Handbook as part of the Utah settlement).

<sup>186</sup> See WILD LANDS POLICY, *supra* note 25, at 1.

<sup>187</sup> See *id.* at 1, 3 (reciting several supporting authorities and explaining that the "Order does not alter or affect any existing authority of the BLM").

<sup>188</sup> *Id.* at 2. (directing BLM to identify non-WSA lands with wilderness characteristics in section 201 inventories and describing them as "Lands with Wilderness Characteristics." It also directed BLM to maintain a public "wilderness database," describing all inventoried lands with wilderness characteristics and discussing how the agency manages them).

consider designating appropriate LWC as “Wild Lands,” that is, lands that the agency would protect in amended RMPs by “avoiding impairment” to their wilderness characteristics.<sup>189</sup> Third, for project-level decisions in areas not yet inventoried under the new framework, the Policy instructed BLM to inventory apparent wilderness characteristics, and then discuss the proposed project’s effects to them—as well as measures to minimize those effects—in a NEPA analysis.<sup>190</sup> As described below—the Policy along with implementing manuals BLM issued in early 2011<sup>191</sup>—reflected a synthesis of BLM’s prior interpretation of its FLPMA authority and obligations, the settlement agreement’s limitation on designation of new WSAs, and the Ninth Circuit’s explicit recognition of BLM’s inventory obligation and its broad land use planning authority under FLPMA in *ONDA v. BLM*.<sup>192</sup>

### A. Inventory

As articulated by the Ninth Circuit<sup>193</sup> and allowed under the 2003 settlement agreement,<sup>194</sup> the Wild Lands Policy directed BLM to consider wilderness values as a FLPMA resource the agency must identify in section 201 inventories.<sup>195</sup> BLM’s new Wilderness Characteristics Inventory manual established the process and factors BLM officials would use to update the agency’s existing wilderness inventory: Evaluating lands to determine whether they possessed wilderness values and therefore qualified as LWCs.<sup>196</sup> The evaluation procedures in the new manual largely echoed the rescinded<sup>197</sup> 2001 Wilderness Inventory Handbook.<sup>198</sup> Like the 2001

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<sup>189</sup> WILD LANDS POLICY, *supra* note 25 (The Secretary’s choice to use the word “impairment” may have been an unfortunate decision, because it echoed Congress’s use of that term in section 603 of FLPMA and BLM’s interpretation of that direction in the IMP. It may also have further alarmed the members of Congress who would eventually seek to block implementation of the Wild Lands Policy).

<sup>190</sup> *Id.* at 3 (describing BLM’s inventory and review process for project-level decisions that may impair wilderness values not yet analyzed under the policy). The order also directed BLM to develop recommendations for congressional designation of lands into the NWPS. *Id.* at 2.

<sup>191</sup> See MANUAL 6301, MANUAL 6302, and MANUAL 6303, *supra* note 26.

<sup>192</sup> See *infra* Section V.A–C.

<sup>193</sup> *ONDA v. BLM*, 625 F.3d 1092, 1099 (9th Cir. 2010) (“[W]ilderness characteristics are among the ‘resource and other values’ of the public lands to be inventoried under [section 201].”).

<sup>194</sup> The settlement agreement preserved BLM’s authority to inventory for wilderness characteristics under FLPMA section 201. *Utah v. Norton*, 2006 U.S. Dist. LEXIS 73480, at \*14 (D. Utah 2006) (noting that the settlement agreement did not diminish BLM’s authority to identify wilderness characteristics in its section 201 inventory).

<sup>195</sup> See WILD LANDS POLICY, *supra* note 25, at 2.

<sup>196</sup> See MANUAL 6301, *supra* note 26, at .14B.

<sup>197</sup> BLM rescinded the 2001 Handbook as part of the Utah settlement agreement because it contemplated designation of section 202 WSAs subject to the modified nonimpairment standard. See *Norton*, 2006 U.S. Dist. LEXIS 73480, at \*58–63.

<sup>198</sup> See MANUAL 6301, *supra* note 26, at .14B–C (describing how agency officials should analyze wilderness characteristics as defined in section 2(c) of the Wilderness Act); see also 2001 Handbook, *supra* note 105, at .13B (same as MANUAL 6301). The new manual also echoed the 2001 Handbook’s definition of “road” and procedures for delineating the boundaries of lands

Handbook, the new manual acknowledged BLM's authority to inventory for wilderness values under section 201 of FLPMA,<sup>199</sup> described when BLM may conduct a wilderness characteristics inventory under that section,<sup>200</sup> and outlined procedures for BLM officials to evaluate new information (e.g., from citizens) suggesting that an area possessed wilderness character.<sup>201</sup> However, unlike the 2001 Handbook, but consistent with the settlement agreement, the new manual did not contemplate designation of new WSAs under section 202.<sup>202</sup>

