

An hourglass-shaped graphic with a globe in the top bulb and another globe in the bottom bulb. The hourglass is light blue and has a dark blue top and bottom. The globe in the top bulb is dark blue, and the globe in the bottom bulb is light blue. The hourglass is centered on the page.

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Report RL33792

*Federal Lands Managed by the Bureau of Land Management
(BLM) and the Forest Service (FS): Issues for the 110th
Congress*

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November 13, 2008

Abstract. The 110th Congress, the Administration, and the courts are considering many issues related to the Bureau of Land Management (BLM) public lands and the Forest Service (FS) national forests. Key issues are described in this report.

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CRS Report for Congress

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**Prepared for Members and
Committees of Congress**

Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service (FS): Issues for the 110th Congress

Summary

The 110th Congress, the Administration, and the courts are considering many issues related to the Bureau of Land Management (BLM) public lands and the Forest Service (FS) national forests. Key issues include the following.

Energy Resources. The Energy Policy Act of 2005 has led to new regulations on the leasing programs and application of environmental laws to certain agency actions. H.R. 6 was enacted as P.L. 110-140 on December 19, 2007, without many of the federal lands provisions considered earlier.

Hardrock Mining. The General Mining Law of 1872 allows prospecting for minerals in open public domain lands, and staking a claim, developing the minerals, and applying for a *patent* to obtain title to the land and minerals. The House passed H.R. 2262 on November 5, 2007, to reform aspects of the General Mining Law.

National Landscape Conservation System. The BLM created the National Landscape Conservation System in 2000 to enhance the focus on specially protected conservation areas. Congress is considering measures to establish the 27 million acre system legislatively and debating the adequacy of funds for the system.

Wilderness. Many agency recommendations for wilderness areas are pending. Questions persist about wilderness review and managing wilderness study areas (WSAs). Nearly fifty wilderness area bills have been introduced this Congress, several have been passed by at least one chamber, and one has been enacted into law.

Wild Horses and Burros. Changes in 2004 to the Wild Free-Roaming Horses and Burros Act of 1971 removed the ban on selling certain animals for commercial products; the House passed H.R. 249 on April 26, 2007, to overturn these changes. The BLM continues to dispose of animals by sale, adoption, and long-term holding.

Wildfire Protection. Various initiatives seek to protect communities from wildfires by expanding fuel reduction, and bills have been offered to restore forest health. Concerns over high and rising suppression costs have led to bills for separate wildfire suppression funding accounts.

FS NEPA Application. The FS has proposed altering its process for activity review under the National Environmental Policy Act of 1969 (NEPA), and has added activities that can be categorically excluded from such environmental and public reviews. Many of these changes and proposals have been challenged in court.

Other issues discussed briefly include roadless areas in the National Forest System, national forest planning, national forest county payments, BLM land sales, and grazing management.

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Federal Lands Managed by the Bureau of Land Management (BLM) and the Forest Service (FS): Issues for the 110th Congress

The 110th Congress is considering actions that affect the various uses and management of federal lands administered by the Bureau of Land Management and the Forest Service. These actions include legislation, administrative or regulatory proposals, and litigation and judicial decisions. Issue areas include access to energy resources on federal lands; development of hardrock minerals; designation of the National Landscape Conservation System; wilderness designation; management of wild horses and burros; wildfire protection; Forest Service implementation of the National Environmental Policy Act (NEPA); and other issues. Many of these issues have been of interest to Congress and the nation for decades.

Background and Analysis

The Bureau of Land Management (BLM) in the Department of the Interior (DOI) and the Forest Service (FS) in the U.S. Department of Agriculture (USDA) manage 449 million acres of land, more than two-thirds of the land owned by the federal government and one-fifth of the total U.S. land area. The BLM manages 255.8 million acres of land, predominantly in the West. The FS administers 192.8 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. Thus, merging the two agencies often is proposed.¹ By law, BLM and FS lands are to be administered for multiple uses, although slightly different uses are specified for each agency. 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 — a high level of resource outputs in perpetuity — without impairing the productivity of the lands. However, each agency also has unique emphases and functions. For instance, most rangelands are managed by the BLM, 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 forest landowners. Moreover, development of the two agencies has differed, and historically they have focused on different issues. Nonetheless, there are many parallels.

¹ See CRS Report RL34772, *Proposals to Merge the Forest Service and the Bureau of Land Management: Issues and Approaches*, by Ross W. Gorte.

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. The BLM assumed these three key functions when it was created in 1946 by the merger of the General Land Office (created in 1812) and the U.S. Grazing Service (created in 1934). The General Land Office had helped convey land to settlers, 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 under the Taylor Grazing Act of 1934 (43 U.S.C. §§ 315, et seq.).

Congress frequently has debated how to manage federal lands, and whether to retain or dispose of the remaining public lands or to expand federal land ownership. Congress enacted the Federal Land Policy and Management Act of 1976 (FLPMA, 43 U.S.C. §§ 1701, et seq.), sometimes called BLM's Organic Act because it consolidated and articulated the agency's responsibilities. Among other provisions, the law establishes a general national policy that BLM-managed public lands be retained in federal ownership, establishes management of the public lands based on the principles of multiple use and sustained yield, and generally requires that the federal government receive fair market value for the use of public lands and resources. BLM public land management encompasses diverse uses, resources, and values, such as energy and mineral development, timber harvesting, livestock grazing, recreation, wild horses and burros, fish and wildlife habitat, and preservation of natural and cultural resources.

