

# CRS Issue Brief for Congress

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## Public (BLM) Lands and National Forests

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## Public (BLM) Lands and National Forests

### SUMMARY

The 108<sup>th</sup> Congress confronts an array of issues related to the public lands managed by the Bureau of Land Management (BLM) and the national forests managed by the U.S. Forest Service (FS). The Administration also continues to address public lands and national forests through budgetary, regulatory, and other actions. Several key issues are covered in this report.

**Wildfire Protection.** The Administration has proposed a Healthy Forests Initiative to protect communities from wildfires by reducing fuels. Stewardship contracting was authorized in the FY2003 Omnibus Appropriations Act. Other options are being pursued through proposed regulations, and wildfire protection bills have been introduced in the 108<sup>th</sup> Congress. H.R. 1904, enacting proposals in the President's Initiative and other provisions, passed the House and was reported by the Senate Agriculture Committee, amended.

**Energy Resources.** The 108<sup>th</sup> Congress and the Administration continue to examine whether and how to increase access to federal lands for energy and mineral development. Major energy policy legislation, with provisions affecting federal lands, is now in conference.

**Roadless Areas of the National Forest System.** The Clinton Administration issued rules that limit road construction and timber cutting in 58.5 million acres of roadless areas in the National Forest System. A court has enjoined implementation of the rules and the Bush Administration proposed changes to the rule on July 15, 2003.

**R.S. 2477 Rights of Way.** Revised Statute (R.S.) 2477 granted rights of way for

the construction of highways across unreserved federal lands, but the extent of valid rights of way is not clear in some states. This statute might allow highways across (and to) federal and private lands, including sensitive lands and potential wilderness. Congress prohibited regulations "pertaining to" R.S. 2477 from becoming effective, but the Bush Administration recently finalized regulations on "disclaimers of interest" for clearing title to R.S. 2477 highway easements, and executed an agreement with Utah to acknowledge and disclaim R.S. 2477 rights of way in that state.

**National Monuments and the Antiquities Act.** The Antiquities Act of 1906 authorizes the President to establish national monuments on federal lands. Congress is considering limiting the authority of the President and amending particular monuments. The Administration also is developing management plans for some new monuments. Court decisions have upheld designations under current law.

**Hardrock Mining and Millsites.** Two mineral issues have been controversial. One is whether to clarify the General Mining Law of 1872 regarding the number and size of millsites per mining claim. The Department of the Interior released a new opinion on this issue that allows for multiple millsites per claim. The second issue relates to the Bush Administration's revisions and review of the hard rock mining regulations finalized by the Clinton Administration.

**Other Issues.** Many other issues affecting federal lands also are of interest, including wilderness, grazing management, national forest planning, land acquisition, and outsourcing government jobs.



## **MOST RECENT DEVELOPMENTS**

- H.R. 1904, the Healthy Forests Restoration Act of 2003, was reported by the Senate Committee on Agriculture, Nutrition, and Forestry with an amendment in the nature of a substitute, on July 31, 2003.
- H.R. 6, comprehensive energy legislation that contains provisions affecting federal lands, is in conference.
- On July 14, 2003, the Federal District Court for Wyoming again enjoined the Clinton roadless rule that seeks to protect roadless areas, again preventing implementation of the rule. On July 15, the Bush Administration proposed modifications to the Clinton roadless rule.
- On April 9, 2003, the Administration executed a Memorandum of Understanding with the State of Utah to acknowledge and disclaim R.S. 2477 rights of way in that state.
- In October 2003, the Supreme Court declined to hear two cases challenging President Clinton's National Monument designations, leaving in place lower court decisions upholding the designations.
- The Bush Administration issued a new opinion on millsites, on October 7, 2003, that allows for multiple millsites per mining claim if necessary for the successful operation of the mine. Also, the Administration continues to review hardrock mining regulations.

## **BACKGROUND AND ANALYSIS**

The Bureau of Land Management (BLM) in DOI and the Forest Service (FS) in the U.S. Department of Agriculture manage 456 million acres of land, 70% of the land owned by the federal government and one-fifth of the total U.S. land area. The BLM itself manages 264 million acres of land, predominantly in the West. These lands are defined by the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. §§1701, *et seq.*) as "public lands." The FS administers 192 million acres of federal land, also concentrated in the West.

The BLM and FS have similar management responsibilities for their lands, and many key issues affect both agencies' lands. However, each agency has unique emphases and functions. For instance, most BLM lands are rangelands, and the BLM administers mineral development on all federal lands. Most federal forests are managed by the FS, and only the FS has a cooperative program to assist nonfederal landowners. Moreover, development of the two agencies has differed, and historically they have focused on different issues.

### **History of the Bureau of Land Management**

For the BLM, many of the issues traditionally center on the agency's responsibilities for land disposal, range management (particularly grazing), and minerals development. These three key functions were assumed by the BLM when it was created in 1946, by the merger of the General Land Office (itself created in 1812) and the U.S. Grazing Service (created in 1934). The General Land Office had helped convey land to settlers and issued leases and administered mining claims on the public lands, among other functions. The U.S. Grazing

Service had been established to manage the public lands best suited for livestock grazing. The Taylor Grazing Act of 1934 (TGA, 43 U.S.C. §§315, *et seq.*) was the principal statute governing the public lands in the early years of the U.S. Grazing Service, and remains a key statute governing the use of federal rangelands for private livestock grazing. Enacted to remedy the deteriorating condition of public rangelands, the Act provides for the management of public lands “pending [their] final disposal.” This language expresses the view that federal lands might be transferred to other ownership.

