

SETTLING THE WILDERNESS

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INTRODUCTION

As an easterner by birth and upbringing, I never would have imagined that issues such as the validity of agency handbooks, bureaucratic inventories, and definitions of rights-of-way across public lands would be the burning ones of my time. Yet throughout my adopted region of the interior West, where public lands comprise a low of 27% (Montana) to a high of 83% (Nevada) of the lands within state boundaries, these issues, which are all questions about the scope of the authority of federal public lands agencies, touch off deep feelings in many quarters, and for good reason. What happens on these lands impacts local communities as well as communities of interest throughout the nation. The country's national ecological health and heritage, resource and recreation demands, and democratic principles are all at stake here, regardless of whether the Founding Fathers would ever have anticipated that highly differentiated bureaucracies would play such a crucial role in the governance of their free country.

This paper addresses two instances of agency action on public lands, both of which originated in Utah, but that have implications wherever federal agencies wield authority. The first is a settlement between the state of Utah and the Department of Interior ("DOI") concerning the authority of the DOI to inventory and manage lands as potential wilderness areas (hereafter the "Wilderness Settlement"). The second is a Memorandum of Understanding ("MOU") between Utah and the DOI concerning recognition of claims to rights of way across public lands pursuant to an old mining statute known as R.S. 2477 (hereafter the "R.S. 2477 MOU"). In both of these cases, the DOI entered into an agreement with the State purportedly to put to rest disputed issues concerning uses of public lands. Underlying both of these settlements is a fight about what kind of wilderness, and how much of it, the federal government should protect.

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The approach of settling environmental disputes, whether through formal legal settlements approved by a court or less formal government-to-government memoranda of understanding, has been a hallmark of the Bush Administration.¹ Another example is a case involving federal reserved water rights in the Black Canyon of the Gunnison River National Park.² A March 2003 settlement between Colorado and the United States, which allocates to the Park a prescribed water right, has been described in strikingly different terms by the governmental parties on the one hand and environmental groups on the other. The state of Colorado and the United States hale it as an "historic agreement" that "ushers in a new era of cooperation with the federal government that results in real environmental benefits."³ Environmental groups describe it as illegal, environmentally unsound, and contrary to the government's own scientific analyses of the water required for preserving key natural features of the Black Canyon National Park.⁴ This paper focuses only on the two Utah agreements. But the divergent characterizations of the Black Canyon settlement typify the conflict that such settlements engender. The clashing responses raise the question of what, exactly, is being settled: the contentiousness or the wilderness itself.

One thing that seems certain is that the legal battles will continue. Both of the Utah agreements are susceptible to legal challenges.⁵ The Wilderness Settlement raises questions concerning the authority of agen-

1. See Michael C. Blumm, *The Bush Administration's Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 E.L.R. 10397 (2004) (surveying a range of natural resource cases and concluding that the Bush Administration's strategy for increasing commodity production on public lands includes entering into settlements that are unduly favorable to anti-environmental plaintiffs); Tom Turner, *Unsettling Development*, ENVTL. FORUM, Jan./Feb. 2004, at 32 (describing the Bush Administration's pattern of settling lawsuits on terms favorable to those challenging environmental protection). See also John M. Carter, *When Citizens Sue, DOJ Now Argues Against the Law*, ENVTL. FORUM, Jan./Feb. 2004, at 34 (asserting that the Bush Administration has taken legal positions that weaken environmental enforcement).

2. See *High Country Citizens' Alliance v. Norton*, No. 03-WY-1712-CB (D. Colo. Apr. 19, 2004) (order denying motion to dismiss).

3. Press Release, Department of Interior, Historic Settlement Agreement Reached on Black Canyon of the Gunnison Water Rights (Mar. 31, 2003), available at <http://www.doi.gov/news/030402b.htm>.

4. See Press Release, Western Resource Advocates, Citizens Sue for Black Canyon Protection: Agreement Between State & Feds Fails to Protect Park, Violates Federal Law (Sept. 5, 2003), available at http://www.westernresourceadvocates.org/media/pdf/Black_Canyon_Suit_Final.pdf.

5. The Wilderness Settlement is currently being challenged in the Tenth Circuit. See *Utah v. Norton*, No. 03-4147 (10th Cir. filed June 13, 2003). Environmental groups have not yet filed a legal challenge to the R.S. 2477 MOU, but it seems likely that they will when Utah's claims start to be approved pursuant to the MOU's terms.

cies to disclaim powers that no court has ever required them to disclaim. With respect to the R.S. 2477 MOU, the legal questions focus on whether the agency has skirted a legislative moratorium on rule-making and also exceeded its authority by adopting an unreasonable interpretation of statutory terms. In short, in the Wilderness Settlement, the concern is that the agency has given up too much, and in the R.S. 2477 MOU, the concern is that the agency is trying to accomplish too much. The story behind both provides a window into the enormous power wielded by agencies in the public lands context. This power, when wielded quietly in back rooms where settlements are crafted, is unseen by most of the public; yet it is a power, in keeping with the theme of the conference at which this paper was presented, that raises questions of constitutional significance.

I. THE UTAH WILDERNESS SETTLEMENT

On Friday, April 11, 2003, at 4:57 p.m., the DOI, the state of Utah, Utah School and Institutional Trust Lands Administration, and the Utah Association of Counties submitted a settlement agreement to United States Federal District Judge Dee Benson, in which the Bureau of Land Management ("BLM") disclaimed authority to conduct inventories for the purposes of wilderness review after 1993.⁶ The Settlement also provides that the BLM will not establish or manage any lands as Wilderness Study Areas (hereafter "WSAs") unless they were designated WSAs before 1993⁷ and revokes an internal management document known as the Wilderness Handbook, which provided guidelines for managing lands inventoried after 1993 that were found to have wilderness characteristics.⁸ The Wilderness Settlement was approved by Judge Benson on the following Monday, April 14, 2003, and unless the Tenth Circuit Court of Appeals sets it aside, it will bind the BLM indefinitely to its terms.⁹ According to the Wilderness Settlement and subsequent internal guidance memoranda, those terms include a nation-wide disclaimer of authority to inventory lands for the purpose of protecting them as wilderness.¹⁰

6. Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint at 12-13, *Utah v. Norton*, No. 2:96CV0870 B (D. Utah Apr. 11, 2003).

7. *Id.* at 14.

8. *Id.* at 13.

9. Environmental groups, who had moved to intervene in the district court proceedings, have challenged the Settlement Agreement on procedural and substantive grounds. The case is currently pending in the Tenth Circuit. See *Norton*, No. 03-4147.

10. See Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss

Thus, although the litigation prompting the Wilderness Settlement was limited to BLM lands in Utah, the BLM will no longer inventory its lands for WSA consideration in Colorado, Alaska, or anywhere else.

A. Historical and Statutory Background of the Wilderness Settlement

The story leading up to the Wilderness Settlement is not a short one. In some sense, it begins at the end of the nineteenth century, when the federal government first began setting aside large tracts of land so that they would remain free from resource development.¹¹ The idea that the federal government could, and should, manage at least some of its vast landholdings for aesthetic, recreational, and ecological purposes took hold then and has enriched (or complicated, depending on one's views) federal land policy ever since. The preservation idea reached its political apex in 1964 when Congress passed the Wilderness Act.¹² The Wilderness Act declares that it is "the policy of the Congress to secure for the American people of present and future generations the benefits of an enduring resource of wilderness."¹³ The Act contains three concrete steps to fulfill that policy objective. First, the Act itself designated 9.1 million acres of forest service lands to be included in the National Wilderness Preservation System.¹⁴ Second, the Act provides a definition of wilderness. Wilderness areas are those where "earth and its community of life are untrammeled by man, where man himself is a visitor who does not remain."¹⁵ More specifically, areas that should qualify for inclusion in the National Wilderness Preservation System are undeveloped lands that retain their "primeval character and influence, without permanent improvements or human habitation," where the "imprint of man" is "substantially unnoticeable" and there are "outstanding opportunities for soli-

the Third Amended and Supplemented Complaint at 12-13, *Norton*, No. 2:96CV0870 B. See also Instruction Memorandum from Director, Bureau of Land Management, United States Department of Interior, to Assistant Directors and Field Officers, No. 2003-195 (June 20, 2003), available at <http://www.blm.gov/nhp/efoia/wo/fy03/im2003-195.htm>.

11. Yellowstone National Park was established as a "pleasuring ground" in 1872, and other federal lands, such as the Yosemite and Sequoia areas, were granted varying degrees of protection until they too eventually became part of the National Park System. See GEORGE CAMERON COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 105-06 (5th ed. 2002). The federal government also began to reserve federal lands for the purpose of conserving the resources—such as trees—found thereon. The dramatic shift from disposition of the public domain to retention embodied both of these sets of concerns. See *id.*

12. 16 U.S.C. §§ 1131-1136 (2000).

13. *Id.* § 1131(a).

14. *Id.* § 1132(a).

15. *Id.* § 1131(c).

tude or a primitive and unconfined type of recreation,” and land that has “at least 5,000 acres of land or is of sufficient size so as to make practicable its preservation and use in an unimpaired condition.”¹⁶ Third, the Act required federal land management agencies to conduct inventories of the lands within their jurisdiction.¹⁷ The Forest Service was to review all primitive areas in the National Forest Service System to determine their suitability for wilderness designation,¹⁸ and the DOI was to conduct an inventory of roadless areas of 5,000 acres and islands of any size in national parks and national wildlife refuges.¹⁹

The BLM was not mentioned in the original inventory provisions of the Wilderness Act. In 1964, the BLM lacked a legal mandate and was viewed as the agency with the nebulous and unenviable task of overseeing the “leftover” public lands—those lands that were never privatized through homesteading or any of the other land disposal policies and yet were never “adopted” by any of the more structured federal land management agencies, such as the National Forest Service, the National Park Service, or the National Wildlife Refuge System.²⁰ These orphaned and largely poorly managed lands had to wait another twelve years before Congress passed the Federal Land Policy and Management Act of 1976 (“FLPMA”),²¹ finally providing the BLM with an organic act to guide its management priorities and practices. FLPMA also contains, in § 603, the wilderness inventory mandate for BLM lands.²² FLPMA’s § 603 required the DOI to “review roadless areas of five thousand acres or more and roadless islands of the public lands . . . identified as having wilderness characteristics” by 1991.²³ The DOI would report the results of its inventory to the President, who then within two years (by 1993) would make wilderness recommendations to Congress.²⁴ Lands identified

16. *Id.*

17. *Id.* § 1132(b)-(c).

18. *Id.* § 1132(b).

19. *Id.* § 1132(c).

20. The Taylor Grazing Act of 1934, 43 U.S.C. § 315 (2000), gave the Interior and, specifically, the predecessor department to the BLM known as the Grazing Service the authority to zone the public domain into grazing districts and to require permits for grazing within these districts. Public lands not otherwise reserved were, from this point on, managed for retention by the federal government. While this was a very significant step, the Taylor Grazing Act did no more than this, and BLM was virtually without legislative guidance as to the host of management issues that arose once retention displaced disposition as official government policy. See generally CHARLES WILKINSON, *CROSSING THE NEXT MERIDIAN* 93-94 (1992) (describing the history and legacy of the Taylor Grazing Act).

