

Public Land and Resources Committee Newsletter

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January 2004

MESSAGE FROM THE CHAIR

Robert D. Comer

Thanks for looking in on the Public Land and Resources Committee's second Newsletter of the year. We are very proud of this Newsletter, the coordination of which again was undertaken by Craig Donovan of the Law Offices of Nolan Cheng, Esq. in New York. I encourage you to contact Craig, let him know what you think of the Newsletter, and offer to prepare an article for the Spring 2004 edition. You will enjoy the experience!

Our Newsletter contains an exciting mix of articles from authors around the country. Stephen Gidiere of Balch & Bingham has prepared an article of broad applicability on the proposed revisions to the U.S. Fish and Wildlife Service's Safe Harbor and Candidate Conservation Agreement regulations under the Endangered Species Act (ESA). Craig Donovan has written about the Bureau of Land Management's forward-looking efforts to enhance conservation of the sage grouse and to potentially stave off its being listed under the ESA. Denise Dragoo of Snell & Wilmer describes an interesting case recently accepted by the Supreme Court for *certiorari* review. There the Supreme Court will look at section 706(1) of the Administrative Procedures Act and whether an agency may

be mandated to undertake a questionably discretionary administrative action to protect areas identified for potential wilderness designation from use by off-road vehicles. This article and the following article by Craig Donovan point out an interesting contrast in wilderness management on federal lands and in the Catskill Forest Preserve of New York, where motorized access is authorized in wild forest areas. The size of the areas managed as wilderness in each instance is also noteworthy. The Newsletter concludes with an interesting note on a new National Park Service Native American memorial.

The Public Land and Resources Committee has other activities under way. Currently, Vonnie Larvie of the Department of the Interior and Sid Ansbacher of Upchurch, Bailey and Upchurch are preparing the Committee's contribution to the Section's 2003 edition of *The Year in Review*. This contribution recognizes the new broader focus of the Committee. In addition to public lands in the traditional context, the Committee is now oriented toward public land and resource issues across the nation, which include such diverse topics as:

- Wilderness management and RS 2477 issues on federal lands
- The role of federal lands in meeting goals established by the President's Energy Plan

**Public Land and Resources
Committee Newsletter
Vol. 6, No. 1, January 2004
Craig T. Donovan, Editor**

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This newsletter is a publication of the ABA Section of
Environment, Energy, and Resources, and reports on the
activities of the committee. All persons interested in joining
the Section or one of its committees should contact
the Section of Environment, Energy, and
Resources, American Bar Association,
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- The President's Healthy Forests Initiative and stewardship contracting
- Evolution of regulatory takings law
- Preemption and local efforts to regulate mineral development on federal lands
- Role of local zoning in species preservation and land
- Species conflicts on recreation lands and waters
- Grazing reform – again!
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- Other land, water and resource issues

The Public Land and Resources Committee statement now reads as follows:

The Public Land and Resources Committee (formerly the Public Lands and Land Use Committee) focuses on a broad array of federal land issues, as well as private, local, state and international public land and resource issues. In the federal context, the Committee will consider federal land matters pertaining to the Bureau of Land Management, Forest Service, National Park Service, Wildlife Refuge Management system, military installations and other federal land holdings. The Committee also will focus on land use issues and on land use opportunities created by private, local, state and international land holdings. For instance, recreation (developed and undeveloped), wilderness, wildlife, open space, grazing, species conservation and regulatory takings law will be considered mission critical issue areas for the Committee. The Committee will consider these issues for both land and water based resources.

The Public Land and Resources Committee along with the Mining Committee recently co-sponsored a highly successful teleconference on the mill site controversy under the Mining Law of 1872. The panel discussion between

Professor and former Solicitor John Leshy and Jim Butler of Parsons, Behle and Latimer was led by Bob Comer. The robust question and answer session was stimulated by Tim McCrum of Crowell and Moring and Professor Mark Squillace of the University of Toledo, College of Law. The Committee will also be sponsoring a panel on the current wilderness debate at the ABA litigation section meeting in Phoenix next May. The Committee hopes to sponsor additional teleconferences, meetings and panel sessions. The Committee also is working to develop program ideas for the upcoming 12th Section Fall Meeting to be held in San Antonio, Texas from Oct. 6-10, 2004. One of the first Section meetings was held at this very same resort, and we look forward to another exciting event. Please contact Denise Dragoo with your ideas for programs that can be initiated or sponsored by the Committee.

There are many opportunities to participate in Committee activities. A list of Vice-Chairs is included in this issue of the Newsletter. Please call any one of us to discuss how you can become more involved in Committee or Section activities. We look forward to seeing you in the not too distant future at a Committee activity, and wish you a fruitful new year.

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Section of Environment, Energy, and Resources:

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Public Land and Resources Committee:

<http://www.abanet.org/environ/committees/publiclands/home.html>

PROTECTING ENDANGERED SPECIES THROUGH VOLUNTARY CONSERVATION AGREEMENTS

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Thirty years after enactment of the Endangered Species Act (ESA), few natural resource lawyers would dispute the U.S. Supreme Court's observation in the 1978 landmark case of *TVA v. Hill* that the ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tennessee Valley Auth. v. Hill*, 98 S. Ct. 2279, 2294 (1978). However, many of those same lawyers would also observe that the ESA, though powerful, can be a blunt tool for species preservation and recovery. In many situations, the ESA can be draconian and admit of no exception. Ironically, the ESA's very potency can frustrate efforts to recover species – for example, by discouraging private landowners from taking conservation measures that would attract listed species to their property. Fortunately, in recent years, the federal agencies responsible for implementing and enforcing the ESA have used their authority under Section 10 of the statute to develop more flexible tools to encourage proactive species preservation and enhancement activities by businesses, individuals, state and local governments, and other landowners.

In 1999, the U.S. Fish & Wildlife Service (FWS) issued two final policies and revised its regulations to allow for the creation of two types of "landowner friendly" agreements under the ESA – Safe Harbor Agreements and Candidate Conservation Agreements with Assurances. See 64 Fed. Reg. 32706 (1999)(final rule); 64 Fed. Reg. 32717 (1999)(Final Safe Harbor Policy); 64 Fed. Reg.

32726 (1999)(Final Candidate Conservation Agreement Policy). The two policies were issued jointly by FWS and the National Marine Fisheries Service (NMFS), which also is responsible for enforcing the ESA with respect to certain species. The NMFS, however, did not issue any implementing regulations.

Under the policies and regulations, FWS can enter into voluntary agreements with businesses, individuals, Native American tribes, and state or local government entities that are designed to enhance the survival of listed or about-to-be-listed species. 64 Fed. Reg. 32717 (1999); 64 Fed. Reg. 32726 (1999). Upon execution of an agreement, FWS issues a companion permit, called an “enhancement of survival permit” pursuant to ESA § 10(a)(1)(A). See 16 U.S.C. § 1539(a)(1)(A); 50 C.F.R. §§ 17.22(c) and 17.32(c) (2002). Such a permit authorizes a certain specified “take” of the species covered by the permit. *Id.* Although similar in some ways, Safe Harbor Agreements and Candidate Conservation Agreements with Assurances serve different purposes and are appropriate in different situations.

Safe Harbor Agreements

Typically, a Safe Harbor Agreement is appropriate where a person or entity is considering implementing voluntary conservation measures that may attract listed species not currently present on its property or that may increase the numbers of listed species already present. Of course, nothing in the ESA requires proactive conservation measures like these. Understandably, persons planning to take such measures can be concerned about ESA land-use restrictions that may beset them if listed species, or more of them, do in fact colonize the property. 64 Fed. Reg. at 32721-32722. Safe Harbor Agreements, with their associated permits and other assurances, are intended to alleviate this perverse disincentive. *Id.* Such an

agreement describes the enrolled property, lists the covered species, describes the conservation measures that will be implemented, describes the baseline conditions, and contains other necessary provisions regarding such topics as monitoring, reporting, termination, and transferability. The Safe Harbor Policy uses the terms “property owner” and “landowner” to refer to the applicant for the permit and the term “enrolled property” to refer to the site to be covered by the permit. 64 Fed. Reg. at 32722. Other stakeholders, such as state and local governments, may sign onto the Safe Harbor Agreement as “cooperators.”

In consideration of the voluntary conservation measures to be implemented, FWS issues an “enhancement of survival permit” which authorizes a “take” of species covered by the permit, down to an agreed upon “baseline.” 64 Fed. Reg. at 32722-32724. See 16 U.S.C. § 1539(a)(1) (2003). In addition, FWS provides “assurances” to the permittee that even if additional conservation measures are deemed necessary, they will “not involve the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources otherwise available for development or use under the original terms of the Safe Harbor Agreement without the consent of the permittee.” 50 C.F.R.