History of the Forest Service

The FS was created in 1905, when forest lands reserved by the President (beginning in 1891) were transferred from DOI into the existing USDA Bureau of Forestry (initially 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 — including timber, grazing, recreation, wildlife and fish, and water — and directs “harmonious and coordinated management” to provide for multiple uses and sustained yields of the many resources found in the national forests.

Many issues concerning national forest management and use have focused on the appropriate level and location of timber harvesting. In part to address these issues, Congress enacted the National Forest Management Act of 1976 (NFMA; 16 U.S.C. §§ 1600-1614, et al.) to revise timber sale authorities and to elaborate on considerations and requirements in land and resource management plans.

Wilderness protection also is a continuing issue for the FS. The Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. § 528-531) authorizes wilderness as a use of national forest lands, and possible national forest wilderness areas have been reviewed under the 1964 Wilderness Act (16 U.S.C. §§ 1131-1136) as well as in the national forest planning process. Pressures persist to protect the wilderness character of areas in pending wilderness recommendations and other roadless areas.

Scope of Report

The missions of the BLM and FS are similar, and many issues, programs, and policies affect both agencies. For these reasons, BLM and FS lands often are discussed together, as in this report. This report focuses on several issues affecting the agencies' lands that appear to be of interest to the 110th Congress, including onshore energy resources, hardrock mining, the National Landscape Conservation System, wilderness, wild horses and burros, wildfire protection, and Forest Service implementation of NEPA. It does not comprehensively cover general issues affecting management of these and other federal lands. For background on federal land management generally, see CRS Report RL32393, *Federal Land Management Agencies: Background on Land and Resources Management*, coordinated by Carol Hardy Vincent. For other information on the BLM, FS, and natural resources issues and agencies generally, see the CRS website at [<http://www.crs.gov/>] and the CRS reports on related issues listed at the end of this report.

Onshore Energy Resources² (by Marc Humphries)

Background. A controversial issue is access to federal lands for energy and mineral development. Phase III of a BLM-coordinated study (issued May 2008) found that 62% of the estimated oil and 41% of the estimated natural gas on the 279 million acres of federal land inventoried are classified as “inaccessible” or unavailable for drilling and development.³ The oil and gas industry contends that entry into currently unavailable areas is necessary to ensure future domestic oil and gas supplies. Opponents maintain that the restricted lands are unique or environmentally sensitive and that the United States could realize equivalent energy gains through conservation and increased exploration on current leases or elsewhere.⁴

Development of oil, gas, and coal on BLM and FS lands (and other federal lands) is governed primarily by the Mineral Leasing Act of 1920 (30 U.S.C. § 181). Leasing on BLM lands goes through a multi-step approval process. If the minerals are located on FS lands, the FS must perform a leasing analysis and approve leasing decisions for specific lands before the BLM may lease minerals. The Energy Policy Act of 2005 (EPAAct, P.L. 109-58) made significant changes to the laws governing federal energy resources, including the management of energy development on BLM and FS lands. Implementation of these changes is discussed below.

² This report does not cover offshore energy resources, such as oil and gas development in the Outer Continental Shelf, or the Arctic National Wildlife Refuge (ANWR).

³ DOI, USDA, and Dept. of Energy, *Inventory of Onshore Federal Oil and Natural Gas Resources and Restrictions to their Development* (Phase III), May 2008, available on the BLM website at [http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas/EPCA_III.html].

⁴ See CRS Report RS22928, *Oil Development on Federal Lands and the Outer Continental Shelf*, by Marc Humphries and CRS Report RL33014, *Leasing and Permitting for Oil and Gas Development on Federal Public Domain Lands*, by Aaron M. Flynn and Ryan J. Watson.

Administrative Actions. The Administration is responding to provisions of EAct.⁵ A BLM report analyzed the respective rights and responsibilities of owners of mineral leases, private surface owners, and the federal government under existing law,⁶ and recommended administrative actions that allow for access to oil and gas deposits while seeking to address surface owner concerns.

Pursuant to § 352 of EAct, the BLM issued a final rule in March 2006 that allows ownership of oil and gas leases covering greater acreages than previously allowed.⁷ The final regulation also extended the lease reinstatement period under the petition process.

In January 2006, the BLM completed a final programmatic environmental impact statement (EIS) for wind energy facilities on BLM lands.⁸ This document supports land management plan amendments providing for wind energy development in the western states. The review was undertaken in compliance with Executive Order 13212,⁹ and seeks to comply with congressional directives in EAct directing renewable energy development on public lands.

Under § 369 of EAct, the BLM has completed environmental assessments and issued leases for five oil shale research, development, and demonstration (RD&D) projects on federal lands in Colorado and one in Utah; a BLM report highlights the progress of the pilot project.¹⁰ Also, the BLM has begun a programmatic environmental impact statement (PEIS) to support a commercial tar sands and oil shale leasing program. The BLM completed its draft PEIS on December 20, 2007, and published its proposed regulations for commercial oil shale development on July 23, 2008. Final regulations are required by EAct 2005 within six months of issuing the final PEIS. However, language in the FY2008 Consolidated Appropriations Act (P.L. 110-161), which included DOI funding, prohibited FY2008 expenditures to finalize regulations for a commercial oil shale leasing program. The prohibition on using funds to issue final rules was omitted from the Continuing Appropriations Resolution, 2009 (CR, Division A, P.L. 110-329). The CR provides appropriations to DOI agencies (among others) through March 6, 2009. The Interior Department issued a statement indicating that the final rule for a commercial oil shale and tar sands leasing program would likely be completed by the end of the 2008 calendar year. The BLM completed its final environmental impact statement on September 4, 2008.