21. 43 U.S.C. §§ 1701-1784 (2000).

22. *Id.* § 1782(a).

23. *Id.*

24. *Id.*

through the inventory process as appropriate for inclusion in the National Wilderness Preservation System must be managed so as not to impair their eligibility for congressional wilderness designation.²⁵

In addition to the § 603 process, which specifically required the BLM to identify wilderness-quality lands, FLPMA § 201 contains a general inventory provision that obligates the BLM to conduct ongoing reviews of all of its lands "to reflect changes in condition and to identify new and emerging resource and other values."²⁶ The inventories conducted pursuant to § 201 inform BLM's land use planning process, which is outlined in § 202.²⁷ There is nothing in § 201 that prohibits the general inventories from considering the wilderness values of BLM lands, nor is there anything in § 201 that declares that the land use planning process should exclude wilderness as a potential use. Indeed, until the Wilderness Settlement, § 201 and § 202 were viewed as complementary to § 603 in terms of wilderness planning.²⁸ As discussed further below, however, the Wilderness Settlement all but precludes the consideration of wilderness as a potential use of BLM lands unless specifically so identified pursuant to a § 603 inventory.²⁹

The Wilderness Act's grand pronouncements about national policy notwithstanding, the effort to add BLM lands to the Wilderness Preservation System was initially mired in fights over whether recreational opportunities on certain lands were truly "outstanding."³⁰ The BLM completed its first survey of BLM lands in Utah in 1980, recommending only 2.5 million acres for management as wilderness study areas out of the total 22.9 million acres of BLM lands in Utah.³¹ Environmental groups immediately challenged this decision through the BLM's administrative appeals process.³² The environmental groups claimed that many parcels were given only cursory consideration and that the subjective aesthetic

25. *Id.* § 1782(c).

26. *Id.* § 1711(a).

27. *Id.* § 1712(a).

28. See, e.g., Kevin Hayes, *History and Future of the Conflict over Wilderness Designations of BLM Land in Utah*, 16 J. ENVTL. L. & LITIG. 203, 213 (2001) ("[L]and not identified as potential wilderness during the initial § 201 inventory, making it unavailable for designation as a WSA under § 603, may alternatively be designated as a WSA by complying with § 202, which allows for changes to BLM land use plans based on new data and changing circumstances discovered during the ongoing § 201 inventory.").

29. See *infra* note 69 and accompanying text.

30. E.g., Utah Wilderness Ass'n, 72 I.B.L.A. 125, 136 (1983) (reversing as erroneous BLM's decision to exclude a unit of land from WSA consideration on the grounds that the scenery was only "average").

31. Utah: Final Wilderness Inventory Decision, 45 Fed. Reg. 75,602 (Nov. 14, 1980).

32. Utah: Decision on Protests to State Director's November 14, 1980 Decisions on Statewide Inventory, 46 Fed. Reg. 15,332 (Mar. 5, 1981).

judgments of BLM officials often resulted in the exclusion of spectacular canyon country wilderness.³³ The Interior Board of Land Appeals affirmed many of the environmental groups' claims that the BLM had unreasonably excluded wilderness quality lands and sent ninety percent of the contested parcels back to the BLM for further review.³⁴ By the end of the administrative appeal process, the BLM had increased its recommended acreage to 3.2 million.³⁵ In 1991, Secretary of the Interior Manuel Lujan recommended to President Bush that 1.9 million acres be designated as wilderness.³⁶ The entire 3.2 million acres, however, continue to be managed as WSAs, pursuant to FLPMA's requirements.³⁷

The environmental groups that formed in order to be watchdogs of the BLM's initial inventory did not give up. The notion that BLM lands could be something other than the nation's scrap-lands gave a vision and mission to activists who believed that southern Utah's unique redrock country embodied the very essence of wilderness.³⁸ In 1985, the Utah Wilderness Coalition formed from a number of citizens' groups dissatisfied with the BLM's inventories.³⁹ The coalition groups surveyed the BLM lands themselves, ultimately finding 5.7 million acres of wilderness-quality lands in Utah.⁴⁰ The Citizens' Wilderness Proposal was born, and the Coalition enlisted Utah Representative Wayne Owens to introduce "America's Redrock Wilderness Act" into Congress.⁴¹ Since then, Representative Maurice Hinchey has assumed sponsorship of the bill, and Senator Richard Durbin has introduced a corresponding Senate bill.⁴² In the 1990s, the Coalition conducted another round of inventories and based on those has increased their proposal to just over nine million acres of lands warranting congressional wilderness designation.⁴³ Reacting against the Citizens' Proposals, Representative James Hansen

33. *Id.*

34. Utah Wilderness Ass'n, 72 I.B.L.A. 125.

35. H. Michael Anderson & Alike Moncrief, *America's Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 428 (1999).

36. *See* Utah v. Babbitt, 137 F.3d 1193, 1199 (10th Cir. 1998).

37. Stephen H. M. Bloch & Heidi J. McIntosh, *A View from the Front Lines: The Fate of Utah's Redrock Wilderness Under the George W. Bush Administration*, 33 GOLDEN GATE U. L. REV. 473, 477 n.16 (2003).

38. *See, e.g.*, Southern Utah Wilderness Alliance, at <http://www.suwa.org> (website for the Southern Utah Wilderness Alliance, an advocacy group formed to protect Utah's wilderness-quality BLM lands).

39. Bloch & McIntosh, *supra* note 37, at 476.

40. Hayes, *supra* note 28, at 219.

41. *Id.* at 218.

42. Bloch & McIntosh, *supra* note 37, at 476.

43. *Id.* at 476-477.

introduced a Utah wilderness bill that would have designated only 1.8 million acres, with various kinds of development permissible.⁴⁴

B. The Litigation Leading to the Wilderness Settlement

To date, no version of a Utah BLM wilderness bill has become law. Nonetheless, the idea of canyon and desert wilderness has certainly gained purchase with vast segments of the American public. The southern Utah National Parks, including Arches, Canyonlands, Bryce, and Zion, draw millions of visitors annually to the area, and many take the time to explore the neighboring, and equally striking, BLM lands.⁴⁵ In apparent recognition of the popularity of these areas, and in order to put to rest the disputes surrounding the first inventory, Secretary of the Interior Bruce Babbitt announced in 1996 that the BLM would undertake a new inventory. Secretary Babbitt explained that the reinventory was necessary, given the conflicting proposed bills with their dramatically different acreage amounts.⁴⁶ For the BLM to have a clear picture of which lands warrant wilderness protection, the agency would have to take a second look.⁴⁷ In October 1996, shortly after the reinventory was announced, the state of Utah, Utah School and Institutional Trust Lands, and Utah Association of Counties filed the lawsuit in federal district court that ultimately culminated in the Wilderness Settlement.⁴⁸

The Utah plaintiffs alleged that the proposed inventory violated provisions of FLPMA and the National Environmental Policy Act ("NEPA") and requested that the court enjoin the inventory. Judge Benson granted the plaintiffs their request for a preliminary injunction.⁴⁹ The Tenth Circuit vacated the preliminary injunction and dismissed the

44. Hayes, *supra* note 28, at 219.

45. These four National Parks draw more than 4 million visitors each year. See <http://www.nps.gov/cany/facts.htm> (visitation figures for Canyonlands National Park) (last visited June 30, 2004); <http://www.nps.gov/zion/pphtml/facts.html> (visitation figures for Zion National Park) (last visited Apr. 30, 2004); <http://www.nps.gov/arch/pphtml/facts.html> (visitation figures for Arches National Park) (last visited Apr. 30, 2004); <http://www.nps.gov/brca/pphtml/facts.html> (visitation figures for Bryce Canyon National Park) (last visited Apr. 30, 2004). In 2000, BLM in Utah reports more than 10 million visitors annually for BLM lands throughout the state, with close to 1.5 million engaging in camping activities and almost 3 million in "trail related" activities. See <http://www.ut.blm.gov/Facts&Figures/facts&figures00/ff29.htm> (last visited Apr. 30, 2004).

46. Hayes, *supra* note 28, at 220. See also *Utah v. Babbitt*, 137 F.3d 1193, 1199 (10th Cir. 1998) (quoting Letter from Bruce Babbitt, Secretary of the Interior, to James V. Hansen, Chairman of Subcommittee on National Parks, Forests, and Public Lands 2 (July 24, 1996)).

47. See *Babbitt*, 137 F.3d at 1199.

48. *Id.* at 1200.

49. *Id.* at 1197.

plaintiffs' challenges to the Babbitt inventory for lack of standing.⁵⁰ The Tenth Circuit's decision was no surprise to those familiar with environmental standing doctrines. *Lujan v. National Wildlife Federation*,⁵¹ a leading case articulating the requirements for plaintiffs to allege "injury in fact" as an element of standing, involved a challenge to BLM's system-wide process of cataloguing its lands to determine whether to realign some lands to increase resource development options. While the Supreme Court emphasized the insufficient detail in plaintiffs' standing allegations, the underlying problem was that an internal review for purposes of potential realignment sounded unlikely, in and of itself, to result in injury of any kind.⁵² Likewise, as the Tenth Circuit repeatedly emphasized, an inventory does not of itself change land use policy in a way that inflicts injuries in fact.⁵³ On remand to the district court, the only claim to have survived the government's motion to dismiss was plaintiffs' challenge to the management of some non-WSA BLM lands as *de facto* wilderness. Plaintiffs had alleged that the BLM was managing some non-WSA lands according to an informal interim management policy that restricted uses to those compatible with wilderness protection. Any such informal management, according to plaintiffs, was an illegal end-run around FLPMA § 202's detailed requirements for amendments to existing land use plans. The court concluded that, while even this claim did not confer standing on the plaintiffs to challenge the *inventory*, the plaintiffs had alleged an injury in fact sufficient to keep alive their claim that interim wilderness management violates FLPMA § 202.⁵⁴ In short, after the Tenth Circuit's *Utah v. Babbitt* decision, no party with an interest in challenging the legality of the inventory had standing to do so. While the Utah plaintiffs were free to pursue the *de facto* wilderness management claims, there appeared to be no interest in the case for some time. The remaining claim languished, largely unattended, in federal district court for five years, until the spring of 2003.

In the meantime, the BLM proceeded with the reinventory, which was completed by 1999. The BLM identified an additional 2.6 million acres with wilderness characteristics. Added to the initial 3.2 million acres of WSAs from the first inventory, the total of 5.8 million acres of wilderness-quality lands was in line with the first Citizens' proposal of

50. *Id.* at 1197, 1214-16.

51. 497 U.S. 871 (1990).

52. *Id.* at 890.

53. See *Babbitt*, 137 F.3d at 1214 (finding that the inventory is not a "major federal action" and reiterating that the inventory does not constitute revision of a land use plan).

54. *Id.* at 1215.