§§ 17.22(c)(5)(ii) and 17.22(c)(5)(B) (2002). In other words, by agreeing to take positive, proactive measures to protect listed species, a permittee is given the certainty that she will be able to utilize her property and its resources in the future, despite an increase in the number of listed species on the property. Importantly, Safe Harbor Agreements are species specific. The permit only covers those species specifically addressed in the agreement, and those species must be listed as threatened or endangered under the ESA. (If unlisted species of concern are present in the area, the parties should consider executing a Candidate

Conservation Agreement at the same time as the Safe Harbor Agreement – the two can be separate sections of one document.)

The standard that drives FWS's decision to enter into a Safe Harbor Agreement and issue the associated permit is the likelihood that a “net conservation benefit” will result from the proposed conservation measures. 50 C.F.R. § 17.22(c)(2)(ii) (2002). The 1999 final policy defines “net conservation benefit” as “the cumulative benefits of the management activities identified in a Safe Harbor Agreement that provide for an increase in a species population and/or the enhancement, restoration, or maintenance of covered species’ suitable habitat within the enrolled property, taking into account the length of the Agreement and any off-setting adverse effects attributable to the incidental taking allowed by the enhancement of survival permit. Net conservation benefits must be sufficient to contribute, either directly or indirectly, to the recovery of the covered species.” 64 Fed. Reg. at 32722. As FWS has explained, this standard requires that the proposed measures be “reasonably likely to produce some benefit for the covered species during the time the SHA remains in effect.” U.S. Fish & Wildlife Service, Draft Safe Harbor Agreement Handbook at 8 (Dec. 2002). The benefit to the covered species may be direct or indirect and is focused on the recovery of the species, not the impact to any particular individual. *Id.* Also, there should be no negative consequences that would outweigh the expected benefit. *Id.*

Assuming a “net conservation benefit” can be demonstrated, a baseline for each covered species must be established. 64 Fed. Reg. at 32723-32724. Determination of the baseline is critical because the associated enhancement of survival permit will only authorize “take” of individuals above that baseline. *Id.* “Baseline conditions” is defined by FWS as “population estimates and

distribution and/or habitat characteristics and determined area of the enrolled property that sustain seasonal or permanent use by the covered species at the time the Safe Harbor Agreement is executed. . . .” 64 Fed. Reg. at 32722. Different species will present different challenges during the baseline determination. For species that are relatively sedentary – for example, aquatic mussels – it may be relatively easy to actually count the number of mature individuals or estimate their numbers through physical sampling. However, young mussels can be very small in size and nearly impossible to count. Migratory birds, on the other hand, present their own obvious challenges, particularly if the timing of the agreement puts the baseline determination at a time when the species is not present. The potential for delay in finalizing an agreement due to a protracted baseline determination can be frustrating, particularly given a biologist’s tendency to always want more data. To be a successful applicant, it is important to understand upfront how a baseline will be determined and to take control of the process of putting together a scientifically-defensible baseline determination.

Applicants should also pay close attention to the monitoring and reporting obligations negotiated in the agreement and permit. Because Safe Harbor Agreements can be of 30-, 40-, or even 50-year duration, what may seem like simple annual monitoring and reporting obligations can turn into a burden over the life of the agreement. Importantly, a valid Safe Harbor Agreement and associated permit need not contain provisions for monitoring and reporting. See 50 C.F.R. § 13.45 (2003) (“Permittees may be required to file reports of the activities conducted under the permit.”); § 17.22(c)(3) (conditions applicable to all permits associated with Safe Harbor Agreements). The only notification requirements are that the permit holder (1) notify FWS of any transfer of lands subject to the agreement and (2) provide 30 days

notice of when he expects to incidentally take any covered species. 50 C.F.R. § 17.22(c)(3).

Candidate Conservation Agreements

In contrast to Safe Harbor Agreements which cover listed species, Candidate Conservation Agreements cover “candidate” species – that is, those species which are not officially listed, but for which FWS has sufficient information on biological vulnerability and threats to warrant a proposal to list. 64 Fed. Reg. at 32733-32734. NMFS defines “candidate” species somewhat differently as “species for which NMFS has information indicating that listing may be warranted but for which sufficient information to support actual proposed listing rules may be lacking.” *Id.* Species proposed for listing and species likely to become candidate or proposed species may also be the subject of a Candidate Conservation Agreement. *Id.* at 32733. At writing, FWS identifies 256 mammals, birds, reptiles, plants and other species as candidate species.

Candidate Conservation Agreements address a different situation than Safe Harbor Agreements. The goal of a Candidate Conservation Agreement is to encourage voluntary actions to remove or reduce threats to candidate species so that listing will no longer be necessary. The incentive for property owners to enter into Candidate Conservation Agreements is two-fold. First, if the measures recover the species and successfully avoid listing, then the ESA’s restrictions will not materialize. Second, even if listing occurs, the property owner will have the permit protection and assurances, as with a Safe Harbor Agreement, that will protect against additional commitment of resources.

A Candidate Conservation Agreement will only be approved if FWS determines that the proposed conservation measures would preclude any need to list the covered species,

assuming that the conservation measures were also implemented on other necessary properties. 64 Fed. Reg. at 32734. As with Safe Harbor Agreements, FWS will issue an enhancement of survival permit in association with a Candidate Conservation Agreement, but the permit will have a delayed effective date that will be triggered on the date of any future listing of the covered species. *Id.* at 32735. The level of “take” authorized by the permit must be “consistent with those levels agreed upon and identified in the Agreement.” *Id.* In other words, the limit of take is not necessarily limited to “new” individuals above the existing baseline population at the time the Candidate Conservation Agreement is executed, as with a Safe Harbor Agreement, because the permit does not become active until some indeterminable time in the future. There is, thus, some room to negotiate the level of authorized take in the case of a Candidate Conservation Agreement.

Proposed Changes to FWS Implementing Regulations

In two recent Federal Register notices, FWS has proposed to make revisions to its regulations applicable to Safe Harbor and Candidate Conservation Agreements and its generic enhancement of survival permit regulations. See 68 Fed. Reg. 53320 (2003); 68 Fed. Reg. 53327 (2003). The purpose of the revisions is to clarify several ambiguities in the 1999 implementing regulations and to correct inconsistencies between those regulations and the 1999 policies. *Id.* Several aspects of the proposed changes are noteworthy.

Definition of “Property Owner”

First, both policies currently speak in terms of a “landowner,” “property owner,” or “non-federal property owner” as the proper applicant for a Safe Harbor or Candidate Conservation Agreement and associated

permit. In contrast, the implementing regulations refer to the “applicant” or the “permittee.” Nothing in statute, 16 U.S.C. § 1539, or FWS’s general permitting regulations, 50 C.F.R. Part 13, require that a permit holder possess any interest at all in the subject property.

Standing alone, the terms “landowner” or “property owner” could be construed in an overly-restrictive manner. For example, the terms could be interpreted to mean that only the fee owner of a parcel of property can enter into an agreement and receive the associated permit. In the context of Safe Harbor and Candidate Conservation Agreements, such a restriction makes no sense. For example, the fee owner of the enrolled property may have given all control over the property and its resources to a lessee under a long-term lease. In such a situation, it is the lessee (and perhaps not the fee owner) who has the authority to commit natural resources to implement conservation measures.

Thus, FWS is revising its regulations to make clear that the term “property owner” includes “anyone with a fee simple, leasehold, or other property interest sufficient to carry out the proposed management activities, subject to applicable State law.” Proposed § 17.22(c)(1). See 68 Fed. Reg. 53320, 53321-53322 (2003) (to be codified at 50 C.F.R. pt. 13 and 17). This definition is consistent with FWS’s interpretation of the term “property owner” under the current policies, but the explicit definition should resolve any confusion on the part of potential applicants. By relating the requisite property interest to the purpose of the agreement and to state law, there should now be no confusion that holders of property interests such as easements or even water rights can apply for and receive permits associated with Safe Harbor and Candidate Conservation Agreements, so long as those property interests are sufficient to carry out the proposed conservation measures.