⁵ For additional information on BLM implementation of the EAct, see the agency's website at [http://www.blm.gov/wo/st/en/prog/energy/epca_chart.html].

⁶ DOI/BLM, *Energy Policy Act of 2005 — Section 1835 Split Estate, Federal Oil and Gas Leasing and Development Practices, A Report to Congress* (Dec. 2006), at [http://www.blm.gov/bmp/Split_Estate.htm].

⁷ 71 *Fed. Reg.* 14821 (Mar. 24, 2006).

⁸ 71 *Fed. Reg.* 1768 (Jan. 11, 2006).

⁹ "Actions to Expedite Energy-Related Projects," 66 *Fed. Reg.* 28357 (May 22, 2001).

¹⁰ DOI/BLM, *Year Two Report: Section 365 of the Energy Policy Act of 2005 — Pilot Project to Improve Federal Permit Coordination* (Feb. 2008).

The BLM has issued its final rule for developing geothermal energy on federal lands, effective June 1, 2007.¹¹ EAct, §§ 221-236, amended the Geothermal Steam Act of 1970 (30 U.S.C. §§ 1001-1028) to change the leasing procedures to offer more competitive leasing and establish a new royalty and rental rate framework. Much of the nation's geothermal energy potential is located on federal lands. The Administration has asserted that improving the efficiency of the federal geothermal leasing process could increase geothermal energy production. The BLM administers 423 geothermal leases, of which 55 are currently in production.

Legislative Activity. The conflict between increased domestic energy production from public lands and environmental concerns over development has continued in the 110th Congress. To address concerns with the implementation of EAct, legislation (H.R. 2337) to repeal or amend several of its provisions related to oil and gas development on federal lands was introduced, then folded into a broader energy proposal (H.R. 3221, Title VII). Portions of this and other bills were combined in the Energy Independence and Security Act of 2007 (H.R. 6). H.R. 6 was enacted on December 19, 2007, as P.L. 110-140, but without the oil and gas provisions contained in Title VII of H.R. 3221.¹² Several bills introduced in the House (e.g., H.R. 6566 and H.R. 6709) also would have ended the spending prohibition on issuing final regulations for commercial-scale oil shale development.

Hardrock Minerals (by Marc Humphries)

Background. The General Mining Law of 1872 is one of the major statutes directing federal lands management policy. The law grants free access to individuals and corporations to prospect for minerals in open public domain lands, and allows them, upon making a discovery, to stake (or *locate*) a claim on the deposit. A claim gives the holder the right to develop the minerals and apply for a *patent* to obtain full title of the land and minerals. A continuing issue is whether this 136-year-old law should be reformed, and if so, how to balance mineral development with competing land uses.¹³

The right to enter federal lands and freely prospect for and develop minerals is the feature of the claim-patent system that draws the most vigorous support from the mining industry. Critics consider the claim-patent system a giveaway of publicly owned resources because royalty payments are not required and because of the small amounts paid to maintain a claim and to obtain a patent. Congress has imposed a moratorium on mining claim patents through the annual Interior appropriations laws since FY1995, but has not restricted the right to stake claims or extract minerals. A BLM study in 2000 estimated that about 165 million acres of lands with federally

¹¹ 72 *Fed. Reg.* 24358 (May 2, 2007).

¹² On April 10, 2008, the Senate passed H.R. 3221, with an amendment in the nature of a substitute, to provide needed housing reform and for other (non-energy) purposes.

¹³ For more information on the General Mining Law and recent reform efforts, see CRS Report RL33908, *Mining on Federal Lands: Hardrock Minerals*, by Marc Humphries.

owned mineral rights¹⁴ (about 24% of all federal mineral acreage) have been withdrawn from mineral entry, leasing, and sale, subject to valid existing rights. Mineral development on another 182 million acres (26% of all federal mineral acreage) is subject to the approval of the surface management agency¹⁵ and must not be in conflict with land designations and plans.

The lack of direct statutory authority for environmental protection under the Mining Law of 1872 is another major issue that has spurred reform proposals. Many Mining Law supporters contend that other current laws provide adequate environmental protection. Critics, however, assert that these general environmental requirements are not adequate to assure reclamation of mined areas and that the only effective approach to protecting lands from the adverse impacts of mining under the current system is to withdraw them from development under the Mining Law. Further, critics charge that federal land managers lack regulatory authority over patented mining claims and that clear legal authority to assure adequate reclamation of mining sites is needed.

Administrative Actions. Since the late 1990s, administrative efforts have focused on new surface management regulations, with attention centering on mine reclamation efforts. New mining claim location and annual claim maintenance fees were increased in 2005 to \$30 and \$125 per claim, respectively (from \$25 and \$100).