In subsequent decades, Congress debated how best to manage federal lands, and whether to retain or dispose of the remaining public lands. In 1976, Congress enacted FLPMA, sometimes called BLM’s Organic Act because it consolidated and articulated the agency’s responsibilities, although it left the TGA in place. Among other provisions, the law establishes management of the public lands based on the principles of multiple use and sustained yield; provides that the federal government receive fair market value for the use of public lands and resources; and establishes a general national policy that the public lands be retained in federal ownership (as opposed to managed until their “final disposal.”) This retention policy contributed to the “Sagebrush Rebellion” of the late 1970s and early 1980s, which was an effort among some Westerners seeking to reduce the federal presence in their states by transferring federal land to state or private ownership. Land ownership, as well as conflicts over land use, continue to be among the key issues for BLM lands.

## History of the Forest Service

The FS was created in 1905, when forest lands reserved by the President (beginning in 1891) were transferred from the Department of the Interior into the existing USDA Bureau of Forestry (an agency for private forestry assistance and forestry research). Management direction for the national forests, first enacted in 1897 and expanded in 1960, identifies the purposes for which the lands are to be managed, allows protection of areas as wilderness, and directs “harmonious and coordinated management” to provide sustained yields of resources.

Many issues over national forest management and use have focused on the appropriate level and location of timber harvesting. Major conflicts over clearcutting began in the 1960s, and litigation in the early 1970s successfully challenged FS clearcutting in West Virginia and elsewhere. Congress enacted the National Forest Management Act of 1976 (NFMA; P.L. 94-588) to revise timber sale authorities and to elaborate on considerations and requirements in land and resource management plans. This NFMA planning has been widely criticized as expensive, time-consuming, and ineffective for making decisions and informing the public. (See Other Issues, below.)

Wilderness protection also has been a continuing issue for the FS because agency recommendations are pending. Pressure to protect these and other areas contributed to the Clinton Administration’s decision to protect roadless areas not designated as wilderness. (For wilderness issues, see Other Issues, below, and CRS Report RL31447.)

## Scope of Issue Brief

Many issues affecting BLM and FS lands are similar, and the missions of the agencies are nearly identical. By law, the BLM and FS lands are to be administered for multiple uses, albeit slightly different uses are specified. In practice, the land uses considered by the

agencies include recreation, range, timber, minerals, watershed, wildlife and fish, and conservation. BLM and FS lands also are required to be managed for sustained yield — *i.e.*, for providing in perpetuity a high level of resource outputs, without impairing the land's productivity. Further, many issues, programs, and policies affect both agencies. For these reasons, BLM and FS lands often are discussed together, as in this report.

This brief focuses on several issues affecting BLM and FS lands that are of interest to the 108<sup>th</sup> Congress. While in some cases the issues discussed here are relevant to other federal lands and agencies, this brief does not comprehensively cover issues primarily affecting other federal lands, such as the National Park System (managed by the National Park Service, DOI) or the National Wildlife Refuge System (managed by the Fish and Wildlife Service, DOI). For background on federal land management generally, see CRS Report RL30867. Information on appropriations for the BLM and FS (as well as other agencies) is included in CRS Report RL31806. For information on park and recreation issues, see CRS Issue Brief IB10093. For information on oil and gas leasing in the Arctic National Wildlife Refuge (ANWR), see CRS Issue Brief IB10111. For information on other related issues, see the CRS web page at [<http://www.crs.gov/>].

## **Wildfire Protection** (by Ross W. Gorte)

**Background.** The 2000 and 2002 fire seasons were, by most standards, among the worst in the past 50 years. Many argue that the threat of severe wildfires has grown, because many forests have unnaturally high fuel loads (e.g., dead trees and dense undergrowth) and an historically unnatural mix of plant species (e.g., selectively logged or containing exotic invaders). Fuel treatments have been proposed to reduce the threats from wildfires, including prescribed burning (setting fires under specific conditions); commercial logging followed with appropriate slash disposal; and other treatments (e.g., precommercial thinning). Proponents of fuel reduction argue that needed treatments often are delayed by environmental studies, administrative appeals, and litigation. However, many project opponents fear that “streamlining” fuel reduction projects could enable timber companies to increase logging on federal lands and that such projects might not receive proper environmental review.

**Administrative Actions.** In August 2002, the Bush Administration proposed a Healthy Forests Initiative to improve wildfire protection by reducing hazardous fuels. The program would have given priority to the “wildland-urban interface,” municipal watersheds, and areas affected by insects and diseases. The proposal included expedited consultations on endangered species and a collaborative process for public involvement, but would have eliminated public requests for an administrative review of project proposals, constrained judicial review, and prohibited restraining orders and injunctions. The proposal also included stewardship (goods-for-services) contracts, essentially allowing the agencies to use timber, instead of cash, to pay contractors for land management services (e.g., thinning, noxious weed control, and road and trail maintenance).

Because wildfire protection legislation has not been enacted, the Administration made two administrative changes to facilitate fuel reduction. One is the addition of two new categories of actions to be excluded from NEPA analysis and documentation: fuel reduction and post-fire rehabilitation activities (68 *Fed. Reg.* 33814, June 5, 2003). These categorical exclusions cannot be used in wilderness, or in wilderness study areas if doing so would impair the suitability of those areas for preservation as wilderness, or if “extraordinary

circumstances” are deemed to exist because the managers determine that the effects might be significant. Projects using herbicides or pesticides or involving new permanent road construction may not be categorically excluded, but the exclusions may be used for projects that include timber sales if fuel reduction is the primary purpose.

The second change is the revision of the administrative review processes (68 *Fed. Reg.* 33582 [June 4, 2003] for the FS; 68 *Fed. Reg.* 33794 [June 5, 2003] for the BLM). Among the many modifications is a clarification that some emergency actions may be implemented immediately and others may be implemented after complying with publication requirements. The change also expands emergency situations to include those “that would result in substantial loss of economic value to the Government if implementation of the proposed action were delayed,” while deleting examples of emergency situations. New standards on standing for who can challenge agency activities also are established.