Notification of Expected Take

The proposed revisions would also provide FWS and Safe Harbor Agreement applicants with flexibility in designing requirements for notification in advance of expected take. Under the present regulations, permits associated with Safe Harbor Agreements must contain a requirement that the property owner notify FWS at least 30 days in advance of any expected incidental take. 50 C.F.R. § 17.22(c)(3)(ii) (2002). This advance notice is intended to give FWS the opportunity to relocate affected individuals. However, there are some types of Safe Harbor Agreements where a notification requirement is not appropriate. One such example given by FWS in the preamble is an agreement based on the red-cockaded woodpecker. If a property owner discovers pine beetle infestation in habitat covered by an agreement, he should not be required to wait 30 days prior to harvesting the infected trees to prevent further spread of the infestation. Although not mentioned by FWS, another example where advance notification would be impossible is flood releases or emergency releases from hydro impoundments. The proposed regulatory change would allow FWS and the applicant to negotiate a notification requirement that makes sense for each specific agreement.

Permit Revocation by FWS

The proposed revisions address the ability of FWS to revoke a permit associated with Safe Harbor or Candidate Conservation Agreements. FWS proposes to add language to § 17.22(c)(7) and § 17.32(c)(7) which would require FWS to exhaust certain other options before resorting to revoking a permit. The new language states: “Before revoking a permit for either of the latter two reasons, the Director, with the consent of the permittee, will pursue all appropriate options to avoid permit revocation. These options may include, but

are not limited to: extending or modifying the existing permit, capturing and relocating the species, compensating the landowner to forgo the activity, purchasing an easement or fee simple interest in the property, or arranging for a third-party acquisition of an interest in the property.” Proposed § 17.22(c)(7) and § 17.32(c)(7). See 68 Fed. Reg. at 53323. This provision would likely avoid outright permit revocation in many cases and thus encourage more property owners to initiate agreements.

Expanded Use of “Generic” Enhancement of Survival Permits

FWS also proposes to expand the situations in which it may issue a “generic” enhancement of survival permit. There are currently three types of enhancement of survival permits recognized by FWS regulations: (1) generic enhancement of survival permits (historically used to authorize activities associated with captive breeding or similar efforts); (2) enhancement of survival permits associated with Safe Harbor Agreements; and (3) enhancement of survival permits associated with Candidate Conservation Agreements. 68 Fed. Reg. 53327-53328 (2003) (to be codified at 50 C.F.R. pt. 17). The changes proposed by FWS would authorize the issuance of “generic” enhancement of survival permits for activities other than those associated with captive breeding under the first category. *Id.*

There are several reasons to expand the first category. For one thing, under the 1999 FWS policies, federal agencies may not apply for enhancement of survival permits associated with Safe Harbor or Candidate Conservation Agreements. Under the proposed regulations, federal agencies could apply for generic enhancement of survival permits to facilitate wildlife management activities intended to benefit listed species (such as prescribed burning), but which may also result in some level of take.

Another reason to expand the first category is to more fully account for all types of take that may occur in carrying out a Safe Harbor or Candidate Conservation Agreement. For example, implementing conservation measures to improve or expand habitat for a species may at the same time necessarily result in take of individuals of the species present in the area. Additionally, if conservation measures are successful, the species may spread to other areas owned by the permittee that are not intended to be part of the agreement. The revisions proposed by FWS would allow a permit issued in conjunction with these agreements to authorize incidental take of the baseline and intentional take of over-expanded populations, so long as the overall conservation activities “will likely be beneficial to the conservation of that species.” Proposed § 17.22(a)(2)(ii) and § 17.32(a)(2)(ii). See 68 Fed. Reg. at 53328-53329.

Conclusion

The regulatory changes proposed by FWS represent a more mature vision of endangered species protection. Taken as a whole, the regulatory revisions proposed by FWS should encourage more property owners to implement voluntary conservation measures aimed at recovering listed or about-to-be-listed species. By making it easier and more attractive for property owners to implement voluntary conservation measures, the true goal of species recovery is one step closer.

33RD ANNUAL
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UPCOMING ACTIVITIES OF THE SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

A conference entitled **Free Trade and the Environment: Doing Business in the Americas After the U.S.-Chile Free Trade Agreement** will be held on Jan.19-20, 2004 at the Sheraton Santiago Hotel & Convention Center in Santiago, Chile. The conference is co-sponsored by the American Bar Association, the Standing Committee on Environmental Law, Section of Administrative Law & Regulatory Practice, Section of Business Law, Section of International Law & Practice and the Section of Environment, Energy, and Resources with the Chilean American Chamber of Commerce – AmCham-Chile and CamCham (U.S.), the Economic Commission for Latin America and the Caribbean, the Foreign Commercial Service-U.S. Embassy- Santiago and the Inter-American Bar Association. For more information about the program, please contact C.C. Coleman, American Bar Association at 202/662-1691 or cccoleman@staff.abanet.org.

The **22nd Annual Water Law Conference** will be held on Feb.19-20, 2004 at The Westin Horton Plaza in San Diego. More information to be posted on the ABA's Section of Environment, Energy, and Resources Web site at www.abanet.org.

The **33rd Annual Conference on Environmental Law** will be held on March 11-14, 2004 at the Keystone Resort and Conference Center in Keystone, Colorado. More information to be posted on the ABA's Section of Environment, Energy, and Resources Web site at www.abanet.org

Eastern Water Resources: Law, Policy and Technology will be held on May 6-7, 2004 at the Westin Diplomat Resort & Spa in Hollywood, Florida. For more information,

please contact the ABA's Section of Environment, Energy, and Resources.

The Section, ALI-ABA and ELI will co-sponsor a conference entitled **Wetlands Law and Regulation** to be held in Washington on May 19-24, 2004. For more information call 800/253-6397.

PRESERVING AN ICON OF THE AMERICAN WEST: THE BUREAU OF LAND MANAGEMENT ANNOUNCES A DRAFT HABITAT CONSERVATION STRATEGY FOR SAGE GROUSE

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Introduction

On July 21, 2003, as part of a joint effort with state wildlife agencies and local environmental organizations, the Bureau of Land Management (BLM) issued a draft national conservation strategy for preserving sage grouse habitat on public lands administered by BLM. See Draft BLM Sage Grouse Habitat Conservation Strategy, 1-34 at www.blm.gov/nhp/spotlight/sage_grouse/draft_sage_grouse_strategy.pdf (July 26, 2003). The population of sage grouse in North America has significantly declined over the last 30 to 40 years. *Id.* at 1. One no longer finds sage grouse in Arizona, Oklahoma, New Mexico, Kansas and Nebraska and British Columbia. See Greater Sage Grouse and Sagebrush Steppe Ecosystems Management Guidelines at 1, 6 (Aug. 21, 2001) at www.or.blm.gov/Resources/Birds/Sage_Grouse/Sage_Grouse_Report.pdf (July 26, 2003). In addition, sage grouse may be at risk in Washington,

California, Utah, Colorado, North Dakota, South Dakota and in the Canadian provinces of Alberta and Saskatchewan. *Id.* Moreover, sage grouse appear to have experienced significant declines in their population numbers in Oregon, Nevada, Idaho, Wyoming and Montana, although it is unclear whether these changes are associated with normal population cycles. *Id.*

In light of this possible decline in the sage grouse population, the U.S. Fish and Wildlife Service (FWS) has received several petitions to list sage grouse as a threatened or endangered species under the Endangered Species Act (ESA). See Draft BLM Sage Grouse Habitat Conservation Strategy at 2. In January 2000, FWS designated the Gunnison sage grouse a candidate species under the ESA. *Id.* Similarly, BLM has declared the Greater sage grouse a sensitive species in several western states. *Id.* BLM manages over 50 million acres of sage grouse habitat, accounting for the majority of the remaining habitat for these birds. See BLM Draft Sage Grouse Habitat Conservation Strategy- Questions & Answers at www.blm.gov/nhp/spotlight/sage_grouse/qa.htm (Aug. 2, 2003). The objective of the national conservation strategy is to manage public land so that BLM will “maintain, enhance, and restore sage-grouse habitats while providing for multiple uses of BLM-administered public land.” See Draft BLM Sage Grouse Habitat Conservation Strategy at 1.