Legislative Activity. Broad-based legislation to reform the General Mining Law of 1872 (H.R. 2262) was introduced on May 10, 2007 — the 135-year anniversary of the original law’s signing. The bill would, among other provisions, establish an 8% “net smelter return” (NSR) royalty (also known as “gross income” royalty defined in § 613 (c)(1) of the Internal Revenue Code of 1986) on hardrock mineral production (e.g., gold, copper, silver) from new mines and mine expansions on public domain lands, and a 4% NSR royalty on existing mines. H.R. 2262 would create an abandoned hardrock mine reclamation fund, require a reclamation plan by mineral producers, and impose new environmental standards. Hearings were held on H.R. 2262 by the House Natural Resources Subcommittee on Energy and Mineral Resources. The Committee reported the bill on October 29, 2007 (H.Rept. 110-412), and the House passed the bill on November 1, 2007. No further action has occurred.

Two oversight hearings on mining law reform have been held by the Senate Energy and Natural Resources Committee in the 110th Congress — one on hardrock mining on federal land (September 27, 2007) and a second on reform of the General Mining Law of 1872 (January 24, 2008). The committee held a third hearing to address abandoned hardrock mine lands and uranium mining (March 12, 2008). In addition, a Senate bill (S. 2750, the Abandoned Mine Reclamation Act of 2008) would address cleaning up abandoned hardrock mines throughout the United States by establishing an Abandoned Mine Cleanup Fund and imposing various fees on

¹⁴ There are approximately 700 million acres of federal mineral rights, including FS and BLM lands as well as lands administered by the NPS, FWS, and Department of Defense and federal mineral rights underlying private lands.

¹⁵ The BLM administers mineral resources under all federal lands, regardless of which agency has responsibility for administering the surface.

hardrock mining operations on federal land, including a 4% “gross income” royalty that would apply to existing hardrock mineral producers on federal land. A second Senate bill (S. 2287) aimed at the hardrock mining industry would eliminate the percentage depletion allowance for certain hardrock minerals and establish an Abandoned Mine Reclamation Trust Fund.

National Landscape Conservation System (by Carol Hardy Vincent)

Background. The BLM created the National Landscape Conservation System (NLCS) in 2000 to focus management and public attention on its specially protected conservation areas. According to the BLM, the mission of the system is to conserve, protect, and restore for present and future generations the nationally significant landscapes that have been recognized for their outstanding archaeological, geological, cultural, ecological, wilderness, recreation, and scientific values.¹⁶ The system consists today of about 27 million acres of land, with more than 850 federally recognized units. These units include national monuments, national conservation areas, wilderness areas, and wilderness study areas as well as thousands of miles of national historic and national scenic trails and wild and scenic rivers. Current issues for Congress include whether to establish the system legislatively, and the adequacy of funds for the system.

Administrative Actions. Over the past several years, the BLM has given priority to developing new or updated land management plans for areas within the NLCS. Currently, most of these plans are completed. The Administration has testified in favor of establishing the NLCS legislatively and is seeking reduced funds for the system for FY2009. (See below.)

Legislative Activity. Legislation has been introduced (H.R. 2016, S. 1139, S. 2180, and S. 3213) to establish the NLCS legislatively without intending to alter the way the areas are currently managed. The measures seek to “conserve, protect, and restore nationally significant landscapes” that have outstanding values for the benefit of current and future generations. S. 2180 has been indefinitely postponed by the Senate, while the other three bills are on the Senate calendar.¹⁷

At hearings on the bills, the Administration (and other witnesses) testified in favor of establishing the system legislatively. For instance, at a hearing on S. 1139, the Acting Director of the BLM testified that DOI supported the bill as a way to provide legislative support and direction to the BLM and to formalize and strengthen its conservation system within the context of the agency’s multiple-use mission.¹⁸ Other witnesses expressed opposition to the legislation, for instance, on the assertion

¹⁶ DOI/BLM, *Budget Justifications and Performance Information, Fiscal Year 2009*, p. I-78.

¹⁷ In addition, provisions of S.Amdt. 5662 would establish the NLCS legislatively, and make federal land designations and add them to the NLCS. The amendment was submitted to H.R. 5151 on September 26, 2008. H.R. 5151 has not been considered by the Senate; it is on the Senate calendar.

¹⁸ U.S. Senate Energy and Natural Resources Subcommittee on Public Lands and Forests, *Hearing to Receive Testimony on Current Legislation* (May 3, 2007).

that it could have the effect of establishing new, standardized requirements for disparate areas in the system.¹⁹

On April 9, 2008, the House passed H.R. 2016 with several amendments. Some of the amendments sought to clarify the effect of establishing the system on the management of its units. For instance, the House agreed to amendments specifying that the bill would not affect existing grazing rights or operations; additionally hinder or restrict energy development; or limit access for hunting, fishing, trapping, or recreational shooting or infringe on the rights of states to manage these activities. The House narrowly rejected a motion to recommit the bill with instructions to report back promptly with an amendment stating that the bill shall not affect the right to bear arms within the NLCS. The amendment was supported as essential to protect the right to bear arms under the Second Amendment to the Constitution, but opposed on the grounds that the legislation already affirmed the rights of gun owners and hunters. On April 10, 2008, H.R. 2016 was placed on the Senate calendar.