### *B. Land Use Planning*

The Wild Lands Policy also directed BLM to use section 202's land use planning process to determine how to manage inventoried LWCs.<sup>203</sup> In that process, BLM would evaluate LWCs' wilderness characteristics and manageability, as well as surrounding resource values and other uses, to determine whether it would designate LWCs as Wild Lands and manage them to protect their wilderness characteristics, or whether it would manage LWCs for other uses incompatible with protection of wilderness characteristics.<sup>204</sup> The policy and manuals set a kind of protective "default"

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with wilderness characteristics. See MANUAL 6301, *supra* note 26, at 15–16 (road definition) and .14C (boundary delineation). See also 2001 Handbook, *supra* note 105, at .13A and .13C (same as MANUAL 6301).

<sup>199</sup> See MANUAL 6301, *supra* note 26, at .01, .04, .06 (directing BLM to maintain and update as necessary an inventory of wilderness resources). See also 2001 Handbook, *supra* note 105, at .01, .04, .06 (same as MANUAL 6301).

<sup>200</sup> See MANUAL 6301, *supra* note 26, at .12 (noting that BLM may need to update a wilderness inventory when 1) the public or BLM identifies wilderness characteristics as an issue during NEPA review; 2) BLM undertakes a land use planning process; 3) BLM receives new information concerning resource conditions, including citizen inventories; 4) BLM determines that the land appears to have wilderness characteristics and a proposed project may impair those apparent characteristics; or 5) BLM acquires new land); see also 2001 Handbook, *supra* note 105, at .06B–D (noting that BLM must conduct a wilderness inventory on all lands acquired via exchange, including certain inholdings, and lands "identified as possibly having wilderness character by BLM, lands included in proposed legislation, or lands within externally generated proposals [documenting] new or supplemental information regarding resource uses and condition[s].").

<sup>201</sup> See MANUAL 6301, *supra* note 26, at .13A–B (describing minimum standards and BLM procedures for evaluating new information); 2001 Handbook, *supra* note 105, at .06E (describing BLM's method of evaluating new information that suggests a public land may have wilderness characteristics).

<sup>202</sup> *Utah v. Norton*, No. 2:96-CV-0870, 2006 U.S. Dist. LEXIS 73480, at \* 11–13 (10th Cir. Sept. 20, 2006); 2001 Handbook, *supra* note 105, at .06D.

<sup>203</sup> See WILD LANDS POLICY, *supra* note 25, at 2; MANUAL 6302, *supra* note 26, at .11 (directing BLM to evaluate all LWCs through the land use process, examining management options where present). The manual also described procedures for BLM state offices to make recommendations to Congress to designate Wild Lands as units within the NWPS. Formulation and issuance of such recommendations would occur outside of the land use planning process. *Id.* at .2.

<sup>204</sup> See MANUAL 6302, *supra* note 26, at .12 (directing BLM to consider factors including 1) the quality of wilderness characteristics for each LWC; 2) the extent to which "LWCs [could] be

position, directing BLM officials to designate LWCs as Wild Lands “unless” BLM determined that impairment of wilderness characteristics was appropriate and consistent with other law and resource management considerations.<sup>205</sup> In making this determination, BLM would analyze a range of alternative management schemes under NEPA, including one that explicitly protected wilderness characteristics.<sup>206</sup> BLM’s analysis would consider the other resources or uses, the quality of the wilderness characteristics, and the effects of the other uses on wilderness characteristics.<sup>207</sup> The manual described management tools BLM could employ in land use plans to protect designated Wild Lands, including prohibiting or limiting new road construction, commercial uses, new structures, and mineral sales and development.<sup>208</sup> Notably, BLM retained authority to change its Wild Land designation decision in subsequent land use planning under section 202, just as it had with WSAs designated under section 202.<sup>209</sup>

This menu of protective management options—applied or revoked using the land use planning process—distinguished BLM’s designation of Wild Lands from its pre-settlement designation of WSAs.<sup>210</sup> Before the Utah settlement, when BLM used its land use planning authority under section 202 to designate WSAs, the agency automatically protected those WSAs under the IMP’s permanent nonimpairment standard.<sup>211</sup> In contrast, BLM did not interpret Secretary Salazar’s Wild Lands order to automatically apply that nonimpairment standard, which would allow only specified uses in a designated area.<sup>212</sup> Instead, consistent with both the settlement agreement<sup>213</sup>

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effectively managed as Wild Lands to protect their wilderness characteristics;” and 3) adverse effects on other uses of an LWC if BLM designated it as a Wild Land).

<sup>205</sup> See WILD LANDS POLICY, *supra* note 25, at 2; MANUAL 6302, *supra* note 26, at .13D (describing other uses BLM should consider when formulating its range of NEPA alternatives, including commercial uses, leasable minerals, rangeland management, recreational uses, renewable energy potential, rights-of-way, and travel and transportation management).