Overview of the Natural Habitat and Life History of Sage Grouse

The Great Basin Sagebrush Desert and Sagebrush Steppe Ecosystems

Sage grouse inhabit the sagebrush landscape of western North America. Sagebrush (*Artemisia spp.*) is a woody plant in the composite family commonly found in dry, open western lands. Jon Naar et al., *This Land Is*

Your Land: A Guide to North America’s Endangered Ecosystems, 149 (1993). Two types of sagebrush ecosystems support sage grouse in the United States: the Great Basin sagebrush desert and the sagebrush steppe. *Id.* The Great Basin sagebrush desert lies between the Sierra Nevada and Cascade Mountain Range in the west and the Rocky Mountains located in the east and extends 160,000 square miles throughout Nevada, Oregon, Idaho, Wyoming, Arizona and California. *Id.* at 220-224. Valley floors or basins with elevations of approximately 4000 feet (1200 meters) comprise the Great Basin desert. See “Great Basin Desert- Overview” at www.helios.bto.ed.ac.uk/bto/desbiome/basin.htm (Aug. 7, 2003). Smaller mountain ranges intersperse these valley floors, creating spacious, flat plains or shallow slopes bordered by mountain ridges. *Id.* The valleys receive low amounts of rainfall and most precipitation occurs as snowfall in the winter. *Id.* The desert’s climate of hot, dry summers and cold winters results in the landscape being dominated by aromatic shrubs with woody stems such as sagebrush. *Id.*

In contrast, the sagebrush steppe is found in the more northern areas of the Great Basin and composed of wiry shrubs such as big sagebrush and bitter brush located among clusters of grasses. Thomas D. I. Beck, *Sage Grouse Flock Characteristics and Habitat Selection in Winter*, *J. Wildl. Manage.* 41(1): 18, 19 (1977). See “Steppe in the Rainshadow in the Columbia Basin” on the Washington State University Web site at wsu.Edu:8080/~wsherb/edpages/raingrass/sagebrush.html (Aug. 7, 2003). The sagebrush steppe also has a very dry climate with most precipitation occurring in fall and winter and a short growing season. Jon Naar et al., *This Land Is Your Land: A Guide to North America’s Endangered Ecosystems*, 148-149 (1993). See “Steppe in the Rainshadow in the Columbia Basin” and “Sagebrush Steppe of the Columbia Basin” at

www.wsu.edu:8080/~wsherb/edpages/
raingrass/sagebrush.html (Aug. 7, 2003).

Physical and Behavioral Characteristics of the Greater Sage Grouse and the Gunnison Sage Grouse in the Western United States

The American Ornithological Union currently recognizes as distinct species: the Greater Sage Grouse (*Centrocercus urophasianus*) and the Gunnison Sage Grouse (*Centrocercus minimus*). Jon Luoma, *A Bird Gains Species Status After a Life in the Shadows*, The New York Times on the Web, at 1-2 (July 4, 2000). The larger Greater sage grouse is a plump, chicken-like bird. Fred J. Alsop III, *Birds of North America- Western Region*, Smithsonian Handbooks, 187 (DK Publishing Inc. 2001). Males are larger and heavier than females and have a yellow eye comb, thin elongated, black feathers on their throat and bib, a white breast ruff, a black belly, mottled grayish brown feathers on their upper body and long, pointed tail feathers that are mottled in brown with small white stripes. *Id.* Males have two large, red air sacs concealed by their white breast feathers used in courtship displays. *Id.* Females resemble males, but lack eye combs, a black bib on their throat, white ruff feathers and air sacs on their breast. *Id.*

Greater sage grouse males perform an elaborate mating display called "strutting" from early spring to early summer in open areas called leks. R.J. Gates, *Observations of the Formation of a Sage Grouse Lek*, *Wilson Bulletin* 97(2): 219, 220-221 (1985). See Draft BLM Sage Grouse Habitat Conservation Strategy at 4-5. During courtship, the male struts and spreads his tail feathers in the shape of a spiky fan and lowers his folded wings. David Attenborough, *The Life of Birds*, 209 (Princeton University Press 1998). The male then inflates and deflates the air sacs on his breast resulting in a series of popping sounds, showing two patches of olive green colored skin and eventually covering his head.

Id. Females build nests near the leks and line the nests with grass and sage leaves. Wayne L. Wakkinen et al., *Sage Grouse Nest Locations in Relation to Leks*, *J. Wildl. Manage.*, 56(2): 381-382 (1992). Females conceal these nests under sagebrush for cover from predators and generally lay six to nine eggs. Fred J. Alsop III, *Birds of North America-Western Region*, Smithsonian Handbooks 187 (DK Publishing Inc. 2001). The young stay with the adult females during their early years. *Id.* Greater sage grouse adults and young feed on sagebrush shoots, soft green leaves, blossoms, pods, buds and insects. *Id.* See Draft BLM Sage Grouse Habitat Conservation Strategy at 5.

Scientists recognized the smaller Gunnison sage grouse as a genetically distinct species in 1999. Jon Luoma, *A Bird Gains Species Status After a Life in the Shadows*, The New York Times on the Web, at 1-3 (July 4, 2000). See also Jeffrey L. Beck et al., *Influences of Livestock Grazing on Sage Grouse Habitat*, *Wildl. Soc'y Bulletin*, 28(4): 993 (2000). Males have long, pronounced black feathers on their nape and neck, mottled brown feathers on their body, a black belly, a pale-colored space between the upper edge of their beak and their eyes, white eye rings, a whitish chin and throat, red air sacs and a long pointed tail with dark and light brown bars. Fred J. Alsop III, *Birds of North America-Western Region*, Smithsonian Handbooks 188 (DK Publishing Inc. 2001). Like Greater sage grouse males, Gunnison sage grouse males also perform elaborate courtship displays at leks. *Id.* During courtship, males erect the long black feathers on their neck, toss the feathers over their head and make a series of low clucking noises. *Id.* They then inflate and deflate their air sacs making three quick loud popping noises followed by six more popping noises. *Id.* Females build nests under sagebrush plants and grasses to provide overhead cover from predators and lay five to nine eggs. *Id.* Gunnison sage grouse adults and young feed

on sagebrush, leaves, buds, blossoms and insects. *Id.* See Draft BLM Sage Grouse Habitat Conservation Strategy at 5.

Causes of Sage Grouse Population Decline in the Western United States

Originally, North America had approximately 220 million acres of sagebrush habitat. See Draft BLM Sage Grouse Habitat Conservation Strategy at 6; Greater Sage Grouse and Sagebrush-Steppe Ecosystems Management Guidelines at 6. Some scientists estimate that more than 80 percent of sagebrush habitat has been lost or altered due to human activities and natural causes during the last century. *Id.* Some of the major factors contributing to the decline of sage grouse populations and their habitat in the United States are the following:

Agricultural Conversion, Livestock Grazing and Invasive Plant Species

Scientists recognize that the conversion of sagebrush habitat to agricultural land has contributed to the loss of natural habitat for sage grouse, which in turn, negatively affects the fecundity, nesting and brooding success of sage grouse. Jeffrey L. Beck et al., *Influences of Livestock Grazing on Sage Grouse Habitat*, Wildlife Soc'y Bulletin, 28(4): 993, 994-998 (2000). Herbicide use in sagebrush ranges frequented by sage grouse broods has caused substantial loss and deterioration of sagebrush and suppressed the growth of broad-leafed herbaceous plants that provide habitat for insects upon which sage grouse young feed. *Id.* at 994. In addition, scientists have reported declines in sage grouse populations due to exposure to organophosphorus insecticides applied to crops cultivated near sagebrush rangelands. *Id.* at 999. See L.J. Blus et al., *Effects of Organophosphorus Insecticides on Sage Grouse in Southeastern Idaho*, J. Wildl. Manage., 53:1139-1146 (1989). Moreover,

livestock grazing affects the nesting success of sage grouse. Jeffrey L. Beck et al., *Influences of Livestock Grazing on Sage Grouse Habitat*, Wildlife Soc'y Bulletin, 28(4): 993, 995-996 (2000). Trampling by livestock kills sagebrush plants. *Id.* at 995. High levels of grazing in the spring by sheep and cattle reduce the vitality and production of grasses on the sagebrush range, converting the sage grouse's habitat to one dominated by sagebrush with little understory of grass. *Id.* This impairs sage grouse nesting success because sage grouse rely on this understory of grass and sage leaves as cover for their nests from predators. *Id.* at 995-996. Furthermore, agricultural activities such as crop seeding disturb the soil surface creating opportunities for non-native invasive plant species to dominate indigenous plant species. See Draft BLM Sage Grouse Habitat Conservation Strategy at 7-8. These invasive species replace indigenous species and alter the natural composition of the sagebrush ecosystem. *Id.* BLM estimated in 1996 that the spread of invasive plant species on public lands was at least 2300 acres per day. *Id.* at 8. Scientists assert that the rate of invasive species dominating indigenous plants on public lands is even greater today. *Id.*