These changes must be read in conjunction with other final and proposed regulatory changes to understand the potential consequences for fuel reduction, public involvement, and environmental impacts. For the Forest Service, new forest planning regulations were proposed on December 6, 2002 (67 *Fed. Reg.* 72770)<sup>1</sup>, and new categorical exclusions were proposed for small timber harvesting projects on January 8, 2003 (68 *Fed. Reg.* 1026). The total impact of these proposals, if finalized, seems to be greater discretion for the Forest Service to act without environmental studies and with fewer opportunities for the public to comment on or to administratively appeal those actions.

**Legislative Activity.** Much of the attention in the 108<sup>th</sup> Congress has been on H.R. 1904, the Healthy Forests Restoration Act of 2003. The bill would enact many of the proposals in the President’s Healthy Forests Initiative and also includes provisions on a biomass utilization-fuel reduction grant program, watershed forestry assistance, insect infestation assessment and treatment, and federal payments for private forest reserves. On the House side, the bill was reported by the Committee on Agriculture (May 9, 2003), discharged from the Committee on Resources (May 9, 2003), and ordered reported by the Committee on the Judiciary (May 14, 2003). The Resources Committee had marked up a committee print, similar to H.R. 1904, on April 30. After initial referral to the Agriculture and Resources Committees, the bill was referred to the Judiciary Committee for consideration of provisions relating to expedited judicial reviews of fuel reduction projects. The Committee approved the bill on a party line vote. Republicans supported the bill on the grounds that it significantly reduces the chances of catastrophic wildfire by expediting removal of underbrush. Democrats opposed the bill on the assertion that it allows widespread clearing of mature forests and they had too little time to consider it. The House passed the bill on May 20, 2003.

H.R. 1904 was referred to the Committee on Agriculture, Nutrition, and Forestry in the Senate. The Committee held hearings on this bill and related legislation on June 26, 2003, and reported the bill on July 31. In addition, the Senate Committee on Energy and Natural Resources held hearings on July 22 on wildfire protection legislation, including H.R. 1904.

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<sup>1</sup> See CRS congressional memorandum, *Analysis and Critique of the Forest Service Planning Regulations Proposed on December 6, 2002*, by Pamela Baldwin (January 3, 2003), 21 p.

Both Senate committees also considered other wildfire protection legislation. (See CRS Report IB10124, *Wildfire Protection in the 108<sup>th</sup> Congress*.)

Congress also continues to address wildfire protection through appropriations. The FY2003 Consolidated Appropriations Resolution (P.L. 108-7) included appropriations for wildfire management for FY2003 and supplemental funds for fire fighting actions in FY2002. (For more information, see CRS Report RL31306, *Interior Appropriations for FY2003: Interior and Related Agencies*.) It also contained a section authorizing unlimited stewardship (goods-for-services) contracting for the FS and BLM through 2013. The House and Senate included \$319 million of FY2003 supplemental fire funds in H.R. 2657 (Legislative Branch Appropriations Act for FY2004), and the President signed the law (P.L. 108-83) on September 30, 2003.

For FY2004, the Administration requested \$2.24 billion for the National Fire Plan (for the FS and BLM); the House-passed Interior Appropriations bill (H.R. 2691) included 4% more funding. The Senate-passed bill virtually matched the request, and added Title IV with emergency firefighting funds of \$400 million. (For more information, see CRS Report RL31806, *Interior Appropriations for FY2004: Interior and Related Agencies*.)

## **Energy Resources** (by Marc Humphries)

**Background.** A key, controversial issue is whether to increase access to federal lands for energy and mineral development. The BLM administers the Mineral Leasing Act of 1920 which governs the leasing of *onshore* oil and gas, coal, and several other minerals on the federal lands. A BLM study determined that of the roughly 700 million acres of federal minerals, 1) about 165 million acres have been withdrawn from mineral entry, leasing, and sale, subject to valid existing rights, and 2) mineral development on another 182 million acres is subject to the approval of the surface management agency, and must not be in conflict with land designations and plans.

The industry contends that entry into areas that are off-limits to development, particularly in the Rocky Mountain region, is necessary to ensure future domestic oil and gas supplies. Opponents to opening these areas maintain that there are environmental risks, restricted lands are environmentally sensitive or unique, and that the United States could meet its energy needs with increased exploration elsewhere and energy conservation. Coal provides a sizable share of U.S. energy supply and accounts for about half of U.S. electricity needs. Over the past 20 years, the government has emphasized developing clean coal technologies (CCT). Although environmental restrictions have led to rescissions and deferrals for CCT programs over the past 5 years, the Bush Administration has been successful in getting funding for its new Clean Coal Power Initiative (CCPI). The CCPI, modeled after the CCT, focuses on improved performance of coal-fired power generators.

**Administrative Actions.** A concern for the Administration is how to best increase U.S. domestic oil and gas supplies. Proposals from the National Energy Policy Development (NEPD) Group, established by President Bush and led by Vice President Cheney, recommended that the President direct the Secretary of the Interior to identify and eliminate impediments to oil and gas exploration and development on federal land. On April 14, 2003, the BLM announced new management strategies that are intended to remove impediments and streamline the processing of permits to drill for oil and gas leasing. The Administration



also is examining land status and reviewing public land withdrawals. The BLM, USGS, and Department of Energy (DOE) continue to assess the oil and gas reserves and resources on federal lands. The January, 2003 *Scientific Inventory of Onshore Federal Lands' Oil and Gas Resources and Reserves and the Extent and Nature of Restrictions or Impediments to their Development*, by several federal agencies, concluded that there were fewer restrictions on access than many have asserted.

The Bush Administration is reviving the CCT program under its Clean Coal Power Initiative (CCPI), and is seeking \$2 billion over 10 years (FY2002-FY2011). Congress has supported the Administration by funding the CCPI at \$146 million in FY2002 and \$150 million in FY2003. The Administration is seeking \$130 million in FY2004. Supporters note that coal resources could be more widely used if the environmental drawbacks could be reduced. Opponents contend that new technology will not make coal environmentally acceptable at a competitive cost.