5.7 million acres.⁵⁵ At that particular moment, one might have been forgiven for opining that the convergence of views on wilderness quality acreage could lead to a federal bill for BLM lands in Utah that would settle the wilderness disputes by designating somewhere in the ballpark of 5.7-5.8 million acres of these lands as official Wilderness.⁵⁶ In hindsight, however, it is evident that the moment was too brief to be transformed into legislation. In 2000, President George W. Bush was elected, and new priorities took hold in our public lands agencies. Shepherding a consensus Utah wilderness bill through Congress was not among them.

On March 31, 2003, the Utah plaintiffs filed a motion for leave to file a third amended and supplemented complaint in Judge Benson's court. The Utah wilderness litigation, which had lain dormant for five years, came back to life. On April 7, 2003, several environmental groups, including the Southern Utah Wilderness Alliance ("SUWA"),⁵⁷ moved to intervene in the case. These groups had not intervened in the initial phases of the litigation because the federal government vigorously defended the Babbitt reinventory⁵⁸ and had prevailed on all inventory-related challenges in the Tenth Circuit.⁵⁹ Events of the past three years, however, gave the environmental groups reason to believe that the DOI was no longer interested in defending the inventory or protecting lands identified therein as having wilderness qualities. President Bush had appointed a number of extractive industry proponents to high posts within public lands agencies,⁶⁰ one of the most prominent of whom is Secretary

55. Hayes, *supra* note 28, at 223 (citing BUREAU OF LAND MANAGEMENT, UTAH WILDERNESS INVENTORY REPORT vii (1999)).

56. See, e.g., *id.* at 246-47 (noting that proponents of "minimal acreage" wilderness bills, such as Rep. Hansen's, have less factual basis for their proposals after the Babbitt inventory).

57. Southern Utah Wilderness Alliance, at <http://www.suwa.org> (last visited June 21, 2004). SUWA formed as a result of the battles over the first inventory of BLM lands in Utah, and has led the effort to introduce America's Redrock Wilderness Act. *Id.*

58. Turner, *supra* note 1, at 33 (noting that environmental groups intervene in litigation against the government when "they can add something to the defense's arguments or when they fear the defense mounted, generally by the Department of Justice, won't be vigorous").

59. *Babbitt*, 137 F.3d at 1193 (dismissing all but one claim for lack of standing).

60. See Paul Stanton Kibel, *Nature of the Beast: An Introduction to the Issue*, 33 GOLDEN GATE U. L. REV. 333, 334 (2003) (describing several key pro-extractive industry appointments by President Bush, including Thomas Sansonetti, lawyer for mining interests, as head of the Natural Resources Division within the Department of Justice; Steven Griles, oil industry lobbyist, as Assistant Secretary of the Interior; Mark Rey, timber industry lobbyist, as Undersecretary for Natural Resources and Environment within the Department of Agriculture; and most significantly, Gale Norton, former attorney with the anti-conservation law firm Mountain States Legal Foundation and long-time proponent of loosening environmental regulation of public lands, as Secretary of the Interior). See also Richard J. Lazarus, *A Different Kind of "Republican Moment" in Environmental Law*, 87 MINN. L. REV. 999, 1007 (2003) (noting President Bush's appointment of Gale Norton to head the DOI and Spencer Abraham to head

of the Interior Gale Norton.⁶¹ The Bush Administration also issued its National Energy Policy Report,⁶² which made domestic oil and gas production a top priority,⁶³ and President Bush signed Executive Order 13,212, entitled "Actions to Expedite Energy-Related Projects," which urges all executive departments and agencies to "expedite projects that will increase the production, transmission, and conservation of energy."⁶⁴ Protecting lands for future designation by Congress as wilderness is not consistent with the priority of maximizing domestic oil and gas production.

On Friday, April 11, 2003, just a week and a half after filing their amended complaint and four days after the environmental groups moved to intervene, the Utah plaintiffs and the BLM submitted a settlement agreement and proposed consent decree to Judge Benson. On Monday, April 14, 2003, Judge Benson signed the order approving the settlement, and dismissed the case with prejudice, retaining jurisdiction only to enforce the settlement terms.⁶⁵ The Wilderness Settlement, as described above, disclaims the BLM's authority to conduct the inventory and also rescinds the 2001 Wilderness Handbook, which provided interim guidance for management of the tracts found to have wilderness qualities pending amendment of BLM Land Use Plans. While the Wilderness Settlement does recognize that BLM has authority to "develop land use plans and give priority to areas of critical environmental concern,"⁶⁶ this acknowledgment does nothing more than repeat statutory language from FLPMA § 202.⁶⁷ Having disclaimed the inventory and interim standards for protecting wilderness-quality lands, the BLM's concession of its legislative obligation in § 202 provides little comfort to wilderness advocates. In short, the Wilderness Settlement embodies the view that the

the Department of Energy, and describing them both as "prominent supporters of increased natural resource development").

61. See Lazarus, *supra* note 60, at 1007.

62. Nat'l Energy Pol'y Dev. Group, National Energy Policy: Reliable, Affordable, and Environmentally Sound Energy for America's Future, *available at* <http://www.whitehouse.gov/energy> (last visited May 16, 2001).

63. See Lazarus, *supra* note 60, at 1007 (noting that the energy policy was developed after "weeks of meetings with industry leaders" and that environmentalists contend that the policy reflects "the priorities and economic interests of White House allies in the energy industry").

64. Exec. Order No. 13,212, 66 Fed. Reg. 28,357 § 1 (May 22, 2001).

65. Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint at 12-13, *Utah v. Norton*, No. 2:96CV0870 B (D. Utah Apr. 11, 2003).

66. *Id.*

67. See 43 U.S.C. § 1712(c)(3) (2000) (requiring the Secretary to "give priority to the designation and protection of areas of critical environmental concern").

time for discovering lands worthy of Congress's protective wilderness designation has come to an end, and that any lands warranting such protection that were overlooked in the inventories authorized under FLPMA § 603 are never to be considered as such. The "Wilderness thing" is over, and it is time to get on with the pragmatic business of developing BLM lands for extractive purposes.

C. Analysis of the Wilderness Settlement

It is the Executive's privilege to change the course of agency policy, within the bounds of legislative commands. Regardless of whether the 2000 election represented a broad mandate of any kind, once the President is elected, it is the Executive Branch's prerogative to staff agencies with like-minded people and to pursue policies that reflect the administration's goals, so long as they comport with a reasonable interpretation of relevant federal statutes.⁶⁸ This broad executive power drives both environmental and resource extraction interests to spend much of their advocacy time and money at the agency level. Agency action is where the action is on public lands, and executive policies create the framework in which interest groups must operate. So how is the Wilderness Settlement any different?

There are two differences between the Wilderness Settlement and typical changes in agency priorities. First, the BLM has disclaimed legal authority that no court has or could require it to disclaim (and furthermore that decades of agency practice have affirmed). Second, the BLM has done so in a consent decree that purports to bind the BLM to its terms indefinitely. Thus, without the benefit of adjudication, the BLM's position is now enshrined in law and enforceable against future administrations. The point of this paper is not to declare that the Wilderness Settlement is therefore illegal; only a court can do that, and the prognostications of legal academics are rarely influential on that score. Rather, the aim of this paper is to speculate at a level slightly removed from the legal rights or wrongs about what settlements of this kind portend, if they are upheld, for the future of public lands. The merits of the legal positions adopted in the Wilderness Settlement are relevant insofar as they shed light on these larger issues, and thus I will review them briefly.

The Wilderness Settlement adopts the position that only FLPMA § 603 gives the BLM legal authority to inventory lands for the purpose of

68. See RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 137-44 (4th ed. 2002) (explaining basics of, and conceptual foundations for, administrative law doctrine of judicial deference to agency decision-making).

considering them for congressional wilderness designation, and that § 603's authority has expired.⁶⁹ Utah and the BLM's position, in other words, is that there is only one statutory source for the BLM to inventory lands to determine their eligibility for wilderness, and that statutory source acts as a ceiling, rather than a floor. It bears repeating that the issue of the legal validity of the reinventory had by this time been dismissed from the litigation between Utah and the BLM.⁷⁰ By 2003, when the litigation was revived, BLM's reinventory in Utah was complete. It is therefore curious that the BLM was willing to revisit this issue, let alone capitulate completely to the plaintiffs' position, particularly given that there is no precedent in case law or agency practice to support this "wilderness sunset" view of FLPMA.

FLPMA was passed in order to give the BLM a comprehensive mission and mandate. Part of that mandate was to incorporate environmental protection into the agency's management of the lands under its jurisdiction.⁷¹ While the BLM retained substantial flexibility in managing its lands for multiple uses,⁷² Congress expressly included safeguarding the ecological value of the lands among those uses.⁷³ FLPMA therefore includes reference to prioritization of environmental values in its general inventory provisions,⁷⁴ in its land use planning provisions,⁷⁵ and in its management provisions, which state that the Secretary "shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands."⁷⁶

The inventory provisions of FLPMA must be seen in this general context of balancing multiple uses, one of those uses being environmental conservation, as well as the specific context of the congressional policy of desiring input from public lands agencies about wilderness-quality lands. In *Utah v. Babbitt*, Secretary Babbitt took the position that FLPMA § 201—the general and ongoing inventory provision—

69. Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint at 12-13, *Norton*, No. 2:96CV0870 B.

70. *Utah v. Babbitt*, 137 F.3d 1193, 1206 (10th Cir. 1998).

71. *E.g.*, H.R. REP. NO. 94-1163, at 35 (1976).

72. 43 U.S.C. § 1701 (stating Congress's policy and providing for multiple uses of BLM lands).

73. *Id.* § 1701(8).

74. *Id.* § 1711(a) (requiring that the ongoing inventory give "priority to areas of critical environmental concern").

75. *Id.* § 1712(c)(3) (requiring the Secretary to "give priority to the designation of areas of critical environmental concern" in the development of land use plans); *Id.* § 1712(7) (requiring the Secretary to "weigh long-term benefits to the public against short-term benefits").

76. *Id.* § 1732(b).

authorized the reinventory.⁷⁷ Secretary Babbitt's argument was that even if § 603 did not serve as legal justification for the reinventory, nothing therein prevented the BLM from taking a second look at its own lands to see if wilderness qualities were missed.⁷⁸ FLPMA § 603 required the Secretary to:

[w]ithin fifteen years after October 21, 1976 . . . review those roadless areas of five thousand acres or more and roadless islands of the public lands . . . and . . . from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness."⁷⁹

The goal of § 603 was to ensure that BLM actually completed the initial inventories in a timely fashion. There is nothing in the text of § 603 nor its legislative history to indicate that, once the initial inventories are complete, § 603 should become a bar to the BLM's desire to provide ongoing information to Congress.⁸⁰ In fact, § 603 relies on the ongoing process provided by § 201 to conduct the initial screening of BLM lands for wilderness characteristics.⁸¹ Secretary Babbitt's position was consistent with FLPMA's specific wilderness mandate and general structure of encouraging constant reevaluation of the highest and best uses of the lands within the BLM's jurisdiction.