Habitat Fragmentation

Fragmentation of sagebrush habitat has contributed to the decline of the sage grouse population in the United States. See Draft BLM Sage Grouse Habitat Conservation Strategy at 6-7. Sage grouse need undisturbed contiguous areas of sagebrush habitat for breeding and rearing their young. *Id.* See Jeffrey L. Beck et al., *Influences of Livestock Grazing on Sage Grouse Habitat*, Wildlife Soc'y Bulletin, 28(4): 993, 995-998 (2000). Human activities that isolate breeding areas from nesting areas decrease the reproduction rates of sage grouse. See Draft BLM Sage Grouse Habitat Conservation Strategy at 6. Noise from traffic and road

construction in the vicinity of sagebrush habitat also interferes with seasonal sage grouse courtship displays resulting in sage grouse avoiding traditional leks and nesting grounds. *Id.* at 6-7. In addition, extraction of minerals in sagebrush habitat impacts sage grouse by increasing noise, causing the evaporation of ponds and lowering the water table resulting in the loss of vegetation and important riparian areas that provide forage and watering for the sagebrush ecosystem. *Id.* at 7. Moreover, the erection of fences and building of roads for off-road recreational vehicle use contribute to the fragmentation of sage grouse habitat. *Id.* Furthermore, the disposal of public lands from federal government ownership and conversion of these lands to other uses such as landfills can affect sage grouse populations because landfills attract scavenging animals such as coyotes, foxes and ravens that prey on sage grouse. *Id.*

Wildfires, Improper Prescribed Burns and Lack of Appropriate Fire Rehabilitation of Sagebrush Habitat

Wildfires and improper prescribed burns in sagebrush habitat have contributed to the decline in sage grouse in the western United States by destroying grasses and broad-leaved herbaceous plants that are prime habitat for ants, beetles and grasshoppers. R.A. Fischer at al., *An Investigation on Fire Effects Within Xeric Sage Grouse Brood Habitat*, J. Range Manage. 49(3): 194, 197-198 (1996). These organisms serve as important food sources for juvenile sage grouse. *Id.* In addition, wildfires and improper prescribed burns have contributed to the loss of big sagebrush plants that serve as habitat for rearing sage grouse young. See Draft BLM Habitat Conservation Strategy at 7. Moreover, the occurrence of wildfires has become more common in sagebrush habitat because of the increase of invasive species of plants such as cheatgrass and other non-native plant species. *Id.* For

instance, the frequency of large wildfires with high spread rates in sagebrush steppe habitat has increased from the historic rate of 30-110 years to cycles of five years or less due to the presence of invasive plant species. *Id.* Sagebrush habitat does not easily rejuvenate in areas of frequent wildfires. *Id.* Furthermore, rangeland fire rehabilitation often includes planting seeds in areas that have been destroyed by wildfire. See Greater Sage Grouse and Sagebrush-Steppe Ecosystems Management Guidelines at 7. Seeding mixtures for rangeland fire rehabilitation may not always contain sagebrush seeds, but rather seeds of more readily available species contributing to the decline in important plants and grasses upon which sage grouse rely for nesting, food sources and cover from predators. *Id.*

Drought

Drought has contributed to a decrease in food sources and productivity of plants on which sage grouse rely. Thomas L. Thurow et al., *Viewpoint: The Role of Drought in Range Management*, J. Range Manage., 52: 413, 415-416 (Sept. 1999). The difficulty in maintaining plant cover increases with prolonged periods of reduced precipitation and rangeland areas become more susceptible to erosion from wind, resulting in a loss of soil, reduction of nutrients and moisture storage capability of sagebrush habitat. *Id.* As a result, the growth of vegetation in sagebrush habitat is reduced and sage grouse face increasing competition from grazing animals such as livestock, wild horses and large game animals for plants. *Id.* at 416-417. See Draft BLM Sage Grouse Habitat Conservation Strategy at 9.

Legal Authority of the Bureau of Land Management to Preserve Wildlife and Natural Habitat on Public Lands Administered by the Bureau

Three major federal statutes provide authority to the BLM to implement the national conservation strategy for preserving sage grouse habitat on public lands: the Federal Land Policy and Management Act of 1976 (FLPMA), the Sikes Act of 1974 and the Endangered Species Act of 1973. See Draft BLM Sage Grouse Habitat Conservation Strategy at 26. FLPMA is the main federal law governing land uses on public lands administered by BLM. *Id.* See 43 U.S.C. §§ 1701-1784 (2003). The Act authorizes management of BLM lands in part for fish and wildlife food and habitat. *Id.* Section 1701(a)(8) of FLPMA states:

The Congress declares that it is the policy of the United States that . . . the public lands be managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals . . .

43 U.S.C. § 1701(a)(8) (2003).

Title II of the Sikes Act of 1974 authorizes the secretary of the Interior and the secretary of Agriculture to plan and implement conservation and rehabilitation programs in cooperation with the states and in accordance with comprehensive plans, including specific habitat improvement projects for the protection of threatened or endangered plants, fish and wildlife on public lands under their administrative jurisdiction. See Draft BLM Sage Grouse Habitat Conservation Strategy at

26 (referring to 16 U.S.C. §§ 670a-670o (2003)). Section 670g of the Sikes Act states:

The Secretary of the Interior and the Secretary of Agriculture shall each, in cooperation with the State agencies and in accordance with comprehensive plans developed pursuant to section 670h of this title, plan, develop, maintain, coordinate programs for the conservation and rehabilitation of wildlife, fish, and game. Such conservation and rehabilitation programs shall include, but not be limited to, specific habitat improvement projects and related activities and adequate protection for species of fish, wildlife and plants considered threatened or endangered.

Sikes Act of 1974, 16 U.S.C. § 670g (2003).

Although the Greater and Gunnison sage grouse have not been listed as endangered or threatened species under the ESA, the ESA provides an impetus to BLM to conserve special status species like sage grouse. See Draft BLM Sage Grouse Habitat Conservation Strategy at 26; 16 U.S.C. §§ 1531-1544 (2003). 16 U.S.C. § 1531(a)(3) states, “[S]pecies of fish, wildlife, and plants are of aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people” Endangered Species Act, 16 U.S.C. § 1531(a)(3) (2003). See *also* BLM Special Status Species Management- Manual 6840, §§ 6840.06C and 6840.06E (declaring BLM’s special status species policy toward candidate and sensitive species).

In addition to these major federal statutes, grazing regulations of BLM provide authority to implement the national conservation strategy for preserving sage grouse habitat on public lands administered by the Bureau. See Draft BLM Sage Grouse Habitat Conservation Strategy at 26. 43 C.F.R. § 4180.2(d) directs BLM State Directors to develop standards that

address habitat for proposed and special status species such as sage grouse. 43 C.F.R. § 4180.2(d) (2003). Section 4180.2(d) states:

(d) At a minimum, State or regional standards developed under paragraphs (a) and (b) of this section must address the following: (4) Habitat for endangered, threatened, proposed, Candidate 1 or 2, or special status species; and (5) Habitat quality for native plant and animal populations and communities.

43 C.F.R. § 4180.2(d)(4)-(5) (2003).

Moreover, 43 C.F.R. § 4180.2(e) requires that the standards promote conservation, and states:

(e) At a minimum, State or regional guidelines developed under . . . this section must address the following: (9) Restoring, maintaining or enhancing habitats of Federal Proposed, Category 1 and 2 Federal candidate, and other special status species to promote their conservation

43 C.F.R. § 4180.2(e)(9) (2003).

Other sources of authority for the national conservation strategy of sage grouse include the BLM Special Status Species Management-Manual 6840 and the BLM Land Use Planning Handbook- H-1601-1. See Draft BLM Sage Grouse Habitat Conservation Strategy at 27-28.