On June 28, 2007, the Senate Committee on Energy and Natural Resources reported S. 1139 with an amendment seeking to clarify the description of the components of the system, but without making substantive changes to the bill as introduced (S.Rept. 110-116, p. 3). The bill was placed on the Senate calendar on the same date. Similar provisions to establish the NLCS were included in broader natural resources legislation: S. 2180, which was indefinitely postponed by the Senate on June 11, 2008, and S. 3213, which was placed on the Senate calendar on June 27, 2008.

P.L. 110-229 (S. 2739) established two Outstanding Natural Areas and provided for their management as part of the NLCS. Specifically, the law established the Piedras Blancas Historic Light Station Outstanding Natural Area (CA) and the Jupiter Inlet Lighthouse Outstanding Natural Area (FL). Other House and Senate bills also would make federal land designations (e.g., wilderness and national monument) and add the BLM areas to the NLCS.

Questions about the adequacy of funds for the NLCS have been recurring. Some questions have centered on whether recent funding for management and law enforcement have been sufficient to address vandalism and other damage to cultural resources in the system. These questions are likely to continue in light of a proposed reduction in funding for the NLCS in FY2009. Specifically, the Administration requested \$49.9 million for the NLCS in FY2009, a \$4.4 million decrease from the FY2008 enacted level of \$54.2 million. Funding for the NLCS has not been determined for FY2009; Interior agencies are operating under a continuing appropriations resolution through March 6, 2009 (Division A, P.L. 110-329).

Wilderness (by Ross W. Gorte)

Background. The 1964 Wilderness Act established the National Wilderness Preservation System and directed that only Congress can designate federal lands as

¹⁹ Mr. Orie Williams, "Testimony," *Legislative Hearing on H.R. 2016*, U.S. House Natural Resources Subcommittee on National Parks, Forests, and Public Lands (June 7, 2007).

part of the national system. Designations often are controversial because commercial activities, motorized access, and roads, structures, and facilities generally are restricted in wilderness areas.²⁰ Similarly, agency wilderness studies often are controversial, because many uses also 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 (see below) was prompted by a belief that Congress had lagged in designating areas as wilderness.²¹ Others assert that the Bush Administration — in promulgating new guidance to preclude additional, formal BLM wilderness study areas and in eliminating the nationwide national forest roadless area protections of the Clinton Administration — is attempting to open areas with wilderness attributes to roads, energy and mineral exploration, and development, thereby making them ineligible to be added to the wilderness system.

One significant issue is when (and whether) the agencies must review the wilderness potential of their lands. The Wilderness Act directed the review of administratively designated national forest primitive areas and of National Park System and National Wildlife Refuge System lands. *Release language*, in statutes designating national forest wilderness areas, and FS planning regulations (36 C.F.R. § 219.7(a)(5)(ii)) provide for periodic review of potential national forest wilderness areas in the FS planning process. For BLM lands, § 603 of FLPMA required the agency to review potential wilderness, to present recommendations to the President, and to not impair the wilderness character of wilderness study areas (WSAs) “until Congress has determined otherwise.”

In 1996, then-DOI Secretary Bruce Babbitt used the general BLM authority to inventory lands and resources (FLPMA § 201; 43 U.S.C. § 1711) to identify an additional 2.6 million acres in Utah as having wilderness qualities. The State of Utah challenged the inventory as violating the review required by § 603, and in September 2003, the DOI settled the case and issued new wilderness guidance (IM Nos. 2003-274 and 2003-275) prohibiting further reviews and limiting the *nonimpairment* standard to previously designated § 603 WSAs.²²

Legislative Activity. As of October 2008, 46 bills²³ to designate new wilderness areas or expand existing ones in 16 states have been introduced in the 110th Congress. (See **Table 1.**) One, the Consolidated Natural Resources Act of 2008 (S. 2739), has been enacted into law (P.L. 110-229). Six other bills have passed

²⁰ See CRS Report RL33827, *Wilderness Laws: Permitted and Prohibited Uses*, by Ross W. Gorte.

²¹ The federal District Court for Wyoming found that the Clinton roadless rule violated the Wilderness Act’s mandate that only Congress had the authority to designate wilderness areas. *Wyoming v. U.S. Dept. of Agriculture*, 570 F.Supp. 2d 1309 (D. Wyo. 2008).

²² See CRS Report RS21917, *Bureau of Land Management (BLM) Wilderness Review Issues*, by Ross W. Gorte and Pamela Baldwin.

²³ This figure excludes omnibus bills that contain the text of other free-standing wilderness bills.

the House, with four of those reported by the Senate Energy and Natural Resources Committee. The Senate committee has reported 12 other bills. In addition, many hearings have been held on numerous bills. Some bills that include provisions to release specific BLM WSAs have been introduced. Bills to prohibit broad future BLM wilderness reviews and to release all WSAs after a specified period had been introduced in the 106th-108th Congresses, but to date have not been introduced in the 110th Congress.

One bill, H.R. 6917, has been introduced to amend the Wilderness Act. It would add a provision granting the right for qualified recreation organizations to cross existing wilderness areas on established trails without restriction, but limit them to 10 such crossings annually. Qualified organizations must have 10 years of “demonstrated compliance and consistency” with one of three specified purposes: “(i) to promote the development and preservation of trails throughout Federal lands; (ii) to promote and encourage education of the public about the fragile nature of mountain and forest ecology and the necessity for its protection and preservation; or (iii) to gather and disseminate information regarding the use and enjoyment of wilderness areas and other Federal land ...”