The Bush Administration has also initiated new guidelines intended to expedite the permitting process for oil and gas leasing on federal lands. Major features of this new strategy include the use of multiple applications for a permit package when appropriate and use of a geographic area development plan for the NEPA analysis and permitting process.

**Legislative Activity.** The House and Senate passed comprehensive energy legislation in the 107<sup>th</sup> Congress (H.R. 4), but the measure stalled in conference. Passing comprehensive energy legislation is a priority in the 108<sup>th</sup> Congress. The House passed a new version of comprehensive energy legislation (H.R. 6) on April 11, 2003. Beginning in May, the Senate debated its new version (S. 14) of energy legislation. However, after contentious debate over high-priority issues, the Senate opted to pass its previously-passed version — H.R. 4 from the 107<sup>th</sup> Congress — as an amendment to H.R. 6. Currently, H.R. 6 is in conference. The conference continues to be the forum through which provisions contained in S. 14, in addition to H.R. 6, are being evaluated and issues are being resolved.

Federal lands could be affected by various provisions of the energy legislation. The House-passed bill would end the 160-acre limit on coal lease modifications and would lead to demonstration technologies for oil and gas recovery in unproven, unconventional reservoirs on public and private lands. It would also alter the siting and administration of rights of way on federal lands, would require the Secretary of the Interior to evaluate the oil and gas leasing and permitting process, with particular emphasis on permitting timeframes. S. 14 would have ended the 160-acre limit on coal lease modifications and would similarly have required further analyses of resource assessments, land withdrawals, and impediments to oil and gas development on public lands. However, the current Senate-passed version (H.R. 4 from the 107<sup>th</sup> Congress) would not end the 160-acre limit, although it would require that the Secretary of the Interior ensure timely action on oil and gas leases and drilling permits on federal lands. Other bills have also been introduced to alter the leasing process for coal (H.R. 794) and for geothermal energy (H.R. 2772).

Whether to open the Arctic National Wildlife Refuge (ANWR) to oil and gas development has been one of the most divisive issues in the energy debate. A provision to open ANWR is in the House-passed version of the energy bill. Neither the Senate-passed version of H.R. 6 nor its predecessor (S. 14) would open ANWR to oil and gas exploration or drilling.

## **Roadless Areas of the National Forest System** (by Pamela Baldwin)

**Background.** In its final months, the Clinton Administration issued several new rules affecting the roadless areas of the National Forest System (NFS), including new rules on roadless areas, NFS roads, and the FS planning process. Although on December 6, 2002, the Bush Administration proposed new rules for the planning process (see Other Issues, below), congressional and public attention has focused on roadless areas, and that issue is discussed here. (For more information, see CRS Report RL30647.)

**Administrative Actions.** The Clinton Administration established a new approach to the management of the approximately 58.5 million acres of NFS inventoried roadless areas by providing national guidance limiting roads and timber cutting in those areas. These issues have generated litigation and delay in the past, when decisions were made at the forest unit level. The Clinton roadless rule would have prohibited road construction in the inventoried roadless areas, with several exceptions, e.g. roads for access to inholdings or for public health and safety purposes. In addition, the cutting of timber in the roadless areas generally would have been prohibited, except for specified purposes, including fire control.

However, on May 10, 2001, the Federal District Court for Idaho enjoined implementation of the roadless rule, citing its “irreparable harm” to federal forests and their neighbors (*Kootenai Tribe of Idaho v. Veneman*, 142 F.Supp. 2d 1231 (Id. D.C. 2001)). On December 12, 2002, the Ninth Circuit reversed the decision. However, on July 14, 2003, the Federal District Court for Wyoming again enjoined implementation of the rule.

In related action, the FS has been assessing whether to keep the Clinton roadless rule, and sought public comment on whether and how to change the rule. On June 9, 2003, the Secretary announced that the Department would retain the roadless rule, but with two important modifications: 1) new rules would be proposed to allow the governors to request exceptions for certain activities; and 2) the Tongass National Forest would be excluded and a special rule proposed. Notices regarding these changes were published on July 15, 2003, but how the Administration will proceed in light of the July 14 injunction is uncertain.

The FS also issued a series of directives constituting interim guidance on roadless area management that places most decisions with the Regional Forester, and some with the Chief of the Forest Service, until each forest plan is amended or revised to address roadless area protection. This approach reverses the Clinton rule by returning decisions on roads and timber activities in roadless areas to the individual forest planning level. This is consistent with the new proposed planning regulations. The FS also has made several changes to its NEPA compliance requirements that could allow some activities in roadless areas without environmental studies, public notice and comment, or appeals.

**Legislative Activity.** Congress is considering legislation on forest management in general and on the roadless areas issue in particular. H.R. 2369 would require that roadless areas be managed in accordance with the original roadless rule. S. 1200 would enact most of the content of the roadless rule. No action has occurred on these bills. A House floor amendment to the FY2004 Interior appropriations bill (H.R. 2691), to prohibit funding for proposing, finalizing, or implementing changes to the Clinton roadless rule, was rejected (185-234).

## **R.S. 2477: Rights-of-Way Across Public Lands** (by Pamela Baldwin)

**Background.** In 1866, in an act that became Revised Statute (R.S.) 2477, Congress granted rights of way across unreserved public lands “for the construction of highways.” This grant was repealed in the Federal Land Policy and Management Act of 1976 (FLPMA; P.L. 94-579; 43 U.S.C. 1701, *et seq.*), but existing rights were protected. What constitutes construction of highways and whether a qualifying right of way existed in 1976 can be contentious issues.