BLM's Sage Grouse Habitat Conservation Strategy

BLM's conservation strategy will rely on a two-pronged approach to conserve sage grouse habitat on public lands administered by BLM. See Draft BLM Sage Grouse Habitat Conservation Strategy at 10. The first prong

involves development of a conservation strategy on the national level. *Id.* The national strategy will provide guidance and direction for conserving sage grouse habitat on public lands managed by BLM. *Id.* The second prong concerns development of a conservation strategy on the state level in cooperation with BLM. *Id.* State offices of BLM will develop conservation strategies on the state and local level that will be linked to conservation strategies on the national level. *Id.* The implementation of this plan will allow BLM to manage public lands under its control in order to preserve and restore sage grouse habitats while using these public lands in a sustainable manner for multiple use purposes. *Id.* In order to make this vision a reality, BLM will meet the following goals:

First, BLM will develop a management framework to address conservation needs of sage grouse on public lands managed by BLM. See BLM Draft Habitat Conservation Strategy at 13. The agency will study the effectiveness of existing BLM resource management plans for the conservation of sage grouse and identify land uses that threaten the survival of sage grouse. *Id.* Given that the Gunnison sage grouse is an ESA candidate species and BLM has declared the Greater sage grouse to be a special status species, BLM will also promulgate rules and regulations implementing management plans that conserve candidate and sensitive species and ensure that actions taken by BLM will not contribute to the need for the species to be listed under the ESA. *Id.* (citing and referring to BLM Manual 6840 sec. 6840.06C). BLM will also study the effects of BLM policies and land use plans on sage grouse habitat and will introduce sage grouse conservation practices in the management of wildfires and rehabilitation of areas destroyed by wildfires on BLM public lands. See BLM Draft Habitat Conservation Strategy at 14-15. In addition, BLM will incorporate sage grouse conservation methods in the development and

use of its grazing lands, treatment of vegetation and construction and location of roads. *Id.*

Second, BLM will increase its understanding of resource conditions impacting sage grouse and identify priorities for the management and restoration of sage grouse habitat. *Id.* at 16. The Bureau will conduct assessments of sage grouse habitat in the Wyoming Basins, Northern Great Plains, Colorado Plateau, Columbia Basin and Great Basin. *Id.* BLM will also standardize terminology to describe different types of sage grouse habitat and complete state-level mapping of sage grouse and sagebrush habitat including disturbance areas. *Id.*

Third, BLM will increase its research and obtain data supporting the effective conservation of sage grouse habitat. *Id.* at 18. BLM will establish an interdisciplinary team of experts that will prioritize issues for research, collect data and review research proposals. *Id.* BLM will also encourage the collection, transfer and sharing of information concerning sage grouse among all BLM programs and with other government agencies and interested parties. *Id.* at 18-19. In addition, BLM will train BLM personnel in understanding the needs and habitat requirements of sage grouse. *Id.* at 18. In turn, BLM personnel will develop training programs in other government agencies as well as with non-governmental parties interested in the conservation of sage grouse. *Id.* at 19.

Fourth, BLM will develop partnerships to effectuate the conservation of sage grouse. *Id.* The Bureau will establish working relationships at the national level to develop and implement the sage grouse conservation strategy. *Id.* BLM will also encourage the formation of state and local partnerships to implement conservation strategies on the state and local level. *Id.* Lastly, BLM will ensure that leadership and financial resources

are adequate to implement conservation plans for sage grouse on the national and state levels. *Id.* at 20. BLM will identify annual budgetary needs for sage grouse conservation on public lands and establish creative funding mechanisms for sage grouse conservation. *Id.* BLM will also establish teams of interdisciplinary experts on sage grouse conservation in order to formulate conservation plans on the state-level and consult with states, other government agencies, Native American tribes, environmental organizations and interested members of the public in preparation of state-level conservation strategies for sage grouse. *Id.*

Conclusion

BLM has developed a forward-looking habitat conservation strategy to keep the sage grouse from being potentially listed as a threatened or endangered species under the ESA. A broad-based listing of sage grouse under the ESA throughout the western United States would limit multiple uses across most public lands administered by BLM and interfere with resource management on public lands. The successful implementation of the BLM's habitat conservation strategy for sage grouse will play an important role in ensuring that BLM continues to manage public lands for multiple uses while preserving this wildlife icon of the American West and the sagebrush landscape for future generations.

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U.S. SUPREME COURT GRANTS CERT TO HEAR UTAH OFF-ROAD VEHICLE DISPUTE IN WILDERNESS STUDY AREA

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Resources Committee**
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On Nov. 3, 2003, the U.S. Supreme Court agreed to review a recent Tenth Circuit decision which held that the Bureau of Land Management (BLM) has an affirmative, mandatory duty to manage wilderness study areas (WSAs) to prevent the impairment of wilderness values alleged to be caused by off-road vehicle use (ORV). *Norton v. Southern Utah Wilderness Alliance*, 124 S. Ct. 462, 2003 U.S. LEXIS 8000; reviewing *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217; 2002 U.S. App. LEXIS 17900 (10th Cir. Utah, 2002). In a split decision, the Tenth Circuit majority panel broadly construes § 706(1) of the Administrative Procedures Act (APA) to compel agency action to routine land use decisions regarding ORVs and applies the APA to alleged agency inaction for failure to manage to prevent impairment of WSAs. *Id.* at 1223-1233. The Tenth Circuit Court focused on three claims brought by the Southern Utah Wilderness Alliance (SUWA) and determined that the Court had subject matter jurisdiction under § 706(1) APA. *Id.* SUWA first contended that BLM had failed to comply with the Federal Land Policy and Management Act (FLPMA) by allowing ORVs to impair the wilderness characteristics of WSAs prior to Congressional determination regarding whether the WSAs should be designated as wilderness. *Id.* at 1227. SUWA asserts that BLM had an affirmative duty to prevent ongoing ORV use in four WSAs in Utah: Moquith Mountain, Parunuweap Canyon, Sid's Mountain and Behind the Rocks. *Id.* at 1225, n.3. The district court determined that because BLM had discretion

to determine what constitutes impairment and was taking some steps to prevent ORV-induced impairment, § 706(1) APA did not provide subject matter jurisdiction. *Id.* at 1231. The Tenth Circuit reversed and remanded the district court's decision, finding that FLPMA's impairment requirements were mandatory, that the agency had a non-discretionary duty to prevent impairment and that BLM had demonstrated "unreasonable delays" in carrying out this duty, within the parameters of § 706(1) APA. *Id.* at 1222. The fact that BLM was taking some steps towards preventing ORV-induced impairment was found inadequate to deprive the court of subject matter jurisdiction. *Id.* at 1232.

SUWA also alleged that BLM had failed to carry out its affirmative duty to manage the WSAs in accordance with their land use plans (LUPs), including compliance with monitoring requirements and ORV implementation plans. *Id.* at 1233. The district court dismissed these claims because they did not relate to site-specific actions and concerned the sufficiency of BLM's actions rather than the failure to act under § 706(1) APA. *Id.* The Tenth Circuit found that the failure to implement a program specifically promised in an LUP has the same effect as if the agency had taken an affirmative act in direct defiance of its LUP obligations. *Id.* at 1217, 1235-1236. The court determined that § 706(1) APA compels BLM to carry out a duty imposed by a LUP that has been "unreasonably delayed or unlawfully withheld." *Id.* The Court held that BLM had a mandatory, non-discretionary duty to comply with the Factory Butte LUP ORV monitoring provision and the San Rafael LUP ORV implementation provision. *Id.* at 1233-1234.

Finally, SUWA contended that BLM could be compelled under § 706(1) APA to consider whether a supplemental environmental impact statement (SEIS) should be prepared under the National Environmental Policy Act (NEPA)

to consider increased ORV use since initial NEPA studies of the WSAs. *Id.* at 1236-1237. The Tenth Circuit concluded that the district court erred by dismissing SUWA's NEPA claim on the basis that the evidence before it did not justify an SEIS. *Id.* at 1217, 1240.

In May of 2003, the Department of Justice filed its petition for writ of certiorari requesting review of *SUWA v. Norton* due to its concern that the Tenth Circuit's decision would allow a floodgate of challenges to the BLM's day-to-day activities in managing federal lands. Tamara Roundtree, with the U.S. Department of Justice, Environmental and Natural Resources Division, confirmed that the Department also has requested review of the Ninth Circuit's decision in *Montana Wilderness Ass'n, Inc. v. United States Forest Serv.*, 314 F.3d 1146 (9th Cir. 2003). Review of the Ninth Circuit case has been placed on "hold" while the Supreme Court considers *SUWA v. Norton*. The Ninth Circuit decision issued on Jan. 6, 2003, confirmed jurisdiction under § 706(1) of the APA to determine whether the Forest Service had met its duty to administer WSAs to maintain their wilderness character by allegedly failing to act to prevent ORV use of the study areas. *Id.* at 1152. The Ninth Circuit reversed the trial court's grant of summary judgment, finding that the record revealed a genuine issue of material fact as to whether the Forest Service had discharged its duty to maintain the wilderness characteristics of study areas. *Id.* at 1150-1152.

The Supreme Court's decision to grant certiorari in the *SUWA v. Norton* case is only the latest chapter in the wilderness debate in Utah. In April 2003, a settlement was reached between the Department of the Interior and the state of Utah in *Utah v. Norton*, D. Utah No. 96-CV-870, setting aside a wilderness reinventory proposing to add more than 2.6 million acres of wilderness inventory areas to the 3.2 million acres of administratively identified WSAs under FLPMA. This settlement is on appeal to the Tenth Circuit.