Table 1. 110th Congress Bills to Designate Wilderness Areas

Bill Title	Acreage	State	Bill No.	Most Recent Action
Alaska Rainforest Conservation Act	3,233,800	AK ^a	H.R. 3757	Introduced 10/4/07
Alpine Lakes Wilderness Additions and Wild Pratt River Act of 2007	22,100	WA	H.R. 4113	Introduced 11/8/07
America’s Red Rock Wilderness Act of 2007	9,425,840 9,208,840	UT	H.R. 1919 S. 1170	H.R. 1919 introduced 4/18/07 S. 1170 introduced 4/19/07
Beaver Basin Wilderness Act	11,740	MI	S. 3017	Reported 9/16/08
Browns Canyon Wilderness Act	20,025	CO	S. 3066	Introduced 5/22/08
California Desert and Mountain Heritage Act	153,339 ^b	CA	H.R. 3682 S. 2109	H.R. 3682 reported by S. ENR 9/16/08 S. 2109 hearing 4/15/08
California Wild Heritage Act of 2007	2,088,766	CA	H.R. 860 S. 493	Both introduced 2/6/07
Cascade-Siskiyou National Monument Voluntary and Equitable Grazing Conflict Resolution Act	23,000	OR	S. 2379	Reported 6/16/08
Central Idaho Economic Development and Recreation Act	318,765	ID	H.R. 222	Introduced 1/4/07
Chattahoochee National Forest Act of 2007	8,448	GA	H.R. 707	Introduced 1/29/07
Colorado Wilderness Act of 2007	1,637,846 ^c	CO	H.R. 3756	Introduced 10/4/07
Consolidated Natural Resources Act of 2008 ^d	106,000	WA	S. 2739	Signed into law on 5/8/08 as P.L. 110-229
Copper Salmon Wilderness Act	13,700	OR	H.R. 3513 S. 2034	H.R. 3513 passed House 4/22/08 S. 2034 reported 4/10/08
Dominguez-Escalante National Conservation Area and Dominguez Canyon Wilderness Area Act	66,280	CO	H.R. 6162 S. 3065	H.R. 6162 introduced 5/22/08 S. 3065 reported 9/16/08

Bill Title	Acreage	State	Bill No.	Most Recent Action
Eastern Sierra and Northern San Gabriel Wild Heritage Act	473,806	CA	H.R. 6156 S. 3069	H.R. 6156 hearing 9/11/08 S. 3069 reported 9/16/08
Gold Butte National Conservation Area and Wilderness Designation Act	220,336	NV	H.R. 7132	Introduced 9/26/08
Izembek and Alaska Peninsula Refuge and Wilderness Enhancement Act of 2007 (S. 1680); ... and King Cove Safe Access Act (H.R. 2801)	45,493	AK	H.R. 2801 S. 1680	H.R. 2801 ordered reported 4/23/08 S. 1680 reported 9/16/08
Lewis and Clark Mount Hood Wilderness Act of 2007 (S. 647); ... of 2008 (H.R. 6290)	128,660	OR	H.R. 6290 S. 647	H.R. 6290 hearing 9/11/08 S. 647 reported 9/17/07
Northern Rockies Ecosystem Protection Act	24,322,915	ID, MT, OR, WA, WY	H.R. 1975	Hearing 10/18/07
Omnibus Public Land Management Act of 2008 ^f	985,375	CO, ID, OR, VA, WV	S. 3213	Senate calendar 6/27/08
Oregon Badlands Wilderness Act of 2008	29,837	OR	S. 3088	Reported 9/16/08
Owyhee Initiative Implementation Act of 2007	517,196	ID	S. 802	Introduced 3/7/07
Owyhee Public Land Management Act of 2008	517,128	ID	S. 2833	Reported 6/16/08
Protecting America's Wild Places Act of 2008 ^g	482,835	AZ, CA, NM, OR, WV	H.R. 5610	Introduced 3/13/08
Rocky Mountain National Park Wilderness and Indian Peaks Wilderness Expansion Act	253,534	CO	H.R. 2334 S. 1380	H.R. 2334 hearing 11/13/07 S. 1380 reported 6/16/08
Sabinoso Wilderness Act of 2007	19,880	NM	H.R. 2632	Reported 9/16/08
Sequoia-Kings Canyon National Park Wilderness Act of 2007	114,686	CA	H.R. 3022 S. 1774	H.R. 3022 reported by S. ENR 9/16/08 S. 1774 hearing 6/17/08
Spring Basin Wilderness Act of 2008	8,661	OR	S. 3089	Reported 9/16/08
Tumacacori Highlands Wilderness Act of 2007	83,300	AZ	H.R. 3287	Hearing 11/13/07
Udall-Eisenhower Arctic Wilderness Act (H.R. 39); no short title to S. 2316	1,559,538	AK ^h	H.R. 39 S. 2316	H.R. 39 introduced 1/4/07 S. 2316 introduced 11/7/07
Virginia Ridge and Valley Act of 2007	39,161 ⁱ	VA	H.R. 1011 S. 570	H.R. 1011 S. ENR hearing 4/15/08 S. 570 reported 6/16/08
Washington County Growth and Conservation Act of 2008	264,394	UT	S. 2834	Hearing 4/22/08
Wild Monongahela Act: A National Legacy for West Virginia's Special Places	47,128	WV	H.R. 5151 S. 2581	H.R. 5151 reported by S. ENR 6/16/08 S. 2581 hearing 4/15/08
Wild Sky Wilderness Act of 2007	106,000	WA	H.R. 886 S. 520	Included in S. 2739, enacted as P.L. 110-229 on 5/8/08

Note: Information in this table generally reflects legislation as introduced, except that the most recent legislative action is included.

a. Affects the Tongass National Forest.