Actions by the Forest Service, the National Park Service ("NPS"), the Fish and Wildlife Service and, until the Wilderness Settlement, the BLM affirm that public lands agencies retain the authority to conduct wilderness inventories outside of the mandatory reviews required by the Wilderness Act and FLPMA. The Forest Service is perhaps the most stunning example. The Wilderness Act required that the Forest Service inventory only its designated "primitive areas" for consideration as wilderness.⁸² Yet the Forest Service has reviewed more than sixty million acres of roadless areas throughout the national forests in its Roadless Area Review and Evaluation (RARE) inventories.⁸³ Courts have as-

77. *Utah v. Babbitt*, 137 F.3d 1193, 1205 n.17 (10th Cir. 1998).

78. *Id.* (noting reliance on § 201 in other contexts, including review of newly acquired BLM lands).

79. 43 U.S.C. § 1782(a).

80. See S. REP. NO. 94-583, at 44 (Dec. 18, 1975); H.R. REP. NO. 94-1163, at 3 (1976). See also John D. Leshy, *Wilderness and its Discontents—Wilderness Review Comes to the Public Lands*, ARIZ. ST. L.J. 361, 367 (1981) (explaining that FLPMA's mandatory wilderness review provisions simply clarified authority that BLM already had to conduct wilderness inventories).

81. 43 U.S.C. § 1782 (2000).

82. 16 U.S.C. § 1132(b) (2000).

83. COGGINS ET AL., *supra* note 11, at 1133.

sumed the legality of these inventories, even though they exceeded the scope of the Wilderness Act and took place after the ten-year deadline.⁸⁴ Congress added millions of acres to the National Wilderness Preservation System based on these inventories.⁸⁵ Similarly, the NPS reviewed all lands within its jurisdiction,⁸⁶ exceeding the Wilderness Act's requirement that NPS inventory only Parks established before September 1964.⁸⁷ Congress has designated wilderness areas based on these non-Wilderness Act inventories.⁸⁸ Likewise, the Fish and Wildlife Service has undertaken non-Wilderness Act reviews of lands within the National Fish and Wildlife Refuge System.⁸⁹

The BLM also undertook to inventory lands for their wilderness potential outside of the terms of FLPMA § 603, even apart from the Babbitt reinventory. In *Sierra Club v. Watt*,⁹⁰ a federal district court acknowledged the DOI's authority to inventory lands for wilderness qualities and to manage them as such, pursuant to FLPMA § 202 and § 302.⁹¹ The case involved, among other things, a challenge to Secretary James Watt's decision to delete BLM parcels of less than 5,000 acres from WSA status and to return them to multiple use management.⁹² The court upheld Secretary Watt's deletion of the lands from WSA status, based solely on deference to the Secretary's very narrow reading of the record supporting their inclusion. The court nonetheless took the trouble to note that there was "sufficient material in the record to support the inclusion of these lands under § 302 and § 202 of FLPMA."⁹³ Moreover, with respect to management of the lands deleted from WSA status, the court ordered the Secretary to maintain a management protocol of protecting the wilderness values of those lands, relying on FLPMA § 202 and § 302.⁹⁴

84. See *California v. Block*, 690 F.2d 753, 765 (9th Cir. 1982).

85. See, e.g., Michigan Wilderness Act, Pub. L. No. 100-184, 101 Stat. 1274 (1987); Wisconsin Wilderness Act, Pub. L. No. 98-321, 98 Stat. 250 (1984); Texas Wilderness Act, Pub. L. No. 98-574 (1984). See also COGGINS ET AL., *supra* note 11, at 1136 (noting that Congress added nearly nine million acres of forest service land to the National Wilderness Preservation System based almost exclusively on the RARE II inventory).

86. See NPS Management Policies 2001 § 6.1 (2000), available at <http://www.nps.gov/policy/mp/policies.pdf> (last visited May 1, 2004).

87. 16 U.S.C. § 1132(c).

88. E.g., 16 U.S.C. § 283e, amended by Guadalupe National Park, Pub. L. No. 95-625, 92 Stat. 3467 (1978).

89. Draft Wilderness Stewardship Policy Pursuant to the Wilderness Act of 1964, 66 Fed. Reg. 3708 (proposed Jan. 16, 2001); F.W.S. Manual ¶ 610; Directors' Order 116 (Oct. 12, 1999).

90. 608 F. Supp. 305 (D.C. Cal. 1985).

91. *Id.* at 339.

92. *Id.* at 338-42.

93. *Id.* at 340.

94. *Id.* at 341.

In recent times, the Colorado BLM undertook a more modest inventory than that initiated in Utah by Secretary Babbitt.⁹⁵ The BLM determined, as a result of the inventory, that several areas required land use plan amendments to ensure that the wilderness values therein would be protected.⁹⁶ In part, the inventory was intended to address lands that had been added to the BLM's jurisdiction after 1993. For example, Colorado BLM conducted a review of lands on the Roan Plateau acquired from the Department of Energy.⁹⁷ Colorado BLM had begun the process of amending its land use plan for the Roan Plateau to reflect the wilderness qualities found in the review when the DOI issued the interim guidance document reflecting the positions in the Wilderness Settlement.⁹⁸

In short, with respect to wilderness inventories and wilderness management, decades of agency practice and court decisions support the position that FLPMA § 603, like the equivalent inventory and management provisions in the Wilderness Act, does not limit the BLM's authority to inventory and manage lands for wilderness protection. It is perhaps conceivable, notwithstanding the weight of legal and agency precedent, that a court would find it reasonable, as a prospective matter, to interpret FLPMA in the way that Secretary Norton has. But it is striking that the BLM would take the definitive position that no such authority existed for past inventories, and then wrap that position in a consent decree. While this administration was free to change course in terms of interpreting FLPMA (again, within the bounds of reasonableness), it has now attempted to ensure that future administrations will not be free to do the same. The implications of this, including constitutional concerns, will be discussed in Section IV below.

95. See Instruction Memorandum from Bureau of Land Management, United States Department of Interior, No. CO-98-017 (1998) (providing procedures and protocols for Colorado BLM's review of roadless areas identified in Citizens' wilderness proposal); Instruction Memorandum from Bureau of Land Management, United States Department of Interior, No. CO-97-044 (1997).

96. See Memorandum from Bureau of Land Management, United States Department of Interior, No. CO-930 (2000).

97. Interview with Ann Morgan, Former Director of Colorado BLM, in Boulder, Colo. (Jan. 22, 2004) (notes on file with author). The BLM has assumed the ability to inventory after-acquired lands for potential wilderness protection in other circumstances as well. See *Utah v. Babbitt*, 137 F.3d 1193, 1205 n.17 (10th Cir. 1998) ("BLM has consistently relied on FLPMA §§ 201 and 202 . . . as providing the necessary authority to conduct the inventories" on newly acquired public lands).

98. See Interview with Ann Morgan, *supra* note 97. See also Instruction Memorandum No. 2003-195, *supra* note 10.

II. THE R.S. 2477 MOU

The second week of April 2003 was a busy time for Utah state officials and the DOI. Recall that the Wilderness Settlement was filed on Friday, April 11, 2003.⁹⁹ Only two days earlier, on April 9, Secretary Gale Norton and then-Governor of Utah Michael Leavitt signed the R.S. 2477 MOU. As with the Wilderness Settlement, the events leading up to the signing of the MOU require historical and legal explanation. And similar to the Wilderness Settlement, the implications of this MOU for the future of wilderness, as well as public participation in decisions about wilderness, are potentially great.

A. Historical and Statutory Background to the R.S. 2477 MOU

R.S. 2477 is the nickname for a provision in an 1866 mining statute that granted rights-of-way across unreserved federal public lands. R.S. 2477 succinctly states: “*And be it further enacted, That the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.*”¹⁰⁰ This little statute has been causing a great deal of legal and political conflict lately, notwithstanding that it was repealed in 1976 with the passage of FLPMA.¹⁰¹ FLPMA grandfathered in all claims in existence on the date of FLPMA’s enactment,¹⁰² and the current battles concern recognition of these pre-1976 claims. Claims under R.S. 2477 are bound up with the battles over wilderness designation. The wilderness reviews are conducted on “roadless” areas, and while the congressional definition of wilderness does not necessarily make roadlessness a criteria, the Wilderness Act does refer to the “untrammeled” and “undeveloped” nature of eligible federal lands.¹⁰³ R.S. 2477 claims, if recognized, can become permanent, bladed, or paved roads. The more R.S. 2477 claims, the more difficult it will be for federal land

99. See *Utah v. Norton*, No. 2:96CV0870 B (D. Utah Apr. 11, 2003). See also *supra* note 6 and accompanying text.

100. Act of July 16, 1866, ch. 262, 14 Stat. 251, Rev. Stat. 2477, codified at 43 U.S.C. § 932 (repealed 1976).

101. 43 U.S.C. §§ 1761-1770 (2000) (outlining procedures under FLPMA for processing rights of way and repealing all inconsistent legislation).

102. See Pub. L. No. 94-579, § 701(a), 90 Stat. 2786-87 (1976) (uncodified savings provision of FLPMA stating that rights of way in existence on October 21, 1976 are not terminated).

103. 16 U.S.C. § 1131(c) (2000) (defining wilderness). See also *supra* notes 12-19 and accompanying text. Furthermore, in the section on uses in wilderness areas, the Act prohibits “permanent roads.” See § 1133(c). While theoretically it is possible for Congress to designate a wilderness area that contains roads and then to terminate them, it is unlikely that heavily roaded lands will be considered worthy of Congressional protection.

managers to include the areas traversed by these claims in wilderness proposals.

The resolution of R.S. 2477 disputes depends upon interpretation of the statutory terms "construction" and "highway." The statute itself does not define these terms, and there is no legislative history directly on point.¹⁰⁴ Before FLPMA's passage, R.S. 2477 did not attract much attention. From 1934¹⁰⁵ to 1976, when FLPMA was passed, the BLM lacked a mission: the age of disposition had ended, but the age of good stewardship had not yet begun. As a result, the BLM did little to oversee recognition of R.S. 2477 claims. What scant interpretation there was before 1976 does not provide much guidance but does tend to support the general view that the statutory terms "construction" and "highway" mean something more than casual routes created by passage. In 1896, the Supreme Court decided a case involving interpretation of a parallel provision of the 1866 Mining Act, which granted rights-of-way for the construction of canals.¹⁰⁶ The Court held that the "construction" requirement was not met in the absence of the "performance of any labor."¹⁰⁷ In addition, an 1898 legal decision by the Secretary of the Interior concluded that a route along section lines, without construction, was not sufficient to establish a right of way.¹⁰⁸

Today, proponents of looser definitions of "highway" and "construction" rely on various sources of authority that appear to defer to state law for the interpretation of R.S. 2477 terms.¹⁰⁹ A 1938 regulation stated that recognition of an R.S. 2477 claim required "construction or establishing of highways in accordance with the State laws."¹¹⁰ Some cases appear to hold that state law cannot only interpret the terms "construction" and "highway" but can read those terms out of existence.¹¹¹

104. Pamela Baldwin, *Highway Rights of Way on Public Lands: R.S. 2477 and Disclaimers of Interest*, RESEARCH SERVICE REPORT FOR CONGRESS 26, Order Code RL32142 (Nov. 7, 2003) ("There is no legislative history that sheds light on why Congress included the highway grant as section 8 in the Mining Act of 1866").