However, BLM has published notice that the disputed new WSAs will not be considered in BLM's pending LUP revisions in Utah. 68 Fed. Reg. 33528 (2003). In addition, by Instruction Memorandum (IM) IM-2003-194, dated June 20, 2003, BLM rescinded the Wilderness Inventory and Study Procedures Handbook (H-1630-1). On Sept. 29, 2003, BLM issued IM-2003-274 providing general guidance regarding interpretation of the *Utah v. Norton* settlement and IM-2003-275 with specific guidance on the consideration of wilderness characteristics in the LUP process. BLM IM-2003-274 (Sept. 29, 2003), and BLM IM 2003-275 (Sept. 29, 2003). Finally, 12 of the 21 parcels recently offered by Utah BLM at its Nov. 24, 2003 oil and gas lease sale involved lands located within these disputed wilderness reinventory areas. SUWA and other environmental groups have protested these lease sales as premature until pending LUP revisions are final. BLM has agreed not to issue the leases until it decides the merits of the protest.

If you are interested in further information, the Public Land and Resources Committee is supporting a panel discussion focusing on these cases and the wilderness debate at the ABA Section of Litigation Annual CLE Conference, May 5-8, 2004, in Phoenix, Arizona. Panelists will include Tamara Ann Roundtree, with DOJ and counsel of record in the Ninth Circuit's decision in *Montana Wilderness Ass'n*; Heidi J. MacIntosh, with SUWA in Salt Lake City, Utah, a party to *SUWA v. Norton*; L. Poe Leggette, with Fulbright and Jaworski, Washington, D.C., currently involved in litigation with SUWA regarding BLM's approval of a seismic oil and gas exploration project in Utah in *SUWA v. Norton*, 277 F. Supp. 2d 1169 (D. Utah 2003); and Denise Dragoo, Snell & Wilmer, Salt Lake City, Utah, panel moderator, ddragoo@swlaw.com. The panel discussion is scheduled for May 7, 2004 at 3:30-5:00 p.m. at the Phoenician Resort. For registration information, see the Section of Litigation's Web site at www.abanet.org/litigation.

AGENCY ACTIVITIES AND NEWS

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION ISSUES A DRAFT REVISION OF THE CATSKILL PARK STATE LAND MASTER PLAN EMPHASIZING A BALANCED APPROACH TO RECREATIONAL DEVELOPMENT AND ACCESS TO PERSONS OF ALL ABILITIES IN THE FOREST PRESERVE

Craig T. Donovan

In August 2003, the New York State Department of Environmental Conservation (DEC) revised the Catskill Park State Land Master Plan, which covers the Catskill Forest Preserve (Preserve), an important ecological and scenic reserve, watershed and recreation area located in Catskill Park in upstate New York. See Draft Revision: Catskill Park State Land Master Plan, New York State Department of Environmental Conservation, i-vi, 1-62 (Aug. 2003). The Plan also covers Preserve land located outside the Park within Greene, Delaware, Ulster and Sullivan Counties. *Id.* at 1. See N.Y. Envtl. Conserv. Law § 9-0101 (McKinney 2003). Approximately 287,100 acres of Preserve land are located in Catskill Park and more than 6,700 acres of detached parcels of Preserve land are located outside Catskill Park. *Id.* at 4. The plan was developed in response to the increasing demand for public use and recreation in the Preserve and applies to state lands administered by the DEC only. *Id.* at ii, 1.

Establishment of the Catskill Forest Preserve and the “Forever Wild” Clause of the New York State Constitution

On May 15, 1885, Gov. David B. Hill signed legislation establishing the Preserve. *Id.* at 1. The legislation provided that “all lands now

owned or which may hereafter be acquired by the State of New York . . . in eleven Adirondack and three Catskill counties . . . be forever kept as wild forest lands. They shall not be sold nor shall they be leased or taken by any person or corporation, public or private.” *Id.* This mandate for land preservation in New York State was later incorporated in Article XIV, § 1 of the New York State Constitution and is referred to as the “forever wild” clause. *Id.* at 10. Article XIV, § 1 states:

The lands of the state, now owned or hereafter acquired, constituting the forest preserve as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased sold or exchanged, or be taken by any corporation, public or private, nor shall the timber thereon be sold, removed or destroyed”

New York State Constitution, art. XIV, § 1 (1894).

New York courts and the attorney general have strictly interpreted the mandate of the “forever wild” clause and have limited public use of the Preserve to recreational uses compatible with conservation of the Preserve as wild forest land. Draft Revision: Catskill Park State Land Master Plan, at 3. See, e.g. *Helms v. Reid*, 394 N.Y.S. 2d 987, 995-996 (N.Y. Sup. Ct. 1987). In *Helms*, the New York Supreme Court, Hamilton County held that although the framers of this constitutional provision intended a strict interpretation of the “forever wild” clause’s language and application of its principles in order to protect the natural forest lands of New York State from commercial exploitation, the protection did not prohibit use and enjoyment of the areas by the people of the State. 394 N.Y.S.2d at 997-998. The Court declared,

[T]he Forest Preserve was for the use and benefit of the people and was not to be an

isolated area in which no man would wander. . . . [T]he Legislature [has] the power to make reasonable regulations as to this public use and preservation That this authority may be properly delegated to an administrative agency particularly suited to the control and supervision of wild forest lands, such as the Department of Environmental Conservation (ENCON), has been specifically recognized by the courts.

Id. at 998-1003.

The DEC's Classification System of the Catskill Forest Preserve Lands

The Preserve contains lands with different degrees of wildness ranging from secluded areas with mountain peaks and streams to campsites and trails heavily used by the public. Draft Revision: Catskill Park State Land Master Plan, at 8. The DEC classifies different types of land in the Preserve by studying the physical characteristics of the land and bodies of water on Preserve lands. *Id.* For instance, the DEC will analyze such characteristics as slope of the land or volume or turnover rate of streams to determine how these characteristics will affect the ability of the public to use Forest Preserve land and water for recreation. *Id.* In addition, the DEC considers the ecology of the Preserve. *Id.* The DEC will consider whether certain plants at higher altitudes are able to survive the impact of public recreation uses compared to plants at lower altitudes or whether lands should be designated as wetlands for their inability to absorb impacts from human activities. *Id.* Moreover, the DEC will take into account the types of facilities already existing on the land and uses of these facilities by the public on the land as well as the sense of tranquility and degree of wildness available to the public from a particular area within the Preserve. *Id.* The DEC has established four categories of lands in the Preserve:

(1) wilderness, (2) wild forest, (3) intensive use and (4) administrative. *Id.* at 9. "Wilderness areas" are managed by the DEC in order to preserve their natural conditions. *Id.* at 16. The DEC severely limits human activities in wilderness areas in order to maintain the solitude and tranquility of these areas when visited by the public. *Id.* "Wild Forest" areas are managed by the DEC to maintain their wild character, while also accommodating an array of human recreational activities including the use of motor vehicles. *Id.* "Intensive Use" areas are managed by the DEC to provide several types of recreational activities for persons with multiple interests and abilities. *Id.* "Administrative" areas are managed by the DEC for uses other than Preserve purposes. *Id.*

Increasing Recreational Use of the Catskill Forest Preserve by the Public and Demand for Access to More Preserve Lands by Persons with Disabilities, Families and the Elderly

Historically, the public has used the Preserve for recreation. *Id.* at 12. In the late 19th century, urban dwellers visited the Preserve in order to find renewal in nature, engage in healthful recreation and find tranquility and solitude from the difficult living conditions of the cities. *Id.* In 1892, New York State built the first public trail in the Preserve to the summit of Slide Mountain, the highest mountain in the Catskill mountain range. *Id.* Later, two major campgrounds were opened to the public in 1926 within the Preserve. *Id.* Since the establishment of the first public trail, a network of more than 300 miles of trails has been built to accommodate traditional recreational uses such as hiking, horseback riding and skiing. *Id.* Presently, the Preserve accommodates an array of recreational activities for the public. *Id.* Recently, the demand has increased for new recreational uses such as cross-country skiing, snowmobiles and bicycling in the Preserve.