- b. Also designates 41,100 acres of “potential wilderness,” to be added when current non-conforming uses have ceased and sufficient inholdings have been acquired to make a manageable unit.
- c. Also designates 36,522 acres of “potential wilderness,” to be added when current non-conforming uses have ceased.
- d. Essentially includes Wild Sky Wilderness Act of 2007 (S. 520) and many other non-wilderness provisions.
- e. Also designates 2,770 acres of “potential wilderness,” to be added when conditions are compatible or land is acquired through a land exchange.
- f. Essentially includes several previously-introduced wilderness bills (plus other provisions): Cascade-Siskiyou National Monument Voluntary and Equitable Grazing Conflict Resolution Act (S. 2379), Copper Salmon Wilderness Act (S. 2034), Lewis and Clark Mount Hood Wilderness Act of 2007 (S. 647), Owyhee Public Land Management Act of 2008 (S. 2833), Rocky Mountain National Park Wilderness and Indian Peaks Wilderness Expansion Act (S. 1380), Virginia Ridge and Valley Act of 2007 (S. 570), and Wild Monongahela Act: A National Legacy for West Virginia’s Wild Places (S. 2581).
- g. Essentially includes several previously-introduced wilderness bills: California Desert and Mountain Heritage Act (H.R. 3682), Copper Salmon Wilderness Act (H.R. 3513), Sabinoso Wilderness Act of 2007 (H.R. 2632), Sequoia-Kings Canyon National Park Wilderness Act of 2007 (H.R. 3022), Tumacacori Highlands Wilderness Act of 2007 (H.R. 3287), and Wild Monongahela Act: A National Legacy for West Virginia’s Special Places (H.R. 5151).
- h. Affects the Arctic National Wildlife Refuge (ANWR).
- i. Also designates 349 acres of “potential wilderness,” to be added when current incompatible conditions are removed or in five years, whichever is first.

Wild Horses and Burros (by Carol Hardy Vincent)

Background. The Wild Free-Roaming Horses and Burros Act of 1971 (16 U.S.C. §§ 1331, et seq.) seeks to protect wild horses and burros on federal land and places them under the jurisdiction of the BLM and FS. For years, management of wild horses and burros has generated controversy and lawsuits. Controversies include the method of determining the *appropriate management levels* (AMLs) for herd sizes, as the statute requires; whether and how to remove animals from the range to achieve AMLs; methods — other than adoption — for reducing animals on the range, particularly fertility control and holding animals in long-term facilities; whether appropriations for managing wild horses and burros are adequate; and the slaughter, or potential for slaughter, of horses.²⁴

Adoption has been the primary method of disposal of healthy animals, with 221,714 adopted from FY1972 to FY2007. The 108th Congress enacted controversial changes to wild horse and burro management on federal lands (P.L. 108-447, § 142) to provide for the *sale* of wild horses and burros. Specifically, the first change directed the agencies to sell, “without limitation,” excess animals (or their remains) that essentially are deemed too old (more than 10 years old) or otherwise unable to be adopted (offered unsuccessfully at least three times). Proceeds are to be used for the adoption program. A second change removed the ban on the sale of wild horses and burros or their remains for processing into commercial products. A third change removed criminal penalties for processing into commercial products the remains of a wild horse or burro, if sold under the new authority. These changes have been supported as providing a cost-effective way to help the agencies achieve AMLs, to improve the health of the animals, to protect range resources, and to restore a natural ecological balance on federal lands. They have been opposed as potentially leading to the slaughter of healthy animals. As of October 14, 2008, the BLM had sold nearly 2,900 animals.

²⁴ For more information, see CRS Report RL34690, *Wild Horse and Burro Issues*, by Carol Hardy Vincent.

As of February 29, 2008, there were an estimated 33,000 wild horses and burros on BLM lands. National maximum AMLs are set at 27,512, which some critics assert is set low in favor of livestock. There were another 3,180 wild horses and burros on FS lands as of September 30, 2006 (most recent year available). Further, 29,772 wild horses and burros were being held in facilities — preparation, maintenance, and long-term facilities — as of April 1, 2007, and the BLM continues to be responsible for these animals.

Administrative Actions. The BLM has been pursuing a multi-year effort to achieve AMLs and in FY2007 had been closer to AMLs than at any time since the early 1970s. To achieve AMLs, the BLM has continued to remove wild horses and burros from the range, and dispose of them through adoption and sale as well as through placement in long-term holding facilities. However, the BLM estimates removal of 5,200 animals in FY2008 and 3,300 in FY2009, sizeable reductions from the number removed in each of the past several years. These reductions will contribute to higher populations on the range. For instance, the BLM projects a total of 33,444 wild horse and burros on the range in FY2009. Although adoptions have been declining over the past several years, they have continued to outpace sales of animals. The BLM has determined that there is very little demand for the estimated 8,000 older animals available through the sales program.