105. See 43 U.S.C. § 315. See also *supra* note 20 and accompanying text (discussing the Taylor Grazing Act of 1934).

106. *Bear Lake & River Waterworks & Irrigation Co. v. Garland*, 164 U.S. 1 (1896).

107. *Id.* at 18.

108. *Right of Way-Highway—Section 2477*, R.S., 26 L.D. 446 (1898).

109. See, e.g., Barbara G. Hjelle, *Reply to Mr. Lockhart: An Explanation of R.S. 2477 Precedent*, 14 J. ENERGY NAT. RESOURCES & ENVTL. L. 349 (1994) (arguing that state law governs recognition of R.S. 2477 claims).

110. *Rights of Way for Roads and Highways over Public Land*, 3 Fed. Reg. 1035, 1041 (June 1, 1938) (codified at 43 C.F.R. § 244.55 (1938)).

111. See, e.g., Baldwin, *supra* note 104, at 42-46 (analyzing in detail cases that conclude state law governs establishment of R.S. 2477 claims); Michael J. Wolter, *Revised Statutes 2477 Rights-of-Way Settlement Act: Exorcism of Exercise or the Ghost of Land Use Past?*, 5

A thorough and neutral analysis of the issue provided by the Congressional Research Service ("CRS") concludes, however, that these precedents, when examined closely, do not stand for the proposition that state law can override the statutory requirements.¹¹² The CRS Report ends its analysis of the apparent conflicts over state law and federal law with the following sensible solution:

If the governing rule is articulated as being that a valid R.S. 2477 highway is one that is both accepted under the laws of the state in which it is located and also meets the federal requirements, the disparate body of state cases can be seen as essentially harmonious, and actual areas of conflict with the federal requirements appear to be few. This interpretation is also consistent with the [DOI's] earliest, and most of its subsequent interpretations.¹¹³

This articulation of the ease with which a harmonious legal solution could be reached masks the political turbulence surrounding R.S. 2477 claims. States, counties, and others that oppose what they perceive as heavy-handed, unilateral actions by the DOI to "lock up" public lands do not necessarily want legal consistency for the recognition of R.S. 2477 claims. Rather, it is in their best interest to keep nebulous standards alive so that R.S. 2477 claims can haunt the public lands planning process. For example, the County Commissioners of Moffatt County, Colorado passed a resolution asserting more than 2,000 miles of R.S. 2477 claims, including 240 miles within Dinosaur National Monument.¹¹⁴ The Moffatt County resolution defines "highway" to include "pedestrian trails, horse paths, livestock trails, wagon roads, jeep trails, logging roads, homestead roads, mine-to-market roads, alleys, tunnels, bridges, dirt or gravel roads, paved roads, and all other ways and their attendant access for maintenance, reconstruction, and construction."¹¹⁵ Some of Moffatt County's asserted claims run along river bottoms and traverse jagged rocky outcroppings.¹¹⁶ Similarly, Utah counties have asserted thousands

DICK, J. ENVTL. L. & POL'Y 315, 327-330 (1996) (arguing that state law cannot eviscerate federal statutory terms that set minimum requirements for the R.S. 2477 grant).

112. Baldwin, *supra* note 104, at 41-45 (concluding that statements in cases that appear to sanction state law definitions of R.S. 2477 terms that undermine statutory requirements are dicta).

113. *Id.* at 46.

114. See *A Resolution Recognizing Rights-of-Way Established Over Public Lands Under R.S. 2477*, Moffatt County, Colorado Resolution No. 2003-05, available at <http://co.moffatt.co.us/NaturalResources/rightsofway.htm> (last visited June 21, 2004).

115. *Id.*

116. Examples of R.S. 2477 Proposed Highways in Colorado, at <http://66.84.44.20/2477/00index.htm> (containing photographs of Moffatt County's claims, including

of R.S. 2477 claims,¹¹⁷ many of which challenge even the most generous definition of “highway” and some of which—such as slot canyons and slick-rock domes—audaciously mock the term.¹¹⁸ The parties asserting these R.S. 2477 rights are very aware of the ways in which their claims could complicate BLM’s ability to prioritize wilderness preservation.¹¹⁹ A letter from a Moffatt County official to Secretary Gale Norton objecting to BLM’s plans to manage the Vermillion Basin in order to protect its wilderness characteristics asserts that many private individuals will be motivated to “exercise . . . rights under R.S. 2477” by taking actions such as bulldozing tracks on public lands in order to oppose wilderness designation.¹²⁰ The problem is largely a political one, not a legal one. The opponents of wilderness designation have adroitly seized on an ancient, but not dead, law in order to bolster their position in the battle over the appropriate uses of the public lands.

B. The Terms of the R.S. 2477 MOU

The political controversy has kept alive the legal uncertainty regarding how to interpret R.S. 2477. The BLM and Utah assert that the R.S. 2477 MOU is designed to put the legal uncertainties to rest, at least for claims in that state. Yet the MOU provides very little guidance concerning how the key statutory terms “construction” and “highway” will be interpreted. The MOU’s preamble states that:

Most of the asserted R.S. 2477 rights-of-way that actually have been part of western states’ inventoried and maintained transportation infrastructure . . . satisfy the statutory requirements of “construction” and “highway” under almost any interpretation of those statutory terms.¹²¹

several in Dinosaur National Monument along the Yampa River) (last visited June 21, 2004).

117. Bloch & McIntosh, *supra* note 37, at 489-90 (noting that Utah and Utah counties have asserted between 10,000 and 20,000 claims, many of which are not recognizable as roads even under very loose standards).

118. R.S. 2477 Photo Gallery, at <http://members.aol.com/gshiker999/index.html> (containing photographs of slot canyons and slick rock trails claimed as R.S. 2477 highways by Utah counties) (last visited June 21, 2004).

119. See, e.g., Letter from Jeff Comstock, Natural Resource Policy Analyst, Moffat County Natural Resources Department, to Secretary Gale Norton (July 12, 2001) (on file with author).

120. *Id.*

121. Memorandum of Understanding Between the State of Utah and the Department of Interior on State and County Road Acknowledgment 1 (Apr. 9, 2003), available at <http://www.highway-robbery.org/Resources/documents.htm> (last visited June 21, 2004) [hereinafter

This reassuring assertion is not followed by clear definitions of highway or construction. First, the MOU's title refers to "roads," rather than highways, and a footnote to the word "roads" states that for the purposes of the MOU, the terms "road" and "highway" are synonymous.¹²² Proponents of a strict interpretation of the statute's terms would point out that this is an immediate deviation from the act's requirements. "Road" and "highway" are *not* necessarily synonymous, and it is likely that "highway" implies more human alteration and greater public access than "road."¹²³ Second, little else in the MOU gives content to the statutory terms.

The R.S. 2477 MOU, which lacks a definitions section, first provides this circular declaration: "existence of the road prior to the enactment of FLPMA is documented by information sufficient to support a conclusion that the road meets the legal requirements of a right-of-way granted under R.S. 2477."¹²⁴ And exactly what are the legal requirements of R.S. 2477? The MOU provides only the following minimal guidance: "the road was and continues to be public and capable of accommodating automobiles or trucks with four wheels and has been the subject of some type of periodic maintenance."¹²⁵ The term "construction" is never defined independently, so presumably "some type of periodic maintenance" will suffice.¹²⁶ The statement in the preamble that most of the state's R.S. 2477 claims will meet "any" interpretation of the terms "highway" and "construction"¹²⁷ does not provide much reassurance when the definitions provided set such a low (and nebulous) bar.

How, then, are claimants or the public to know whether there will be any discernment at all by the BLM in its process of recognizing claims under the R.S. 2477 MOU? Moreover, why are the terms of the R.S. 2477 MOU so unclear? There are two possible answers to the second question. The first is that, like the Commissioners of Moffatt County, the BLM recognizes all manner of paths, trails, and routes as valid R.S. 2477 claims. Whether this is the case or not will be revealed

MOU Between Utah and DOI].

122. *Id.* at 1 n.1.

123. See Baldwin, *supra* note 104, at 24 (noting that American dictionaries in use in 1866 indicate that "highway" meant a principal public road, as opposed to "road," which was the more generic term for any route on which one traveled). Baldwin concludes that "while all highways are roads, not all roads are highways, since, arguably, highways are public, and are more significant, built up roads." *Id.* at 25.

124. MOU Between Utah and DOI, *supra* note 121, at 3.

125. *Id.* at 3.

126. *Id.*

127. *Id.* at 1.

as Utah goes through the process of proposing claims under the MOU.¹²⁸ The second is that, regardless of what the BLM's actual standards are or will be in recognizing claims under the R.S. 2477 MOU, the agency felt legally constrained not to be too specific for fear of violating a congressional moratorium on making rules pertaining to R.S. 2477.¹²⁹ The R.S. 2477 MOU does not appear to be a "rule,"¹³⁰ so how could it violate a moratorium on rule-making? The R.S. 2477 MOU does not, in and of itself, include any mechanism for adjudicating or otherwise finalizing claims brought pursuant to the MOU's terms. Instead, the MOU states that claims will be acknowledged through the "recordable disclaimer of interest" process provided for in FLPMA.¹³¹ New rules *were* passed implementing FLPMA's Recordable Disclaimer of Interest provision (FLPMA § 315),¹³² and those rules became final on January 6, 2003,¹³³ three months before Utah and the BLM entered into the R.S. 2477 MOU.

128. Utah filed its first R.S. 2477 claim pursuant to the MOU on January 14, 2004. The name of the proposed right-of-way is Weiss Road, and it is located in Juab County, in western Utah. On February 9, 2004, the BLM published a notice in the Federal Register of the claim, and the comment period was extended to May 8, 2004. For a description of Weiss Road as submitted to the State of Utah, see <http://www.ut.blm.gov/rs2477/weisshighway.htm> (last visited June 21, 2004). Weiss Road, from the photographs on BLM's website, appears to be an established and maintained gravel road with sloped shoulders indicating mechanical beveling and construction. See also <http://www.ut.blm.gov/rs2477/weisshighway/mapjuabcolor.htm> (last visited June 21, 2004). Other claims on Utah's list, however, do not appear to be quite so uncontroversial. See, e.g., Rural County Roads: Applications, Forshea Springs Road-Piute County, at <http://www.rs2477.utah.gov/Claims/Forshea/ForsheaGL5.htm> (last visited June 21, 2004). Forshea Springs Road is described as "a route for transporting water from the mountain to the valley, and it is therefore an important road for livestock management." *Id.* Other uses are described, but none seem to indicate that the route is a thoroughfare for transporting people from place to place. In addition, the photos available make the route look as if it is following the natural contours of the land. *Id.*

129. See Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 108, 110 Stat. 3009, 3009-200 (Sept. 30, 1996), available at <http://www.highway-robbery.org/Resources/documents.htm> (last visited June 21, 2004). Congress has since relied on an Opinion of the Comptroller General that section 108 was permanent. See H.R. REP. NO. 105-337, at 74 (1997) (citing Opinion of the Comptroller General B-277719 (Aug. 20, 1997)) [hereinafter R.S. 2477 Moratorium].