For much of the time between 1866 and 1976, as the West was being settled, state law largely governed the validity of highways under R.S. 2477, although federal law provides the parameters of the grants. The laws in many states were clear as to when a public highway was established and few issues remain; in other states, such as Alaska and Utah, the situation is less clear. In such states, depending on existing rights and the definitions of “highway” and “construction,” the public might have broad, unrestricted access across (and to) federal (and private) lands, including sensitive lands, potential wilderness, or even through national forests and parks if the highways were established before the lands were reserved. Thus, the possible existence of R.S. 2477 rights of way across federal lands can affect the management of those lands and their suitability as wilderness.

In 1988, the Department of the Interior issued a policy on the subject that defined certain terms. At the request of Congress, the Department completed a study of R.S. 2477 issues in June 1993, and in August 1994 proposed regulations to process R.S. 2477 claims. Those regulations met with both congressional support and opposition, and led to a prohibition on using FY1996 funds to promulgate or implement a rule concerning R.S. 2477 rights of way (P.L. 104-134). Section 108 of the FY1997 Interior Appropriations Act (P.L. 104-208) states that final regulations “pertaining to” R.S. 2477 rights of way cannot take effect unless expressly authorized by an Act of Congress.

In 1997, the Clinton Administration issued a new R.S. 2477 policy that revoked the 1988 policy and directed the BLM to defer processing R.S. 2477 claims unless there was a “demonstrated, compelling, and immediate need to make such determinations,” and the Forest Service has followed suit. The Administration offered a legislative proposal on R.S. 2477, but no bill was introduced.

**Administrative Actions.** On January 6, 2003 (68 *Fed. Reg.* 494), the Bureau of Land Management finalized changes to its regulations at 43 CFR Part 1864 under which the agency issues “disclaimers of interest.” A disclaimer functions much as a quit-claim deed does and can help clear title to property or interests in property with respect to possible interests of the United States. The regulations allow states, subdivisions of states, and “creations” of states to apply for disclaimers. It is not clear what entities might be included in the last group, but it might include special commissions. Secretary Norton and the State of Utah executed a Memorandum of Understanding on April 9, 2003, under which R.S. 2477 rights of way in the State of Utah will be acknowledged and disclaimed, and other states have also requested MOUs. The MOU repeals the 1997 policy, for purposes of the MOU, but does not clarify what criteria will be used to validate right of way claims. Critics assert that the disclaimer regulations therefore “pertain to” R.S. 2477 rights of way and are unlawful in light of §108 of P.L. 104-208.

**Legislative Activity.** H.R. 1639 would establish a process for resolving R.S. 2477 claims and would define certain terms critical to evaluating the validity of such claims. The House approved an amendment to the FY2004 Interior appropriations bill, H.R. 2691, that prohibits implementation of the amendments to the disclaimer regulations in certain federal conservation areas. This language was adopted instead of a more general prohibition on implementation.

## **National Monuments and the Antiquities Act** (by Carol Hardy Vincent)

**Background.** Presidential establishment of national monuments under the Antiquities Act of 1906 (16 U.S.C. §§431 *et seq.*) sometimes has been contentious. The President may proclaim national monuments on federal lands containing “historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest.” The President is to reserve “the smallest area compatible with the proper care and management” of the protected objects. Congress has limited the President’s authority to proclaim monuments in Wyoming and Alaska.

**Administrative Actions.** President Clinton’s proclamation of 19 new monuments, and enlargement of 3 others, set off renewed controversy regarding presidential authority to proclaim monuments. Controversies have focused on whether the President should be required to seek congressional, state, or public input or environmental reviews; the size of the areas and types of resources protected; and restrictions on land uses that may result. To date courts have upheld the monuments. In October 2003, the Supreme Court declined to hear two cases challenging President Clinton’s designations of monuments, leaving in place lower court decisions upholding the designations.

On April 24, 2002, the Department of the Interior began the process of developing management plans for the new DOI monuments. Some observers interpreted this action as an indication that the Secretary is dropping consideration of significant reductions to monument sizes. Currently, some monuments are concluding the scoping process, formulating management options, and issuing draft management plans. Some issues have involved recreational uses, including off-highway vehicles, and commercial uses, including grazing and energy development.

Other actions of the Bush Administration affect national monuments. First, the Bush Administration is reported to be considering the issue of nonfederal lands within national monuments, and to support the removal of private and state lands from the boundaries of national monuments. Second, Governors Island National Monument was conveyed to the National Trust for Historic Preservation and back to the government. The Monument was “established” again on February 7, 2003 by Proc. 7647 (68 *Fed. Reg.* 7053, February 11, 2003), although the previous proclamation (from January 19, 2001) was not expressly repealed. The Monument consists of approximately 22 acres and will be managed by the Secretary of the Interior. The rest of Governors Island was conveyed to the Governors Island Preservation and Education Corporation of the State and City of New York. The Monument lands and the rest of the Island were each conveyed for \$1, according to the deeds, which emphasized the public benefit aspects of the conveyance. However, the deeds also allow retail development and other uses. Governors Island was required by law to be conveyed, but at fair market value (P.L. 105-33, § 9101). That value had been estimated by some at

between \$300 million and \$500 million, but by others as much less because New York authorities reportedly were opposed to major development.

**Legislative Activity.** H.R. 2386 would amend the Antiquities Act of 1906 to make presidential designations of monuments exceeding 50,000 acres ineffective unless approved by Congress within 2 years. The bill also would establish a process for input into presidential monument designations, and require monument management plans to be developed in accordance with the National Environmental Policy Act of 1969. A 107<sup>th</sup> Congress version of this measure, which was supported by the Bush Administration, was on the House calendar but not considered on the House floor.

The House- and Senate-passed versions of the FY2004 Interior appropriations bill (H.R. 2691) would bar funds from being used for energy leasing activities within the boundaries of presidentially created national monuments, as they were on January 21, 2001, except where allowed by the presidential proclamations that created the monuments. Similar provisions were enacted for FY2002 and FY2003. Also, hearings were held on H.R. 1629, which seeks to exclude private property from the boundaries of the Upper Missouri River Breaks National Monument; a similar bill was introduced last Congress.