Id. The growth in the demand of new recreational uses has resulted in the construction of some specialized trails for these recreational uses in the Forest Preserve. *Id.* The DEC, however, has more often accommodated a combination of traditional and non-traditional recreational uses on the existing network of trails. *Id.* This combination of traditional and non-traditional recreational uses has increased the potential for disagreements between persons using the Preserve's trails. *Id.* Moreover, the recent growth in recreational use in the Preserve has been in areas with scenic beauty located in the backcountry such as Kaaterskill Falls, the Peekamoose Valley primitive camping area and Russell Brook. *Id.* The DEC recognizes the necessity to expand access to persons with disabilities or persons not inclined to travel into the backcountry. *Id.* Access to these areas for recreation is limited especially for families, the elderly and persons with disabilities because the land in the Preserve is steeply inclined and located away from public highways by private lands. *Id.* Preserve managers face a daunting challenge in preserving the natural environment of the Preserve while determining ways to accommodate the increasing demand for recreation by the public with a wide range of interests and physical abilities. *Id.*

Guidelines and Management Plans of the New York State Department of Environmental Conservation to Provide Recreational Opportunities in the Catskill Forest Preserve for Persons of All Abilities

The Draft Master Plan provides several guidelines by which the DEC will develop and manage the Preserve in order provide various recreational activities for people of all abilities and interests. *Id.* at 13. First, the DEC will designate certain preexisting trails and construct new trails as family trails. *Id.* The trails will be located in areas accessible from major highways and located through land with

high scenic, ecological or historical importance. *Id.* The family trails will consist of footpaths approximately two miles or less in length and terrain that is not rough. *Id.* The trails will be marked by signs identifiable from the road. *Id.* Along the path of the trails, trailhead signs, side exhibits and publications will provide information to the public on the ecological, scenic and historical importance of the area. *Id.* Second, Preserve lands will be linked with local communities through trail connections. *Id.* These connections will be supported by local governments, residents and landowners. *Id.* The DEC will focus on establishing trail linkages to public transportation reducing the need for construction of new facilities such as parking lots on Preserve lands. *Id.* at 13-14. Third, the DEC will minimize conflicting uses of trails on Preserve lands. *Id.* at 13. When feasible, the DEC will separate trails for different recreational uses. *Id.* In cases where trails are shared by different types of recreational uses, the DEC will inform visitors to the Preserve about the different types of permissible trail uses and encourage the use of trail-sharing etiquette through trailhead signs, personal contacts and published information. *Id.* at 14. In addition, the DEC will monitor recreational use on the trails and take appropriate actions to reduce unacceptable levels of conflict between persons using the trails or unacceptable physical damage to the trails. *Id.*

The DEC will also issue temporary revocable permits (TRP's) under Environmental Conservation Law § 9-0105(15) in order to manage certain activities that would otherwise be permitted on Preserve lands, but because of the nature of these activities, such activities would have a significant adverse impact on the Preserve. *Id.* at 17. See N.Y. Env'tl. Conserv. Law § 9-0105(15) (McKinney 2003). The DEC's issuance of TRP's will ensure that the state protects the Preserve in compliance with New York State environmental law and

that certain recreational activities will not become the subject of environmental enforcement lawsuits in the future. *Id.*

One area where TRP's will play an important role in maintaining a balanced approach to recreational development is DEC's management of the Preserve to provide access for persons with disabilities. *Id.* The Americans with Disabilities Act of 1990 requires that state agencies provide access for persons with disabilities to services, programs and activities administered by the state, unless such access would cause a fundamental alteration of the nature of the service, program or activity or impose an undue financial and administrative burden on the state. Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2003). Section 12132 of the ADA states,

[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. *See also* 42 U.S.C. § 12131(1)(A)-(B) (2003)(defining the term "public entity" as any State or local government, any department, agency, special purpose district or other instrumentality of the State or States or local government); 42 U.S.C. § 12131(2) (2003)(defining the term "qualified individual with a disability" as an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity).

Over the last century, Preserve land managers have constructed a vast network of trails, a ski

center and campgrounds on interior lands of the Preserve for public recreation. *Id.* at 15. Because the interior of the Preserve is largely undeveloped land, persons with disabilities and the elderly have found such areas inaccessible. *Id.* In order to provide greater access for these persons to the interior lands of the Preserve, the DEC has solicited the opinion of several federal and state government experts on the ADA and environmental and recreational interests in order to develop a plan to implement the requirements of the ADA on the Preserve. *Id.* at 16. In 1997, DEC adopted policy CP-3, Motor Vehicle Access to State Lands under Jurisdiction of the Department of Environmental Conservation for People with Disabilities. *Id.* (referring to CP-3, Motor Vehicle Access to State Lands under Jurisdiction of the Dept. of Environmental Conservation for Persons with Disabilities). This policy provides guidelines for the issuance of temporary revocable permits in order to allow qualified persons with disabilities to use motor vehicles for access to designated routes in "wild forest" and "intensive areas" of the Preserve. *Id.* at 16. Presently, the DEC has not opened any roads for the use of motor vehicles by persons with disabilities in the Preserve. *Id.* The DEC, however, expects to change this policy as the DEC revises and develops unit management plans. *Id.* The unit management plans will rate the accessibility of Preserve lands and identify accessible opportunities for recreation in the Preserve. *Id.* The DEC will also consider proposals to improve existing recreational opportunities as well as establish new ones in an appropriate manner on Preserve lands. *Id.* Experts in design and representatives of people with disabilities will participate in the preparation of these unit management plans to ensure that the DEC complies with accessibility requirements and recommendations as well as environmental regulations concerning natural resources. *Id.*

NATIONAL PARK SERVICE DEDICATES MEMORIAL TO NATIVE AMERICAN WARRIORS AT BIGHORN BATTLEFIELD NATIONAL MONUMENT

Craig T. Donovan

On June 25, 2003, the National Park Service with members of the public and representatives of the Cheyenne, Sioux, Crow and other Indian Nations gathered at Little Bighorn Battlefield National Monument on the Crow Indian Reservation at Crow Agency, Montana, to dedicate the first permanent memorial to the Indian warriors who defeated Lt. Col. George Custer and the soldiers of the United States 7th Cavalry at the Battle of the Little Bighorn on June 25, 1876. See Becky Bohrer, *Indians Finally Get Bighorn Memorial* from The Standard Times at www.southcoasttoday.com/daily/06-03/06-26-03/a02wn014.htm (visited Aug. 20, 2003); Andrew Metz, *Descendants of Great Indian Warriors Reclaim Their Sacred Ground: Indians Finally Get Battlefield Memorial*, The Staten Island Advance, A21 (June 26, 2003). See also Little Bighorn Battlefield National Monument News Release, "Indian Memorial Dedication Officially Scheduled for June 25, 2003" located at the National Park Service's Web site at www.nps.gov/libi/indmemdedpr.htm (Aug. 20, 2003). The new memorial consists of a wire sculpture of Indian warriors on horseback, a sunken stone circle and an open area for tribal ceremonies. Andrew Metz, *Descendants of Great Indian Warriors Reclaim Their Sacred Ground: Indians Finally Get Battlefield Memorial*, The Staten Island Advance, A21 (June 26, 2003).

The dedication of the memorial represents a momentous victory for Native Americans. Becky Bohrer, *Indians Finally Get Bighorn Memorial* from The Standard Times at www.southcoasttoday.com/daily/06-03/06-26-03/a02wn014.htm (Aug. 20, 2003). For several years, Native Americans have

petitioned Congress for the establishment of a memorial recognizing the warriors who participated in this battle to defend their land and existence. Andrew Metz, *Descendants of Great Indian Warriors Reclaim Their Sacred Ground: Indians Finally Get Battlefield Memorial*, The Staten Island Advance, A21 (June 26, 2003). The Indian memorial will now stand in sight of the granite obelisk and white headstones on Last Stand Hill honoring the soldiers of the United States 7th Cavalry as well as scouts and civilians attached to the cavalry who died in the battle. *Id.* Congress authorized the creation of the memorial in Public Law 102-201, which was signed into law by President George Bush on Dec. 10, 1991. See Little Bighorn Battlefield National Monument News Release at www.nps.gov/libi/indmemdedpr.htm (Aug. 20, 2003). Public Law 102-201 states that the purpose of the memorial is to "honor and recognize the Indians who fought to preserve their land and culture in the Battle of Little Bighorn, to provide visitors with an improved understanding of the events leading up to and the consequences of the fateful battle, and to encourage peace among people of all races . . ." H. Rep. No. 848, 102nd Cong., 1st Sess. 2 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1631, 1632.

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The Public Land and Resources Committee welcomes the participation of members who are interested in preparing this Newsletter.

If you would like to lend a hand by writing, editing, identifying authors, or identifying issues, please contact the editor Craig T. Donovan at ctdonovan@yahoo.com or 212/385-2122.

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