<sup>206</sup> See MANUAL 6302, *supra* note 26, at .13D (requiring BLM to disclose each NEPA alternative’s effects on LWCs and BLM’s rationale for not designating LWCs as Wild Lands).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.* In areas BLM chose not to designate as Wild Lands, the agency would consider other measures to minimize effects on wilderness characteristics. *Id.* The manual also described procedures for high-level review of this analysis. *Id.* (requiring that the BLM Washington Office review draft alternatives and planning decisions affecting LWCs, then brief the BLM Director).

<sup>209</sup> *Wild Lands Policy: Hearing on Secretarial Order 3310 Before the H. Natural Res. Comm.*, 112th Cong. 4 (2011) (statement of Robert Abbey, BLM Director), available at [http://www.blm.gov/pgdata/etc/medialib/blm/nv/special\\_areas.Par.87548.File.dat/Wild.Lands.Policy.Testimony.March2011.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/nv/special_areas.Par.87548.File.dat/Wild.Lands.Policy.Testimony.March2011.pdf) (“The designation of Wild Lands may be revisited, as the need arises, through a subsequent public planning process.”).

<sup>210</sup> See *id.*

<sup>211</sup> See 2001 Handbook, *supra* note 105, at .04C9 (declaring that BLM will protect areas designated as section 202 WSAs under the IMP).

<sup>212</sup> See WILD LANDS POLICY, *supra* note 25, at 2; MANUAL 6302, *supra* note 26, at .11.

<sup>213</sup> See *supra* note 151 (discussing how the settlement agreement did not prohibit BLM from protecting lands with wilderness characteristics in section 202’s land use planning process, and noting how BLM conceded that section 202 authorized it to “protect and preserve public lands in other ways [than under section 603’s nonimpairment standard].”).

and the Ninth Circuit's opinion in *ONDA v. BLM*,<sup>214</sup> BLM interpreted the order to encourage use of section 202 to “avoid[] impairment” of wilderness characteristics by selecting and applying management tools, either alone or in combination.<sup>215</sup>

Some of those Wild Lands management tools echoed the prohibitions of the IMP, but the Wild Lands manual did not require BLM to apply all of them at once, as required under the IMP.<sup>216</sup> In fact, the agency never articulated whether more than one protective action was necessary to “avoid[] impairment,” or how two or more actions might combine to protect wilderness character.<sup>217</sup> BLM simply gave itself the option to select and apply some land management tools—which BLM conceded it had full authority to use before the Wild Lands Policy<sup>218</sup>—which the agency deemed appropriate to confer sufficient protection.<sup>219</sup> Thus, BLM's designation and management of Wild Lands, which the agency could protect not under the permanent section 603 nonimpairment standard articulated in the IMP, but instead could “avoid[] impairment” with changeable land management, would be distinct from the agency's presettlement designation and management of both types of WSAs.<sup>220</sup> Under those, BLM automatically applied the IMP's nonimpairment prohibitions until Congress took action on section 603 WSAs or BLM undesignated section 202 WSAs.<sup>221</sup>

### C. Project Level Decisions

The Wild Lands Policy also directed BLM to take LWCs into account when making decisions on proposed projects where the governing land use plan had not yet been updated to consider them.<sup>222</sup> In so doing, the Policy and manuals instructed agency officials to preserve BLM's discretion to

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<sup>214</sup> See *supra* notes 174–78, (discussing the Ninth Circuit's opinion—and BLM's agreement—that section 202 authorized BLM to prioritize and protect lands with wilderness characteristics in land use plans by employing management tools).

<sup>215</sup> See MANUAL 6302, *supra* note 26, at .06, .13D. See also *supra* note 189 (discussing the unfortunate—and perhaps fatal—use of the word “impairment”).

<sup>216</sup> The IMP prohibited all uses, facilities, and activities that were not temporary and created surface disturbance, including those that did not “clearly protect or enhance the land's wilderness values.” See 1995 IMP, *supra* note 11, at 9. In contrast, in the Wild Lands manual, BLM gave itself the option to protect Wild Lands by “[r]estrict[ing] construction of new structures and facilities unrelated to the preservation or enhancement of wilderness characteristics.” Cf. MANUAL 6302, *supra* note 26, at .13D.

<sup>217</sup> See MANUAL 6302, *supra* note 26, at .06, .13D; 1995 IMP, *supra* note 11, at 10.

<sup>218</sup> See *supra* note 151; U.S. DEP'T OF THE INTERIOR, H-16-1-1, LAND USE PLANNING HANDBOOK 12 (2005), available at [http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/planning/planning\\_general.Par.65225.File.dat/blm\\_lup\\_handbook.pdf](http://www.blm.gov/pgdata/etc/medialib/blm/ak/aktest/planning/planning_general.Par.65225.File.dat/blm_lup_handbook.pdf) (describing management of wilderness values in land use plan and implementation decisions).