## **Hardrock Mining and Millsites** (by Marc Humphries)

**Background.** Two recent mineral issues have been controversial. One is the regulations governing hardrock mining operations (43 CFR 3809), changed by the Clinton Administration to enhance the agency's ability to prevent "unnecessary or undue degradation" of public land resources from mining operations and to make mining operators more responsible for reclaiming mined lands. The mining industry asserted that the regulations were unlawful, impeded mining operations, and duplicated existing federal and state laws. The Bush Administration has revised these regulations.

A second issue involves mining millsites. At issue is whether the language in the General Mining Law of 1872 allows only one millsite (of no more than five acres) or multiple millsites per mining claim. The Clinton Administration decided that only one millsite is allowed per claim. Congress, and later the Bush Administration, exempted ongoing mining operations from this decision. The Bush Administration subsequently issued a new opinion overturning the Clinton decision, that would allow for more than one millsite per claim if it is necessary for the successful operation of the mine. According to the Department of the Interior, this recent opinion reflects the longstanding interpretation of the 1872 Mining Law and the industry practice. (For information on other mining issues, see CRS Issue Brief IB89130.)

**Administrative Actions.** After a decade of review, the Clinton Administration revised the hardrock mining regulations, effective on January 20, 2001. The Bush Administration revised these rules, effective December 31, 2001 (66 *Fed. Reg.* 54834). The final rule eliminates some of the most controversial Clinton changes, primarily the part on unnecessary and undue degradation of BLM lands that permitted BLM to stop mining operations that would cause substantial irreparable harm to significant resources that could not be effectively mitigated. Environmental groups have challenged the new regulations in court claiming they fail to prevent undue land degradation.

On October 30, 2001 (66 *Fed. Reg.* 54863), BLM also published a proposed rule that proposed many of the changes that were just put in place in the final rule published the same day. According to BLM, this unusual procedure was intended to both achieve some stability by issuing changes in final form, but then also issuing them as proposals in order to gather additional public comments. A decision on this issue is under review.

With respect to millsites, on November 7, 1997, a legal opinion of the Solicitor of the Department of the Interior stated that each mining claim could use no more than five acres for activities associated with mining (i.e., for “millsites”). This opinion affects many modern mining operations, such as heap-leach mines for gold, which typically require large tracks of land beyond that of the mining claim for mining-related purposes, including disposal of waste rock. Critics charged that this opinion was a new interpretation of the Mining Law, inconsistent with agency practice, and an indirect way of reforming the 1872 Mining Law. Supporters assert that it is based both in law and practice, and necessary because the Mining Law is anachronistic and lacks tough environmental protections.

On September 28, 2001, the Department of the Interior instructed the BLM not to apply the millsite opinion to on-going mining operations and simultaneously tasked its Solicitor (under President Bush) to review the 1997 millsite opinion. These actions came as a similar legislative exemption from the Solicitor’s 1997 opinion was due to expire. A new opinion on millsites, released by the Bush Administration on October 7, 2003, allows for multiple millsites per mining claim if necessary for the successful development of mineral resources.

**Legislative Activity.** The millsite issue and hardrock mining regulations were not addressed in 107<sup>th</sup> Congress laws and only the millsite issue has been addressed in 108<sup>th</sup> with the October 7, 2003 opinion by the Solicitor of the DOI. A broad-based mining reform bill, the Mineral Exploration and Development Act (H.R. 2141), introduced on May 15, 2003, would establish a mine reclamation fund and a royalty regime, and would limit issuance of mineral patents on federal lands.

## Other Issues

Several other federal lands issues that are under evaluation could lead to increased legislation or congressional oversight. These include wilderness, grazing management, national forest planning, federal land acquisition, and outsourcing government jobs.

**Wilderness.** The Wilderness Act established the National Wilderness Preservation System in 1964 and directed that only Congress could designate areas as part of the System. Wilderness designation is often controversial because wilderness areas usually may not be developed — commercial activities, motorized access, and roads, structures, and facilities generally are prohibited. Wilderness studies are also controversial, because many uses are restricted in the study areas to preserve wilderness characteristics while Congress considers possible designations.

Some observers believe that the Clinton rule protecting national forest roadless areas (discussed above) was prompted by congressional inactivity in designating areas which many people believe should be wilderness. Others assert that the Bush Administration — in disclaiming R.S. 2477 rights-of-way (discussed above) and settling a lawsuit by agreeing to end additional wilderness studies and study area protections agreed to during the Clinton

Administration — is attempting to undermine potential wilderness area protection and open the areas to energy and mineral exploration and development, thereby preventing Congress from adding the areas to the Wilderness System. Many bills to designate wilderness areas are typically introduced in each Congress, and to date, about a dozen wilderness designation bills have been introduced in the 108<sup>th</sup> Congress.

**Grazing Management.** The BLM is considering changes to grazing regulations (43 CFR Part 4100) and policies. Past efforts at grazing reform were highly controversial. On March 3, 2003, the agency issued an advanced notice of proposed rulemaking describing the nature of the proposed regulatory changes, and a notice of intent to prepare an environmental impact statement (EIS) analyzing the potential impact of the proposed changes and of alternative actions. The agency asserts that regulatory changes are needed to comply with court decisions, increase flexibility of managers and permittees, improve administrative procedures and business practices, and promote conservation. Among the regulatory changes under consideration are: (1) authorizing the agency to establish reserve common allotments, which permittees could use while their normal allotments undergo rest or range improvements; (2) extending a permittee's non-use of a permit from 3 to 5 years, (3) allowing title to range improvements to be shared by the BLM and permittees, (4) streamlining the administrative appeals process, and (5) allowing permittees to acquire water rights for grazing if consistent with state law. The proposal does not relate to controversial issues, such as the grazing fee. The BLM currently is reviewing public comments, and expects to issue a proposed rule and draft EIS during the winter of 2003-2004 and a final rule/EIS by the end of 2004.