130. The General Accounting Office, however, concluded that the R.S. 2477 MOU did qualify as agency rulemaking. See G.A.O. Opinion (Feb. 6, 2004), http://www.rs2477.com/documents/GAO-Opinion_2_6_04.pdf.

131. See MOU Between Utah and DOI, *supra* note 121, at 3.

132. 43 U.S.C. § 1745 (2004).

133. Conveyances, Disclaimers, and Correction Documents, 68 Fed. Reg. 494, 494 (Jan. 6, 2003) (amending 43 C.F.R. pt. 1860).

C. *The R.S. 2477 Moratorium and "Recordable Disclaimers of Interest"*

At this point it is necessary to back up a step to explain the R.S. 2477 rule-making moratorium, as well as the disclaimer of interest provisions of FLPMA. The R.S. 2477 controversies that bubbled along throughout the eighties and early nineties failed to result in any rule-making by the DOI. Guidance came, instead, in the form of opinion letters and policies. A 1980 letter by a Deputy Solicitor of the Interior, known as the Ferguson Opinion, shored up the views of the strict R.S. 2477 constructionists, concluding that whether highways had been established was a matter of federal law and that "construction" means some actual building of a road by mechanical means, including for example culverts, grading, or paving.¹³⁴ Then in 1988, the liberal interpreters won a round when Secretary Hodel adopted a policy to govern R.S. 2477 claims that substantially loosened the requirements for "highway" and "construction."¹³⁵ The Hodel policy allowed pack or pedestrian trails and toll roads to count as "highways."¹³⁶ For "construction," as little as moving high vegetation or rocks could count, as could the passage of vehicles over time.¹³⁷

The uncertainties created by the various administrative, as well as judicial, interpretations prompted Congress to address the issue. Unable to agree on legislation, Congress instead directed the DOI to prepare a report on R.S. 2477 that would describe the history and current impacts of R.S. 2477 claims on public lands and propose recommendations for criteria to determine the validity of R.S. 2477 claims that would be consistent with the intent both of R.S. 2477 and FLPMA.¹³⁸ The DOI completed its report in June 1993.¹³⁹ Among the recommendations was that the DOI publish regulations that would establish uniform criteria and

134. See Letter from Frederick Ferguson to James Moorman, Assistant Attorney General (Apr. 28, 1980), *reprinted in* UNITED STATES DEP'T OF INTERIOR, REPORT TO CONGRESS ON R.S. 2477: THE HISTORY AND MANAGEMENT OF R.S. 2477 RIGHTS-OF-WAY CLAIMS ON FEDERAL AND OTHER LANDS, Appendix II, Exhibit J (1993), *available at* <http://www.highway-robbery.org/Resources/documents.htm> (last visited June 21, 2004) [hereinafter Ferguson Opinion].

135. See DEPARTMENTAL POLICY STATEMENT ON SECTION 8 OF THE ACT OF JULY 26, 1866, REVISED STATUTE 2477 (REPEALED), GRANT OF RIGHT-OF-WAY FOR PUBLIC HIGHWAYS (R.S. 2477) (December 7, 1988), *available at* <http://www.highway-robbery.org/Resources/documents.htm> (last visited June 21, 2004) [hereinafter Hodel Policy].

136. *Id.*

137. *Id.*

138. H.R. REP. NO. 102-901, at 71 (1992).

139. Baldwin, *supra* note 104, at 5.

processes for recognizing R.S. 2477 claims.¹⁴⁰ Secretary Babbitt proposed such regulations¹⁴¹ but they met with potent political opposition. The Babbitt regulations adopted definitions of “construction” and “highway” that some members of Congress found to be too onerous.¹⁴² Congress responded by prohibiting Secretary Babbitt from promulgating R.S. 2477 rules.¹⁴³ This initial congressional prohibition on R.S. 2477 rule-making eventually transformed into a permanent one, banning rules “pertaining to” R.S. 2477 from becoming effective unless approved by Congress.¹⁴⁴ In response to the moratorium, Secretary Babbitt issued a policy memorandum stating that the DOI would not process any R.S. 2477 claims absent a “compelling and immediate need.”¹⁴⁵ For any claims warranting the DOI review, “highway” is defined as “a thoroughfare used prior to October 21, 1976, by the public for . . . passage of vehicles carrying people or goods from place to place.”¹⁴⁶ “Construction” is required, though the Babbitt policy does not define the term.¹⁴⁷

Meanwhile, on the ground in Utah, several counties set out to blade roads across BLM lands. SUWA sued the BLM in order to prompt the agency to stop the counties from trespassing on federal lands.¹⁴⁸ The counties defended by asserting that the roads were valid R.S. 2477 claims.¹⁴⁹ The federal litigation was stayed so that the BLM could make an administrative determination concerning the validity of the counties’ claims.¹⁵⁰ Although the Babbitt policy is not mentioned in the court opinion, presumably a lawsuit and a court order suffice to meet the policy’s requirement of a “compelling and immediate interest,” and the BLM therefore adjudicated the counties’ claims, finding that fifteen out of sixteen rights-of-way claimed by the counties were not valid R.S.

140. *See id.*

141. Revised Statute 2477 Rights-of-Way, 59 Fed. Reg. 39,216 (Aug. 1, 1994).

142. Baldwin, *supra* note 104, at 5 n.19.

143. National Highway System Designation Act of 1995, Pub. L. No. 104-59, § 349, 109 Stat. 568, 617-18 (1995) (prohibiting agencies from promulgating R.S. 2477 rules); Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 110, 110 Stat. 1321-177 (1996) (extending R.S. 2477 prohibition in to 1996 fiscal year).

144. *See* R.S. 2477 Moratorium, *supra* note 129.

145. Interim Departmental Policy on Revised Statute 2477 Grant of Right-of-Way for Public Highways, Revocation of December 7, 1988 Policy (Jan. 22, 1997), available at <http://www.highway-robbery.org/Resources/documents.htm> (last visited June 21, 2004) [hereinafter Babbitt Policy].

146. *Id.* at 3.

147. *Id.*

148. *See* S. Utah Wilderness Alliance v. Bureau of Land Mgmt., 147 F. Supp. 2d 1130, 1133 (D. Utah 2001).

149. *Id.*

150. *Id.*

2477 claims.¹⁵¹ In adjudicating the counties' claims, the BLM used definitions of "highway" and "construction" that were in line with the Ferguson Opinion¹⁵² and the proposed (and scuttled) Babbitt rules.¹⁵³ The BLM interpreted "construction" to require "[s]ome form of mechanical construction" and declared that a right-of-way "cannot be established by haphazard, unintentional, or incomplete actions," including the mere passage of vehicles.¹⁵⁴ To meet the BLM's definition of "highway," the claimed route had to be "public in nature . . . [and] should lead vehicles somewhere Routes that do not lead to an identifiable destination are unlikely to qualify."¹⁵⁵ The counties advocated for much looser definitions, but the federal district court, after a thorough review of the various sources construing R.S. 2477's terms, affirmed the BLM's interpretation.¹⁵⁶ The parties urging minimal requirements to establish R.S. 2477 claims were thus dealt a significant setback, even in the absence of formally promulgated regulations. Although the state of Utah was not a party to the litigation, it had sent a Notice of Intention to File Suit to the Secretary of the Interior on June 14, 2000, alerting the DOI of its plans to quiet title to asserted R.S. 2477 claims.¹⁵⁷ In the absence of action by the Secretary, Utah might have been stuck with the clear definitions of "construction" and "highway" approved by the federal district court.

This leads us back up to 2003, when the DOI entered into the R.S. 2477 MOU with Utah and published new rules implementing FLPMA § 315, the recordable disclaimer of interest provision. In establishing a process for the R.S. 2477 MOU that would actually resolve some of Utah's claims, the DOI had to walk a fine line between providing enough detail so that the statute itself was not gutted of any meaning, and enough vagueness so that the moratorium on rule-making was not violated. This was no easy feat. To allow the disclaimer rules to accommodate federal acknowledgment of R.S. 2477 rights-of-way, the rules had to be

151. *Id.* at 1133-34.

152. *See* Ferguson Opinion, *supra* note 134, and accompanying text.

153. *See* Babbitt Policy, *supra* note 145, and accompanying text.

154. *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 147 F. Supp. 2d 1130, 1138 (D. Utah 2001).

155. *Id.* at 1143.

156. *Id.* at 1138-45. *See also id.* at 1135 (articulating level of deference accorded to BLM's interpretation). The court's review of the legal justification for interpreting R.S. 2477's terms was particularly thorough because the court did not afford full *Chevron*-style deference to the BLM. The court correctly noted that informal policy pronouncements, unlike rules subject to the full notice and comment process required by the Administrative Procedures Act, "are 'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Id.* at 1135 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

157. *See* MOU Between Utah and DOI, *supra* note 121, at 2.

amended. This alone could make the rules ones that "pertain" to R.S. 2477, in violation of the moratorium. In response to comments expressing this concern, the DOI asserted that the disclaimer rules do not violate the moratorium because they merely amend a *process* for applying to the government for its acknowledgment that it does not claim an interest in certain property; they do not "provide standards for recognizing, managing or validating an R.S. 2477 right-of-way."¹⁵⁸

Yet without the new disclaimer rules, R.S. 2477 claimants would not have been able to take advantage of § 315 of FLPMA, which provides, in relevant part, that

the Secretary is authorized to issue a document of disclaimer of interest or interests in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where he determines (1) a record interest of the United States in lands has terminated by operation of law or is otherwise invalid¹⁵⁹

The old rules required the applicant to be a record owner and imposed a twelve-year statute of limitations.¹⁶⁰ Because no R.S. 2477 claimant is a "record owner," and because, by definition, any R.S. 2477 claims that are still alive are at least eighteen years old, the old rules did not apply to R.S. 2477 rights-of-way. The new rules eliminate the "owner of record" requirement and also exempt "states" from the twelve-year statute of limitations.¹⁶¹ The new rules also include a very expansive definition of states, including subdivisions and any "official local governmental entities,"¹⁶² which are therefore also exempt from the twelve-year statute of limitations. The Secretary's rationale for the statute of limitations change is to make the disclaimer rules consistent with the Quiet Title Act ("QTA"),¹⁶³ which is the only means by which title disputes can be brought against the United States.¹⁶⁴ The QTA, however, does not contain the expansive definition of "states," and therefore the disclaimer rules actually provide broader release from the twelve-year statute of limitations than the QTA.¹⁶⁵ Whether the Secretary's intent was pure or

158. Conveyances, Disclaimers, and Correction Documents, 68 Fed. Reg. 494, 497 (Jan. 6, 2003).

159. 43 U.S.C. § 1745(a) (2004).