<sup>219</sup> See, e.g., MANUAL 6302, *supra* note 26, at .12 (explaining that “preparation and maintenance of the inventory shall not . . . change or prevent change of the management or use of the lands” and providing that “BLM will determine when it is appropriate to conduct a wilderness characteristics inventory.”).

<sup>220</sup> WILD LANDS POLICY, *supra* note 25, at 2.

<sup>221</sup> 1995 IMP, *supra* note 11, at 1.

<sup>222</sup> WILD LANDS POLICY, *supra* note 25, at 3.

eventually designate Wild Lands by first conducting a wilderness inventory (unless the area “clearly lack[ed]” wilderness characteristics),<sup>223</sup> then considering options to protect LWCs in the NEPA analysis for the project.<sup>224</sup> When BLM decided to approve projects that might impair wilderness characteristics,<sup>225</sup> it needed review from BLM’s Washington office.<sup>226</sup>

This process echoed a provision in BLM’s 2001 Handbook directing BLM to consider NEPA alternatives to a proposed action that could degrade wilderness values enough to disqualify the area from further consideration as a WSA.<sup>227</sup> However, whereas the 2001 Handbook directed BLM to automatically postpone all proposed actions that would disqualify the area from further consideration as a WSA,<sup>228</sup> the Wild Lands manual permitted “impairing” projects to move forward with Washington-level review.<sup>229</sup> The procedures outlined in the Wild Lands manual emphasized a kind of protective default management, fully disclosed and analyzed in the NEPA process, without encroaching on the settlement agreement’s prohibition on creating new WSAs.<sup>230</sup> Further, the procedures essentially implemented the Ninth Circuit’s interpretation of BLM’s obligations to analyze and disclose impacts to inventoried wilderness characteristics in the NEPA process, but with a protective default and an extra layer of internal review.<sup>231</sup>

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<sup>223</sup> An area “clearly lack[ed]” wilderness characteristics only if it did not meet the naturalness criterion and/or the size criterion of 5,000 acres or more. *See* MANUAL 6303, *supra* note 26, at .11.

<sup>224</sup> *See* WILD LANDS POLICY, *supra* note 25, at 3 (directing BLM to consider the effects of proposed projects on inventoried LWCs, as well as measures to minimize detrimental effects); MANUAL 6303, *supra* note 26, at .13 (if BLM’s NEPA analysis finds that a proposed action may impair wilderness values, BLM may “(1) deny the action, (2) approve the action, (3) approve the action with measures to minimize impacts on wilderness characteristics, or (4) postpone the decision until wilderness characteristics can be addressed through a land use planning process.”).

<sup>225</sup> BLM distinguished projects that would “impact” wilderness characteristics from those that would “impair” them. Projects that would “impact” wilderness characteristics would worsen or diminish the value of the wilderness resource. Projects that would “impair” wilderness characteristics would cause more intensive damage, precluding BLM from exercising its discretion to designate all or a portion of an LWC as a Wild Land. MANUAL 6303, *supra* note 26, at .2. *See also id.* at .14 (describing projects that would “impact,” not “impair,” wilderness characteristics, including control expansion of invasive exotic species, exercise of valid existing rights, renewal of livestock permits, and projects causing only minor surface disturbance).

<sup>226</sup> *See* WILD LANDS POLICY, *supra* note 25, at 3; MANUAL 6303, *supra* note 26, at .15.

<sup>227</sup> *See* 2001 Handbook, *supra* note 105, at .06F (requiring BLM to consider NEPA alternatives that would mitigate project impacts to wilderness values or postpone a decision on the project until BLM could implement the wilderness values through a new land use plan or amendment).

<sup>228</sup> *Id.* The 2001 Handbook created an exception for valid existing rights. *Id.*

<sup>229</sup> *See* MANUAL 6303, *supra* note 26, at .15. Although the manual did not require approval from BLM’s Washington, D.C., NCLS headquarters, it did require BLM staff to brief the Director on draft decisions. *Id.*

<sup>230</sup> *See, e.g.*, MANUAL 6303, *supra* note 26, at .13 – .16.

<sup>231</sup> *ONDA v. BLM*, 625 F.3d 1092, 1122 (9th Cir. 2010) (holding that NEPA required BLM to analyze and disclose impacts to inventoried wilderness characteristics when preparing land use plan).