The BLM also is considering related grazing policy changes with a goal of providing more flexibility to managers and increasing innovative partnerships. Changes under consideration include voluntary allotment restructuring, conservation easement acquisition, and conservation partnerships. Currently, BLM's Resource Advisory Councils (RACs) are providing input to BLM on the agency's objectives and are developing recommendations for policy changes. The RACs are to report their advice and recommendations to BLM State Directors by November 1, 2003. Final grazing policy changes will be developed when the rulemaking process is "substantially completed," according to BLM. For more information, see CRS Report RS21634.

**National Forest Planning.** Another issue is land management planning for the national forests. This is largely an administrative issue, with new Forest Service planning regulations promulgated by the Clinton Administration on November 9, 2000, and further new regulations proposed by the Bush Administration on December 6, 2002. The Clinton regulations would have established ecological sustainability as the priority for managing national forests, and were to be implemented over several years. The Bush proposal responded to concerns about the feasibility of the Clinton regulations with revisions seeking to simplify planning and to lead to decisions made closer to the users, but without ecological sustainability as the main priority and with other changes that some assert will reduce public participation in and review of agency decisions. To date, the Bush Administration has not finalized new planning regulations.

**Federal Land Acquisition.** Federal land acquisition is a perennial focus of Congress and the public. The principal source of land acquisition funding for BLM and the Forest Service (and the Park Service and Fish and Wildlife Service) is the Land and Water

Conservation Fund (LWCF). The fund is authorized at \$900 million annually, but only the amount that is appropriated is available to the federal agencies. Most of the appropriations are identified for specific units of public land. Legislation has been introduced in the past three Congresses to appropriate the full authorized level and to make it mandatory spending, removing that discretion from the appropriators. One version of this legislation, known as CARA, passed the House in the 106<sup>th</sup> Congress, and a slightly different version was reported by the House Resources Committee in the 107<sup>th</sup> Congress. CARA legislation has not been reintroduced in the 108<sup>th</sup> Congress.

Funding for land acquisition programs declined in FY2003 and appears certain to decline again in FY2004. Reasons include the change from a federal budget surplus to a deficit, different spending priorities since 9/11, and some concern about the extent of federal land ownership. For more information, see CRS Reports RS21503 and RL30444.

**Outsourcing.** The Bush Administration is considering privatizing numerous and diverse government jobs in agencies including the Forest Service and BLM under its “competitive sourcing” initiative. The goal is to save money through competition between government and private businesses, particularly in areas where private business might provide better commercial services, e.g., law enforcement and maintenance. The plan is controversial, with concerns as to whether it would save the government money and whether the private sector could provide the same quality of service. The House- and Senate-passed versions of the FY2004 Interior appropriations bill (H.R. 2691) contain provisions on the outsourcing initiative. The House language would bar agencies funded in the bill from using funds to begin new outsourcing studies. The Senate language would require the Secretary of the Interior to report annually to Congress on outsourcing. P.L. 108-7, providing consolidated appropriations for FY2003, limits the use of quotas in agencies’ outsourcing efforts. Authorizing committees and other appropriations subcommittees also are considering the outsourcing initiative. For more information, see CRS Report RL31806, under “Cross-Cutting Topics.”

## **LEGISLATION**

### **Wildfire Protection.**

#### **H.R. 387 (Shadegg)**

The Wildfire Prevention and Forest Health Protection Act would authorize Forest Service Regional Foresters to exempt tree-thinning projects from any provision of law, and from administrative appeals and judicial review. Introduced January 27, 2003; referred to Committee on Agriculture and Committee on Resources.

#### **H.R. 1042 (Udall, M.)**

The Forest Restoration and Fire Risk Reduction Act authorizes a cooperative program for wildland fire hazard reduction and forest restoration on federal and other lands, with special procedures for projects meeting the specified conditions. Introduced February 27, 2003; referred to Committee on Agriculture and Committee on Resources.



**H.R. 1621 (Miller, G.)**

The Federal Lands Hazardous Fuels Reduction Act of 2003 authorizes expedited procedures for fuel reduction projects on federal lands. Introduced April 3, 2003; referred to Committee on Agriculture and Committee on Resources.

**H.R. 1904 (McInnis)**

The Healthy Forests Restoration Act of 2003 authorizes expedited planning and review procedures for fuel reduction projects on federal lands, grants for fuel reduction-biomass utilization, watershed forestry assistance, assessment and treatment of insect infestations, and a federal payments for a private forests reserve system. Passed by the House (256-170) on May 20, 2003. The Senate Committee on Agriculture, Nutrition, and Forestry reported the bill with an amendment in the nature of a substitute on July 31, 2003 (S.Rept. 108-121).

**H.R. 2639 (Hooley)/S. 1352 (Wyden)**

The Community and Forest Protection Act authorizes expedited procedures for fuel reduction projects on certain federal lands over 5 years, biomass utilization grants, forest health inventory and monitoring, emergency fuel reduction grants, and assistance to communities with proactive steps for fire protection. Both introduced June 26, 2003. H.R. 2639 referred to House Committee on Agriculture and House Committee on Resources. S. 1352 referred to Senate Committee on Agriculture, Nutrition, and Forestry; July 22, 2003, hearings held.

**S. 1314 (Bingaman)**

The Collaborative Forest Health Act authorizes expedited procedures for certain fuel reduction projects over the next 5 years, assessment of insect infestations, borrowing for fire suppression, limits on competitive sourcing, and funding for wildfire protection and rehabilitation of nonfederal lands. Introduced June 23, 2003. Referred to Committee on Energy and Natural Resources; July 22, 2003, hearings held.