160. 43 C.F.R. § 1864.1-3(a)(1) (2002).

161. *Id.* § 1864.1-3(a).

162. 43 C.F.R. § 1864.0-5(h).

163. 28 U.S.C. § 2409(a) (2004).

164. Baldwin, *supra* note 104, at 8.

165. *See id.* at 10 (discussing definition of "state" in QTA and court interpretation).

not, the result is that the disclaimer rules now apply to R.S. 2477 claims, whether asserted by states, counties, or other "official governmental entities."

The R.S. 2477 MOU, when quilted together with the new disclaimer rules, amounts to the functional equivalent of an R.S. 2477 rule. The R.S. 2477 MOU creates the terms upon which the DOI will officially legitimize R.S. 2477 claims asserted by Utah, and the disclaimer process provides Utah with the means to achieve an official statement of "no property interest" from the federal government. This functional equivalence may help explain why the R.S. 2477 MOU itself is so devoid of clear definitions. The more detailed it is, the more its reference to the disclaimer process makes the whole package seem like an elaborate evasion of the moratorium. Indeed, it is likely that environmental groups will challenge the R.S. 2477 MOU and the disclaimer rules on a variety of grounds, including both exceeding a reasonable interpretation of R.S. 2477 and violating the moratorium.¹⁶⁶ Whether these claims succeed or fail, the DOI's muscular attempt to accomplish potentially dramatic shifts in federal lands policy without appearing to do so is notable and troubling.

III. CONSTITUTIONAL AND OTHER CONCERNS ABOUT THE AGENCY PRACTICE OF SETTLING THE WILDERNESS

When Ralph Nader said during the 2000 presidential race that there was no difference between Republicans and Democrats,¹⁶⁷ he could not possibly have been thinking about public lands policy. Ranchers, oil and gas companies, environmental groups, and many other average citizens of the West know that the party affiliation of the President matters a great deal. Why? Because the President staffs the extremely powerful executive agencies that manage the public lands, and because much of what these agencies do is reviewable largely only in a procedural

Baldwin notes that "[r]ecent cases have held that the exception for states is to be interpreted narrowly, such that counties and other subdivisions of a state may not avail themselves of this exception to the QTA." *Id.*

166. See BLM Cannot Approve Weiss Highway Disclaimer Application, UTU-81100, Comment Letter Submitted to BLM by Earthjustice on behalf of the Wilderness Society (May 6, 2004), available at http://www.highway-robbery.org/documents/Weiss_Highway_May_6_2004.pdf (objecting to approval of Weiss Highway R.S. 2477 claim on grounds that it violated FLPMA's disclaimer provisions and R.S. 2477 statutory terms).

167. See Kavita Kumar, *Nader to Supporters: "Vote Your Conscience,"* PALM BEACH POST, Nov. 6, 2000, at 7A (quoting Nader as stating that Democrats and Republicans are the "same corporate party").

sense.¹⁶⁸ The Executive's ability to accomplish significant policy shifts regarding the federal government's vast landholdings is breathtaking.¹⁶⁹ Given that this is the case, the procedural and substantive hooks that allow the public to understand, participate in, and attempt to influence public lands agencies are particularly valuable.¹⁷⁰ They provide the only check on the broad exercise of executive discretion, short of congressional legislation. In short, while there is unquestionably wide latitude given to the Executive Branch to implement public lands policies, the legislative framework also provides a significant role to the public. Without that public role, the agencies could quickly become tyrannies of the public lands, serving only their own and a few special interests.¹⁷¹ The Wilderness Settlement and the R.S. 2477 MOU upset the delicate balance of agency discretion and public oversight that is enshrined in the relevant laws and, in the case of the Wilderness Settlement, even in the Constitution.

168. The Public Lands statutes (including FLPMA and the National Forest Management Act, 16 U.S.C. §§ 1600-1614) have substantive and procedural aspects that can be enforced by private citizens through the Administrative Procedures Act, 5 U.S.C. §§ 551-559, 701-706. Agencies are afforded substantial deference, however, whenever Congress has not "directly spoken to the precise question at issue." *Chevron, USA, Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-45 (1984). Moreover, even when there is clear congressional direction, the agencies control the pace and tone with which these directives are met, and failures to act to protect public lands may often be completely unreviewable. *See Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004).

169. *See* Blumm, *supra* note 1, at 10397 (describing this administration's changes to public lands policy as a "revolution.").

170. *Cf.* Harold J. Krent & Nicholas S. Zeppos, *Monitoring Governmental Disposition of Assets: Fashioning Regulatory Substitutes for Market Controls*, 52 VAND. L. REV. 1705, 1771-72 (1999) (arguing for greater public participation and judicial review of government disposition programs). Krent and Zeppos review the practices of agencies, including the BLM, that dispose of governmental assets to the public, and conclude that their susceptibility to interest group capture and other market-distorting behaviors require more public scrutiny and oversight. *See generally id.* While they are looking only at the narrow issue of BLM's "disposition" practices, including mining, oil and gas leasing, and grazing permitting, their observations apply to the entire BLM operation because of the inextricable nature of these "disposition" practices with the broader FLPMA land use planning process.

171. Krent & Zeppos aptly noted:

Private entities have successfully lobbied Congress for public resources to subsidize their own financial activities. Interest group influence continues post-enactment, with groups exerting leverage to retain legislative benefits. Moreover, private groups have similarly curried favor with agencies to obtain (or retain) government largesse. Such governmental subsidization reflects the organizational advantages of the few who can benefit at the expense of the less well-organized public.

Id. at 1708.

A. The Wilderness Settlement and the Constitution

The typical constitutional question that arises in the public lands context is whether the federal government has constitutional authority, pursuant to the Property Clause, to regulate or conduct activity on or adjacent to federal lands.¹⁷² In general, the answer to this question has been "yes."¹⁷³ In the Utah Wilderness Settlement, the government is restraining itself from conducting activities on the public lands. Certainly there is no Property Clause limitation on the federal government's decision *not* to act, even if it could (though there may be statutory limitations on the government's decision not to act). There are other constitutional concerns presented by the Wilderness Settlement, however. The BLM's self-imposed straitjacket raises separation of powers questions that constitutional law commentators have not considered since the 1980s, when a small number of cases upheld consent decrees against constitutional challenges¹⁷⁴ and in response, the Department of Justice ("DOJ"), under the command of Attorney General Edwin Meese III, issued a "Department Policy Regarding Consent Decrees and Settlement Agreements."¹⁷⁵ These events sparked a discussion about the constitutional parameters of executive authority to bind the government to certain legal commitments in settlement agreements.¹⁷⁶

Attorney General Janet Reno rejected the Meese Policy,¹⁷⁷ and to date Attorney General John Ashcroft has not taken a position on the matter. It is clear, however, from the Wilderness Settlement that the Ashcroft Department of Justice has adopted a very liberal view of its own powers to bind the Executive Branch, including future administrations, to a singular interpretation of the law. The Meese policy prohib-

172. See COGGINS ET AL., *supra* note 11, at 182-93.

173. See *id.* at 183-84. See also John Leshy, *A Property Clause for the 21st Century*, 75 U. COLO. L. REV. 1101 (2004).

174. See Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 526 (1986) (approving the use of consent decrees that provide even broader relief than the court could have awarded after trial); Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983) (holding that a settlement agreement between the Environmental Protection Agency and environmental groups relating to program for developing Clean Water Act regulations did not impermissibly infringe on agency discretion committed to it by Congress); United States v. Bd. of Educ. of Chicago, 554 F. Supp. 912 (N.D. Ill. 1983) (approving consent decree).

175. Timothy Stolzhus Jost, *Commentary: The Attorney General's Policy on Consent Decrees and Settlement Agreements*, 39 ADMIN. L. REV. 101, 101 (1987).

176. See generally Symposium, *Consent Decrees: Practical Problems and Legal Dilemmas*, 1987 U. CHI. LEGAL F. 1 (1987).

177. See United States Department of Justice, *Authority of the United States to Enter Settlements Limiting the Future Exercise of Executive Branch Discretion*, http://www.usdoj.gov/olc/consent_decree2.htm.

ited terms in consent decrees "that divest the Secretary or agency administrator, or his successors, of discretion committed to him by Congress or the Constitution where such discretionary power was granted to respond to changing circumstances, to make policy or managerial choices, or to protect the rights of third parties."¹⁷⁸ The Meese Justice Department specified two reasons for the policy.¹⁷⁹ The DOJ sought first to avoid binding future administrations in the exercise of their agency discretion, and second to protect the discretion of the Executive Branch from an intrusive exercise of judicial power in enforcing consent decrees that create obligations that the court itself could not have imposed after a trial.¹⁸⁰

The Meese policy did not allude to constitutional concerns, but commentators have since put concerns about consent decrees into constitutional context. The peculiar nature of consent decrees forms the basis for the constitutional risks they pose. Consent decrees "have attributes both of contracts and of judicial decrees."¹⁸¹ They are contractual in that they are a consensual agreement between parties, the consideration for which is abandoning litigation. But unlike contracts, they are adopted by a court as a final order and decree and are enforceable according to terms dictated, not by the Judicial Branch after due consideration of the facts and law, but by the parties themselves.¹⁸² Notwithstanding the court's lack of involvement in determining a decree's terms, the court must enforce those terms just as it would any other final injunctive relief.¹⁸³

Consent decrees therefore have the potential to bind future administrations to a legal position that has never been adjudicated. The constitutional risks identified by scholars are two-fold: first, Article II concerns are raised by the specter of one Executive Branch binding a future Executive Branch;¹⁸⁴ second, Article III problems are presented by the courts being enlisted to interfere unduly in the exercise of executive

178. Jost, *supra* note 175, at 102-03 (quoting Memorandum from Edwin Meese III, Attorney General, to All Assistant Attorneys General and All United States Attorneys, at 3 (Mar. 13, 1986) (concerning Department policy with regard to consent decrees and settlement agreements)).

179. *Id.* at 104.

180. *Id.* at 104-05. Professor Jost opines that the policy was also intended to centralize political control over troublesome, judicially enforceable agreements and to serve as a negotiating tool by imposing certain outer limits on settlement terms. *Id.* at 105-06.

181. *United States v. ITT Cont'l Banking Co.*, 420 U.S. 223, 236 n.10 (1975).

182. Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203, 205 (1987).

183. Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 296 (1987).