## VI. THE DEATH AND AFTERLIFE OF THE WILD LANDS POLICY

The Wild Lands Policy sparked immediate protest. Public land user groups like ranchers, sportsmen, energy companies, and their allies claimed that it resurrected BLM's presettlement practice of administratively designating lands and managing them under the nonimpairment standard.<sup>232</sup> They feared that the new policy's inventory and land use planning requirements would delay development and that its protective default management would threaten acreage they counted on for recreational and commercial activities.<sup>233</sup> Members of Congress also assailed Secretary Salazar for his "sweeping" new policy, which they claimed authorized administrative designation of Wild Lands as de facto wilderness, usurping a role otherwise reserved for Congress.<sup>234</sup> The Utah delegation was particularly outspoken against the policy, alleging that its implementation would block development and hinder energy production, resulting in job losses and harm to the state education system by decreasing local revenue streams.<sup>235</sup>

The order also faced legal challenges. Both Uintah County, Utah and the state of Utah sued Secretary Salazar and BLM director Bob Abbey, alleging that the order was ultra vires and unlawful on multiple grounds.<sup>236</sup> First, they claimed that the order created an unlawful administrative designation that impermissibly elevated wilderness uses over other uses and could extend the nonimpairment directive to all public lands, when FLPMA and the Wilderness Act limit wilderness management to designated WSAs or

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<sup>232</sup> Letter from Claire M. Moseley, Exec. Dir. of Public Lands Advocacy et al., to Ken Salazar, Sec'y of Interior (Jan. 31, 2011) (on file with author) (expressing the concerns of Public Lands Advocacy and its members, related to Department of Interior Secretarial Order 3310).

<sup>233</sup> Phil Taylor, *House Chairman to Target BLM 'Wild Lands' Policy*, ENV'T & ENERGY DAILY, Jan. 5, 2011, <http://www.eenews.net/eedaily/2011/01/05/stories/1059943647> (last visited Feb. 22, 2014) (describing Utah Rep. Ron Bishop's decision to grill Salazar on authority to implement wilderness policy).

<sup>234</sup> Letter from Members of Congress to Ken Salazar, Sec'y of Interior (Jan. 28, 2011) (on file with author) (describing the Wild Lands designation process as an "underhanded attempt . . . to circumvent Congress and the federal rulemaking process" and create de facto wilderness).

<sup>235</sup> See Taylor, *supra* note 233. See also Thomas Burr, *Lee Criticizes 'Wild Lands' Policy*, SALT LAKE TRIBUNE, Jan. 7, 2011, <http://www.sltrib.com/sltrib/home/51000111-76/lee-utah-interior-salazar.html.csp> (last visited Feb. 22, 2014). In contrast, wilderness advocates heralded the policy as a long overdue articulation of BLM's existing authority to inventory, manage, and protect wilderness as a FLPMA-recognized resource. Letter from Karin P. Sheldon, W. Res. Advocates, et al., to Ken Salazar, Sec'y of Interior, & Bob Abbey, Dir., Bureau of Land Mgmt., (Feb. 1, 2011) (on file with author). These advocates praised the Secretary for rectifying the "bad idea" reflected in the Utah settlement that eliminated the agency's longstanding ability to protect the values of wilderness-quality lands. Editorial, *More Wilderness?*, SALT LAKE TRIBUNE, Jan. 2, 2011, <http://www.sltrib.com/sltrib/opinion/50943508-82/wilderness-policy-interior-salazar.html.csp> (last visited Feb. 22, 2014).

<sup>236</sup> First Amended and Supplemental Complaint for Declaratory, Mandatory and Injunctive Relief at 2, Uintah Cnty., Utah v. Salazar, No. 2:10-cv-00970-CW (D. Utah Mar. 22, 2011); Complaint at 2–3, Utah v. Salazar, No. 2:11-cv-00391-DB (D. Utah Apr. 29, 2011). SUWA intervened in the Uintah County suit and the court consolidated the cases. Order Granting Consolidation of Civil Cases 2:10-cv-00970-CW and 2:11-cv-00391-DB at 1, Uintah Cnty., Utah v. Salazar, No. 2:10-cv-00970-CW (D. Utah June 1, 2011).

congressionally designated wilderness.<sup>237</sup> Thus, the policy allegedly usurped authority reserved to Congress by FLPMA and the Wilderness Act to protect public lands with wilderness characteristics.<sup>238</sup> Second, the plaintiffs maintained that, in issuing the order, Secretary Salazar bypassed FLPMA's procedures for rulemaking, amending RMPs, and withdrawing lands from development, as well as NEPA's requirements for evaluating possible environmental effects of federal action.<sup>239</sup> Third, they alleged that the order violated the terms of the 2003 settlement agreement.<sup>240</sup> After a lengthy jurisdictional discovery process, in July 2013 the plaintiffs filed amended complaints against BLM and Defendant-Intervenor SUWA, requesting that the District of Utah find unlawful BLM's alleged "de facto" wilderness management—"whether based on claimed authority, Secretarial Order 3310 . . . or other written direction"—and enjoin the agency from managing non-WSA public lands "as if they were WSAs."<sup>241</sup>