**S. 1449 (Crapo)**

America's Healthy Forest Restoration and Research Act authorizes accelerated procedures for fuel reduction projects on certain federal lands over the next 5 years, biomass utilization grants, watershed forestry assistance, applied silvicultural research and forest inventory and monitoring, and private forest reserves. Introduced July 23, 2003; referred to Senate Committee on Agriculture, Nutrition, and Forestry.

**S. 1453 (Leahy)**

Forestry and Community Assistance Act of 2003 authorizes expedited procedures for certain fuel reduction projects over 5 years, research on forest health protection, watershed forestry assistance, federal payments for private forest reserves, and assistance for rural communities dependent on natural resources. Introduced July 24, 2003; referred to Committee on Agriculture, Nutrition, and Forestry.

**Energy Resources, Hardrock Mining, and Millsites.****H.R. 6 (Tauzin)**

Omnibus energy legislation. Federal lands could be affected by provisions including those ending the 160-acre limit on coal lease modifications and leading to demonstration technologies for oil and gas recovery in unproven, unconventional reservoirs on public and private lands. September 5, 2003, conference held.

**H.R. 504 (Udall, M.)**

Helps finance the cleanup of inactive and abandoned mine sites in certain eligible states. The proposal would establish an interest-bearing Abandoned Minerals Mine Reclamation Fund. Its revenues would come from a reclamation fee imposed on producers of hardrock minerals that received a claim or patent under the General Mining Law of 1872. The fee would be a percentage of the net proceeds from the mine. Introduced January 29, 2003; referred to Committee on Resources and Committee on Transportation and Infrastructure.

**H.R. 794 (Cubin)**

The Coal Leasing Act Amendments of 2003 amend the Mineral Leasing Act of 1920 to repeal the 160-acre limit on coal leases, modify plan requirements and advance royalty payments, and require periodic assessment of coal resources under public lands. Introduced February 13, 2003; referred to Committee on Resources.

**H.R. 2141 (Rahall)**

The Mineral Exploration and Development Act (H.R. 2141) establishes a mine reclamation fund and a royalty regime, and limits issuance of mineral patents on federal lands. Introduced on May 15, 2003; referred to Committee on Resources.

**H.R. 2772 (Gibbons)**

Amends the Geothermal Steam Act of 1970 in many ways, to alter the leasing process and the collection and disposition of royalties, and to require a periodic assessment of geothermal steam energy potential under federal lands. Introduced July 17, 2003; referred to Committee on Resources. July 22, 2003, Subcommittee hearings held.

**S. 14 (Domenici)**

Omnibus energy legislation. Federal lands could be affected by provisions ending the 160-acre limit on coal lease modifications and requiring further analyses of resource assessments, land withdrawals, and impediments to oil and gas development on public lands. July 31, 2003, Senate returned S. 14 to the calendar, and passed H.R. 4 from the 107<sup>th</sup> Congress in lieu, as an amendment in the nature of a substitute to H.R. 6.

**S. 44 (Feingold)**

Amends the Internal Revenue Code to repeal the percentage depletion allowance for hardrock mines located on land subject to the general mining laws or patented under such laws. Introduced January 7, 2003; referred to Committee on Finance.

**Roadless Areas.****H.R. 2369 (Inslee)**

The National Forest Roadless Area Conservation Act requires that roadless areas be managed in accordance with the original roadless rule. Introduced June 5, 2003; referred to Committee on Agriculture and Committee on Resources.

**S. 1200 (Cantwell)**

The Roadless Area Conservation Act of 2003 enacts most of the content of the Clinton Administration roadless rule. Introduced June 5, 2003; referred to Committee on Energy and Natural Resources.

**R.S. 2477: Rights-of-Way.****H.R. 1639 (Udall, M.)**

The R.S. 2477 Rights-of-Way Act of 2003 establishes a process for resolving R.S. 2477 claims and defines certain terms critical to evaluating the validity of such claims. Introduced April 3, 2003; referred to Committee on Resources.

**National Monuments and the Antiquities Act.****H.R. 1629 (Rehberg)**

Provides that the Upper Missouri River Breaks National Monument does not include private property within its boundaries. Introduced April 3, 2003; referred to Committee on Resources. September 30, 2003, Subcommittee hearings held.

**H.R. 2386 (Simpson)**

Amends the Antiquities Act of 1906 making presidential designations of monuments exceeding 50,000 acres ineffective unless approved by Congress within 2 years, establishing a process for public input in presidential monument designations, and requiring monument management plans to be developed in accordance with the National Environmental Policy Act of 1969. Introduced June 5, 2003; referred to Committee on Resources.

**FOR ADDITIONAL READING**

CRS Issue Brief IB10116, *Energy Policy: The Continuing Debate*, by Robert L. Bamberger.

CRS Report RS21402, *Federal Lands, "Disclaimers of Interest," and RS2477*, by Pamela Baldwin.

CRS Report RL30755, *Forest Fire/Wildfire Protection*, by Ross W. Gorte.

CRS Report RS21634, *Grazing Regulations and Policies: Consideration of Changes by the Bureau of Land Management*, by Carol Hardy Vincent.

CRS Issue Brief IB89130, *Mining on Federal Lands*, by Marc Humphries.

CRS Report RL30647, *The National Forest System Roadless Areas Initiative*, by Pamela Baldwin.

CRS Report RS20902, *National Monument Issues*, by Carol Hardy Vincent.

CRS Report RL32078, *Omnibus Energy Legislation: Comparison of Major Provisions in House- and Senate-Passed Versions of H.R. 6, Plus S. 14*, by Mark Holt (Coordinator).

CRS Report RL31447, *Wilderness: Overview and Statistics*, by Ross W. Gorte.

CRS Issue Brief IB10124, *Wildfire Protection in the 108<sup>th</sup> Congress*, by Ross W. Gorte.