184. *Id.* at 300. See also Rabkin & Devins, *supra* note 182, at 219-220.

powers.¹⁸⁵ These concerns are interrelated, in that the Executive could not impermissibly constrain future Executives (the Article II concern) without recruiting the Judicial Branch, and the Judicial Branch could not overstep its constitutional boundary of hearing “cases and controversies” unless the federal party to the consent decree is ceding powers beyond those within its capacity to cede.¹⁸⁶

Notwithstanding the constitutional risks, courts have left it largely to the Executive Branch to avoid the problematic consequences of settlement agreements.¹⁸⁷ Some scholars have urged that in addition to abdicating their constitutional obligations, the courts invite behavior that abuses democratic principles.¹⁸⁸ These abuses come in several forms. First, federal agencies might “placate particular parties at the expense of their broader policy responsibilities to the general public.”¹⁸⁹ Second, agencies are invited to “evade proper accountability by securing a judicial imprimatur for their own disputable policy choices.”¹⁹⁰ Third, allowing one administration to bind successors undermines electoral prerogatives and therefore democratic accountability.¹⁹¹

The Wilderness Settlement presents both the constitutional concerns and the specter of practical abuses. With respect to the Article II concerns, by recruiting the court to side with a particular interpretation of FLPMA (an interpretation with no legal or administrative precedent),¹⁹² the Secretary locked in that interpretation in a way that would not have been possible pursuant to her own authority.¹⁹³ While Secretary Norton was free to change course with respect to all land use planning conducted under her own administration, she would not, in the absence of the Wilderness Settlement, have been able to guarantee to Utah that future administrations would take the position that FLPMA prohibits wilderness inventories and interim standards of management that protect wilderness qualities.¹⁹⁴ With respect to the Babbitt wilderness inventory, the Article

185. See Rabkin & Devins, *supra* note 182, at 257.

186. See *id.* at 243 (discussing interrelationship between separation of powers and Article III concerns).

187. See *id.* at 205 (“[N]o appellate decision on the subject has yet offered a clear ruling on the underlying constitutional issues”). This remains true today.

188. See *id.* at 269. See also McConnell, *supra* note 183, at 297.

189. Rabkin & Devins, *supra* note 182, at 270.

190. *Id.*

191. *Id.* See also McConnell, *supra* note 183, at 299-300.

192. See *supra* Section I.C.

193. McConnell, *supra* note 183, at 301-04.

194. See Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint at 12-13, *Utah v. Norton*, No. 2:96CV0870 B (D. Utah Apr. 11, 2003). See also McConnell, *supra* note 183, at 303 (proposing that consent decrees should only be enforceable if the government signatory has authority, other than

II and Article III concerns converge. In *Utah v. Babbitt*,¹⁹⁵ the court held that the plaintiffs lacked standing to challenge the Babbitt reinventory.¹⁹⁶ Only the *de facto* management of BLM as wilderness challenge remained alive in the litigation.¹⁹⁷ Yet the Wilderness Settlement disavows legal authority for the Babbitt reinventory.¹⁹⁸ In approving the Wilderness Settlement, the district court therefore allowed the Secretary to resolve, by judicial decree, a matter that the court, according to the Tenth Circuit, lacked constitutional authority to hear.¹⁹⁹

The three practical concerns raised by scholars are all present in the Wilderness Settlement as well. First, the Settlement placates the state parties, adopting wholesale their legal position, at the expense of the legal and policy positions of members of the public.²⁰⁰ The fact that environmental groups filed petitions to intervene that the district court never considered, and that the Wilderness Settlement underwent expedited consideration in the district court while the petitions to intervene were pending,²⁰¹ heightens this concern. Second, the dearth of legal support for the Secretary's position concerning FLPMA's constraints on wilderness inventories and protection bolsters the critique that the administration was seeking judicial cover for a questionable policy choice.²⁰² Finally, the Wilderness Settlement undermines the public's ability to change BLM's wilderness-stingy direction by contacting public officials or even voting for a different administration.²⁰³ Even if the public's desire for a policy change is strong enough to influence electoral outcomes, the Wilderness Settlement purports to lock in a particular interpretation of FLPMA's wilderness-related provisions.

from the decree itself, to bind the discretion of present and future officeholders).

195. 137 F.3d 1193 (10th Cir. 1998).

196. *Id.* at 1197.

197. *Id.* at 1215.

198. Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint at 9-10, 12-13, *Norton*, 2:96CV0870 B.

199. Rabkin & Devins, *supra* note 182, at 223 (describing Article III limitations, including standing requirements). See also *id.* at 265 (commending a court for raising standing questions in the context of rejecting a proposed settlement).

200. See *id.* at 270 (describing abuse of placating certain parties at the expense of other members of the public).

201. See *supra* Section I.C (analyzing legal positions adopted in the Wilderness Settlement).

202. Rabkin & Devins, *supra* note 182, at 270 (noting that administrations might abuse consent decrees by seeking judicial "imprimatur" for questionable policy choices).

203. See *id.* and McConnell, *supra* note 183, at 297 (both expressing concerns about undermining agency accountability to the general public, which is typically accomplished through voting and contacting agency officials).

As noted above, federal courts have been reluctant to impose constitutional constraints on the Executive's ability to enter into consent decrees. With the exception of the standing concern,²⁰⁴ it is therefore unclear whether the separation of powers questions raised by the Wilderness Settlement will persuade a court to set aside the consent decree. Yet the foregoing discussion highlights the substantial risks to values of public accountability and statutory fidelity if the Executive Branch is left to police itself.

B. Agencies, Public Lands, and Public Participation

Unlike the Wilderness Settlement, the R.S. 2477 MOU is not enshrined in a judicially enforceable decree. The R.S. 2477 MOU therefore does not present the same legally cognizable constitutional issues. As a practical matter, however, the R.S. 2477 MOU has the potential to impact public lands policies as concretely and as permanently as the Wilderness Settlement. If the BLM proceeds to recognize even a proportion of the claims on Utah's list, let alone any of the claims asserted by Utah counties, BLM's ability to protect lands for their wilderness qualities will be greatly compromised. The R.S. 2477 MOU and the Wilderness Settlement together represent serious challenges to the BLM's authority to protect the wilderness and associated environmental values of BLM lands, and the public's ability to influence BLM management authority.

The legal and historical details of these two agreements between the BLM and Utah present serious questions about the authority of federal public lands agencies. The complexity of both of these stories makes them fairly inaccessible to the average citizen. And yet these obscure, highly technical maneuvers and legal interpretations determine the fate of public lands in which, as of today, the average citizen has a legitimate legal interest. The approach of capitulating to special interest groups (in this case states and counties, with extractive industries looming in the background)²⁰⁵ appears inconsistent with Secretary Norton's stated policy of "the 4C's: communication, consultation, cooperation, all in the service of conservation."²⁰⁶ The full implications and details of the Utah settlements are difficult to communicate to the public; interested parties were not consulted; cooperation with interested members of the public is

204. Rabkin & Devins, *supra* note 182, at 265 (discussing D.C. Circuit opinion that raised standing issue).

205. See Blumm, *supra* note 1, at 10420 (concluding that extractive industries drive Bush administration policies on public lands disputes).

206. U.S. Department of Interior, *Welcome from Secretary Gale Norton*, <http://www.doi.gov/welcome.html> (last visited on May 11, 2004).

therefore not in evidence, and the "conservation" goals are elusive, to say the least. The point, however, is not to criticize this particular administration. It seems entirely likely that strenuous agency action excising an entire community's point of view, and making indelible marks on public lands management, would be objectionable to whichever community was on the short end of the agency's policy agenda.²⁰⁷ The particularly disturbing aspect of these attempts to "settle the wilderness" is the sub rosa nature of this kind of policy making. Many have criticized the federal government's management of the public lands.²⁰⁸ But as long as the federal government is still the manager of just under one-third of the nation's lands, one of the primary virtues is that the entire spectrum of public opinion can be taken into account. Doing so is slow, inefficient, and frustrating. Yet short-circuiting this cumbersome democratic process not only runs the risk of violating the governing statutes²⁰⁹ but also of interfering with the very essence of what is *good* about a legal structure that creates a grand, albeit contentious, federal commons. What is good is the ongoing and open public debate about what should happen to our remaining wildlands and resources. The Utah settlements end that debate, without acknowledging that they are doing so. Agencies, without the scrutiny of courts, Congress, or the public, are quietly making drastic changes in policy. In an age in which we have acknowledged the importance of agency expertise and have willingly made trade-offs between democratic control and agency knowledge, such approaches take a step too far.²¹⁰ Current constitutional doctrines of separation of powers may not be able to address this elusive and complex form of agency overreaching, but that should serve only to heighten our attentiveness to the problem.

CONCLUSION

Settling the wilderness through consent decrees and MOUs is not likely to actually settle the legal issues. Litigation is, and will be, ongo-

207. See generally DANIEL KEMMIS, *THIS SOVEREIGN LAND* (2001) (describing views of many westerners that Democratic policies excluded their voices and concerns from public lands decisions).

208. See, e.g., *id.* See also COGGINS ET AL., *supra* note 11, at 20-27 (excerpting a handful of articles that critique public lands management from a variety of perspectives); Krent & Zeppos, *supra* note 170 (criticizing public lands disposal practices).

209. See *supra* Sections I.C and II.B-C, (discussing possible violations of FLPMA and R.S. 2477).

210. See Krent & Zeppos, *supra* note 170, at 1771-72 (arguing that the cure for agency capture and mismanagement is more public participation and judicial accountability).

ing. Constitutional issues will be raised, and either reached or avoided by the courts. Judges will decide whether the agencies' interpretations of statutes are reasonable. In the meantime, parcels within areas identified by the BLM as having wilderness characteristics are being leased for oil and gas extraction. Routes claimed as highways leave BLM lands vulnerable in the planning process. And energy is devoted to fighting myriad legal battles instead of coming to reasonable solutions about how best to manage the public lands.

Perhaps, instead of settling the wilderness, government agencies could sit down with *all* members of the interested public and actually settle the contentiousness. Rather than engage in lawyer games about reasonable interpretations of FLPMA and whether rules "pertaining" to R.S. 2477 include recordable disclaimers of interest, why not start with ideas about the public lands themselves. How much wilderness is too much? There are 22.9 million acres of BLM lands in Utah. Is 5.8 million acres of wilderness, the amount identified by the BLM in its reinventory,²¹¹ really too much? With respect to R.S. 2477, if the routes the BLM intends to recognize really are "highways," according to anyone's definition, why not provide that definition? In other words, why not take on the substance of the issues up front, with *all* the parties who have so passionately claimed an interest in these matters—the states, the counties, the ranchers, the folks who traipsed about for years on those bone dry BLM lands, learning every corner of them to be able to make their case about wilderness values. Everyone has an interest who has claimed one. At the moment, it seems unlikely, under any administration, that the polarization will cease. The cycle of "one for us, one for them" seems firmly set in motion. Indeed, the strategy of entering into quiet settlements is a procedural upping of the ante in this regard: "One for us, and not one for you!"

But perhaps I am too pessimistic. Maybe we should suspend judgment. The R.S. 2477 claims will start rolling in, and maybe Utah and the BLM will only recognize the routes that we *would* all agree are "highways." As for wilderness, perhaps the BLM will find creative ways to protect most of the wilderness-identified lands outside of formal WSA status, though that one seems less likely. And then we are depriving future Congresses and future generations of the chance to protect what little there is left: 5.8 million out of 22.9 million. Can we settle the fight for the soul of the region without settling the wilderness? That is the challenge.

211. See Hayes, *supra* note 28, at 223.