Opposition to the Wild Lands Policy culminated in an April 14, 2011, congressional rider prohibiting the use of appropriated funds to implement the order, and thus blocking BLM from acting on it or the Wild Lands manuals.<sup>242</sup> Citing the funding limitation, Secretary Salazar rescinded the order two months later.<sup>243</sup> Thus died the Interior Department's attempt to encourage—though not require—a default protective management of LWCs as Wild Lands, in line with both the 2003 settlement agreement and the Ninth Circuit's ruling in *ONDA v. BLM*.<sup>244</sup> Despite this setback, Secretary Salazar's rescission memorandum clarified that BLM would continue to include wilderness values in its section 201 inventories, and that the agency would consider wilderness characteristics when undertaking land use planning and

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<sup>237</sup> First Amended and Supplemental Complaint for Declaratory, Mandatory and Injunctive Relief, *supra* note 236, at 2. The State complained that the order created quasi-WSAs in disregard of section 603's deadline, and that it required all lands to be managed according to the nonimpairment standard reserved for WSAs until released by the order's new procedures. Complaint, *supra* note 236, at 3.

<sup>238</sup> First Amended and Supplemental Complaint for Declaratory, Mandatory and Injunctive Relief, *supra* note 236, at 2.

<sup>239</sup> *Id.*; Complaint, *supra* note 236, at 3, 26–27.

<sup>240</sup> First Amended and Supplemental Complaint for Declaratory, Mandatory and Injunctive Relief, *supra* note 236, at 2.

<sup>241</sup> Second Amended and Supplemental Complaint for Declaratory, Mandatory, and Injunctive Relief at 4, *Uintah County, Utah v. Jewell*, No. 2:10-cv-00970-DVB-BCW (D. Utah July 19, 2013).

<sup>242</sup> Dep't of Def. & Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1769, 125 Stat. 155 (2011) (prohibiting the use of congressional funds to implement, administer, or enforce Secretarial Order 3310 in Fiscal Year 2011).

<sup>243</sup> See 2011 Rescission Memo, *supra* note 29, at 1. After Secretary Salazar rescinded the order, BLM acted pursuant to interim guidance until the agency released new guidance in 2012. This interim guidance directed BLM offices to "conduct and maintain inventories regarding the presence or absence of wilderness characteristics, and to consider identified lands with wilderness characteristics in land use plans when analyzing projects under [NEPA]." See 2011 Interim Guidance, *supra* note 29, at 1.

<sup>244</sup> See John C. Martin & Sarah Bordelon, *Axing Access: Emerging Limits on Public Land Development*, 57 ROCKY MOUNTAIN MIN. L. INST. 27-1, 27-10 (2011) (discussing timeline of Department of Interior Wild Lands Initiative).



making project-level decisions.<sup>245</sup> The Secretary directed BLM to develop new manuals for the management of lands with wilderness characteristics and to identify lands that may be appropriate for congressional protection under the Wilderness Act.<sup>246</sup>

Although the Wild Lands designation died with the order, BLM's revitalized interpretation of its FLPMA obligations and authority lives on. In March 2012, the agency issued post-Wild Lands guidance describing its new approach to considering and managing lands with wilderness characteristics.<sup>247</sup> To avoid accusations that it was resuscitating either Wild Lands or post-settlement WSAs, the new guidance excluded reference to Wild Lands and LWCs, and did not contemplate a new land designation.<sup>248</sup> For the same reason, the agency did not use the word "impair," or establish a protective "default" of inventoried lands with wilderness characteristics that could appear to be default protection.<sup>249</sup> Instead, consistent with *ONDA v. BLM*, the post-Wild Lands guidance emphasized BLM's discretion to manage wilderness values just as one of multiple uses on the public lands.<sup>250</sup> Additionally, perhaps in an effort to remove the multilayer protective review process protested by public land user groups, the guidance also omitted specific procedures guiding BLM officials in addressing wilderness characteristics in project-level decisions, did not require preparation of NEPA alternatives that explicitly protected wilderness characteristics, and

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<sup>245</sup> See 2011 Rescission Memo, *supra* note 29, at 1. Wilderness advocates posited that even without the new Wild Lands designation process, the Ninth Circuit's decision confirmed that wilderness characteristics were among the resources BLM must include in its section 201 inventories, and that the agency's multiple-use mandate required it to balance wilderness values in land management planning and site-specific decisions. Letter from The Wilderness Society et al. to Ken Salazar, Sec'y of Interior (Apr. 28, 2011) (on file with author) (reasoning that "multiple-use" management allows BLM to consider the relative values of its resources, and that the land use planning handbook explained how BLM should make planning and management decisions to protect wilderness characteristics).

<sup>246</sup> See 2011 Rescission Memo, *supra* note 29, at 1 (directing the Deputy Secretary to develop recommendations regarding the management of lands with wilderness characteristics and soliciting input regarding appropriate candidates for Congressional protection under the Wilderness Act).

<sup>247</sup> See MANUAL 6310, *supra* note 30; MANUAL 6320, *supra* note 31. See also 2011 Interim Guidance, *supra* note 29.

<sup>248</sup> Despite those omissions, the new guidance inspired concern from the western Republican congressmen, who accused Interior of circumventing Congress and the public process by attempting to resuscitate the controversial Wild Lands proposal, "unpopular policies that have already been overwhelmingly rejected." These members of Congress claimed that the new guidance impermissibly mirrored the Wild Lands manuals and would still enable the agency to administratively designate areas to receive WSA-like protection, just without the label "Wild Lands." See 2012 Congressional Letter, *supra* note 27.

<sup>249</sup> See *supra* notes 184–92 (describing management of Wild Lands under the Wild Lands manuals).

<sup>250</sup> *ONDA v. BLM*, 625 F.3d 1092, 1114 (9th Cir. 2010). See MANUAL 6320, *supra* note 31, at 3 (acknowledging that considering wilderness values in the land use planning process may result in 1) emphasizing other uses over wilderness characteristics; 2) emphasizing other uses while applying management restrictions to reduce impacts to wilderness characteristics; and 3) prioritizing wilderness characteristics).

omitted BLM director review of NEPA alternatives and certain actions that would impair wilderness values.<sup>251</sup>

At bottom, however, the guidance reflected the fundamental principle at the heart of BLM's pre-settlement and Wild Lands era interpretation of FLPMA: That wilderness is one of the resources that BLM must both inventory and balance as part of its multiple-use mandate.<sup>252</sup> Building on this principle, the post-Wild Lands wilderness inventory manual required BLM to maintain a current inventory of wilderness characteristics.<sup>253</sup> In a manner similar, if not identical, to both the Wild Lands manual and the 2001 Handbook, the new manual instructed BLM officials when to conduct or update wilderness inventories,<sup>254</sup> how to consider new wilderness proposals,<sup>255</sup> and how to evaluate wilderness characteristics.<sup>256</sup> Similarly, the post-Wild Lands land use planning manual provided specific guidance as to how BLM would consider lands with wilderness characteristics in the land use planning process.<sup>257</sup> Like the Wild Lands manual, the new manual required BLM to consider a range of alternative management schemes and disclose each alternative's effects on wilderness characteristics.<sup>258</sup> Where BLM analyzed an alternative that protected lands with wilderness characteristics, that alternative could include a range of protective management tools<sup>259</sup> identical to those in the Wild Lands manual.<sup>260</sup>

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<sup>251</sup> See *supra* notes 160, 183–91 (describing the Wild Lands manuals directives regarding NEPA alternatives, project-level decisions, and Washington-level review). Like the Wild Lands manuals, the new 2012 Manual does seem to direct BLM to consider mitigating impacts to wilderness characteristics, a requirement less stringent than creating and examining an alternative designed to protect them. See MANUAL 6320, *supra* note 31, at 6 (directing BLM officials to “consider measures to minimize impacts” on wilderness characteristics in “areas where the management decision is not to protect wilderness characteristics”).

<sup>252</sup> See MANUAL 6320, *supra* note 31, at 2 (proclaiming wilderness as part of the BLM's multiple use mission and directing Managers to update and maintain the wilderness inventory).

<sup>253</sup> See MANUAL 6310, *supra* note 30, at 2 (“Section 201 of FLPMA requires the BLM to maintain on a continuing basis an inventory of all public lands and their resources and other values, which includes wilderness characteristics.”).

<sup>254</sup> *Id.* (declaring that BLM will conduct wilderness inventories when 1) the public or BLM identifies wilderness characteristics during the NEPA process; 2) BLM undertakes land use planning; 3) BLM receives new information on resource conditions, including citizen inventories; 4) during NEPA analysis of a project that may impact wilderness characteristics; 5) BLM acquires land; or 6) in “other circumstances in which BLM . . . find[s] it appropriate to update its wilderness characteristics inventory.”).

<sup>255</sup> *Id.* at 3 (directing BLM officials to evaluate new information “as soon as practicable,” and to document and publish the rationale behind its assessment).

<sup>256</sup> *Id.* at 5 (describing how BLM shall evaluate wilderness characteristics as defined in section 2(c) of the Wilderness Act). The manual also contains similar procedures for boundary delineation and repeats the Wild Lands manual's definition of roads. *Id.* at 4–5, 11–12.

<sup>257</sup> MANUAL 6320, *supra* note 31.

<sup>258</sup> See *id.* at 2–3 (requiring BLM to prepare a range of alternatives for comparing impacts to inventoried lands with wilderness characteristics).

<sup>259</sup> *Id.* at 6 (giving examples of land use plan decisions that could protect lands with wilderness characteristics, including recommending withdrawal or closing the area to mineral entry, leasing, motor vehicle use, or road construction; designating right-of-way exclusion areas; and excluding or restricting certain commercial uses, new structure construction, or other activities). These exactly mirror the land management tools that BLM proposed to use to

Consistent with the Ninth Circuit's holding in *ONDA v. BLM*, the new manual emphasized discussion and disclosure of effects on inventoried wilderness values in the NEPA process.<sup>261</sup> The post-Wild Lands guidance did not go so far as to contemplate designation of new WSAs protected under the nonimpairment standard, or new Wild Lands protected through any number of land management tools.<sup>262</sup> However, it did reflect BLM's renewed focus on wilderness as a FLPMA-recognized resource that the agency has an ongoing responsibility to inventory and balance, and that it has ample authority to prioritize.<sup>263</sup>

## VII. CONCLUSION

Since Congress enacted FLPMA in 1976, BLM has narrowed its interpretation of its statutory authority concerning lands with wilderness characteristics.<sup>264</sup> From 1976 until the end of the Clinton Administration in 2001, BLM interpreted sections 201 and 202 of FLPMA to require the agency to consider and balance wilderness values in land use planning.<sup>265</sup> BLM also read section 202 to authorize the designation of WSAs outside section 603's mandate.<sup>266</sup> Consequently, BLM designated WSAs under section 202, managing them under the modified nonimpairment standard that the agency could alter in land use plans.<sup>267</sup> During that period, BLM viewed wilderness as a FLPMA resource the agency must balance in land use planning and could protect under the nonimpairment standard.<sup>268</sup>

The Bush Administration eschewed this authority in 2003, settling the contentious Utah litigation by abdicating BLM's authority to protect any new lands with wilderness characteristics under the nonimpairment standard by designating new section 202 WSAs.<sup>269</sup> Under President Obama, Interior Secretary Salazar struggled to find the middle ground between these two interpretations.<sup>270</sup> Echoing his pre-2003 predecessors, Secretary Salazar's 2010 Wild Lands Policy recognized wilderness as a FLPMA resource and articulated BLM's authority to prioritize and protect wilderness values in the land use planning process.<sup>271</sup> Under the Wild Lands Policy, BLM could designate and protect "Wild Lands" with a variety of management tools, but it could not manage them under section 603's nonimpairment standard, as

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protect Wild Lands. *See supra* notes 206–09 (describing BLM's menu of management options under the Wild Lands Policy).

<sup>260</sup> *See supra* notes 204–07.

<sup>261</sup> *See supra* note 31.

<sup>262</sup> *See supra* notes 252–53.

<sup>263</sup> *See supra* notes 256–60.

<sup>264</sup> *See supra* notes 144–45.

<sup>265</sup> *See supra* notes 97–110.

<sup>266</sup> *See supra* note 98.

<sup>267</sup> *See supra* notes 111–15.

<sup>268</sup> *Id.*

<sup>269</sup> *See supra* notes 144–46.

<sup>270</sup> *See supra* notes 217–22.

<sup>271</sup> *See supra* notes 185–91.

articulated in the IMP.<sup>272</sup> This interpretation of FLPMA reflected—to some extent—BLM’s prior expansive interpretation of its authority, but also retained the limits imposed by the 2003 settlement.<sup>273</sup>

After the death of the Wild Lands Policy in 2011, BLM issued new 2012 guidance solidifying this narrower reading of FLPMA, but without the Wild Lands designation.<sup>274</sup> The new guidance acknowledges wilderness as a FLPMA resource and outlines management options for its protection.<sup>275</sup> Although its directives remain consistent with the 2003 settlement agreement’s prohibitions on new WSAs,<sup>276</sup> the 2012 guidance reflects a renewed focus on wilderness values and a recognition of their place in the complex task of managing multiple resources.<sup>277</sup>

In many ways, this latest chapter in the BLM wilderness characteristics saga is not yet complete. Under new Interior Secretary Sally Jewell, and in future administrations, the question persists whether BLM will maintain its renewed focus and choose to employ the agency’s land management tools to prioritize protection of lands with wilderness characteristics. Once BLM begins to follow the 2012 post-Wild Lands Policy guidance for its land use planning process for new or revised RMPs across the West, it remains to be seen whether the new guidance has actually effectuated a meaningful change in the way BLM values wilderness characteristics and prioritizes their protection as a legitimate resource under FLPMA.

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<sup>272</sup> See *supra* notes 212–20.

<sup>273</sup> See *supra* notes 217–21.

<sup>274</sup> See *supra* notes 251–65.

<sup>275</sup> See *supra* notes 256–64.

<sup>276</sup> See *supra* notes 252–53.

<sup>277</sup> See *supra* notes 256–60.