In addition, the BLM is reportedly considering whether to euthanize healthy wild horses and burros, under current authorities, to bolster efforts to reach AML. The possibility of euthanizing wild horses and burros has been controversial. Authority to destroy excess animals is provided for under the 1971 law. Specifically, the Secretary of the Interior, for BLM lands, and the Secretary of Agriculture, for FS lands, are to remove animals exceeding the range's carrying capacity to restore a natural ecological balance and protect the range from deterioration associated with an overpopulation of wild horses and burros. First, they are to destroy old, sick, or lame animals by the most humane means available. Second, they are to remove healthy animals for private adoption. Third, if adoption demand is insufficient, "the Secretary shall cause additional excess wild free-roaming horses and burros ... to be destroyed in the most humane and cost efficient manner possible."²⁵ The agencies have not used this authority since January 1982.

For FY2008, the BLM requested \$32.1 million for management of wild horses and burros, a 12% decrease from the FY2006 and FY2007 level of \$36.4 million. The agency expected that the funding reduction would be achieved by reducing efforts to gather and remove animals from the range, at the time anticipating the removal of 830 animals in FY2008. Congress did not support the requested decrease, instead appropriating \$36.2 million for FY2008. For FY2009, the Administration requested \$37.0 million. Funding for wild horse and burro management has not been determined for FY2009; BLM is operating under a continuing appropriations resolution through March 6, 2009 (Division A, P.L. 110-329).

The level of funding that would be sufficient to care for wild horses and burros, achieve AML, and reduce long-term budgetary needs has been a matter of debate.

²⁵ 16 U.S.C. §1333(b). Other provisions provide for the sale of excess animals.

A particular concern has been the cost of holding animals in facilities, in part in light of declining rates of adoption over the past several years. BLM estimates that the cost of holding animals in all facilities in FY2008 will be nearly three-quarters of its appropriation for wild horse and burro management. The BLM currently needs additional space in long-term holding facilities and has been soliciting bids for new facilities. Most recently, in June 2008, the agency solicited bids for contracts for one or more new pasture facilities. Each facility must be able to provide care for between 500 and 2,500 animals.

Legislative Activity. On April 26, 2007, the House passed H.R. 249 to overturn the changes enacted in the 108th Congress. Specifically, the bill would repeal the authority to sell wild horses and burros, reimpose a ban on the sale of wild horses and burros and their remains for processing into commercial products, and reinstate criminal penalties for processing the remains into commercial products.²⁶ As with the 108th Congress legislation, the debate centered on whether the sale authority would result in the slaughter of healthy animals or whether it is needed as a tool to manage the number of wild horses and burros on the range. There has been no further action on H.R. 249.

In October 2008, the Government Accountability Office (GAO) released a report on BLM management of wild horses and burros.²⁷ GAO examined a number of issues including BLM's progress towards setting and meeting AML; use of adoptions, sales, and holding facilities for managing wild horses and burros off the range; controls to ensure humane treatment of animals; and challenges in program management. Among other findings, GAO determined that if the costs of holding animals in facilities are not controlled, they will overwhelm the program. GAO also concluded that BLM's options for dealing with unadoptable animals are limited, and that because BLM is not destroying animals or selling them without limitation, it is not in compliance with 1971 law. Among its recommendations for executive action, GAO recommended that the Secretary of the Interior direct BLM to discuss with Congress and other interests how best to comply with the 1971 law or to amend it so that BLM would be able to comply.

Wildfire Protection (by Ross W. Gorte)

Background. Recent fire seasons seem to have been getting more severe, with more acres burned and presumably more damage to property and resources than in previous years. Despite early concerns about, and evacuations from, wildfires in California, the 2008 fire season has been relatively mild — 40% fewer acres burned

²⁶ For information on horse slaughter legislation generally, see CRS Report RS21842, *Horse Slaughter Prevention Bills and Issues*, by Geoffrey S. Becker.

²⁷ U.S. Government Accountability Office, *Bureau of Land Management: Effective Long-Term Options Needed to Manage Unadoptable Wild Horses*, GAO-09-77, (Washington, DC: GPO, October 2008). Available on the GAO website at [http://www.gao.gov/docsearch/locate?searched=1&o=0&order_by=rel&old_keyword=GAO-08-196&ft=&search_type=publications&add_topic=&remove_topic=&add_type=&remove_type=&add_fed_type=&remove_fed_type=&add_fed_desc=&remove_fed_desc=&add_year=&remove_type=&keyword=GAO-09-77].

through October 15 than on average in the previous five years. In contrast, in 2005, 2006, and 2007, more area burned than in any other years since record-keeping began in 1960. Many assert that the threat of severe wildfires and the cost of suppressing fires have grown, because many forests have unnaturally high fuel loads (e.g., dense undergrowth and dead trees) and increasing numbers of structures are in and near the forests (the *wildland-urban interface*²⁸).

Administrative Actions. In August 2002, President Bush proposed the Healthy Forests Initiative to improve wildfire protection by expediting projects to reduce hazardous fuels on federal lands. The Healthy Forests Restoration Act of 2003 (HFRA; 16 U.S.C. §§ 6501 et al.) included many of these proposals as well as other provisions. Title I authorized a new, alternative process for reducing fuels on FS or BLM lands in many areas; five other titles indirectly relate to fire protection.²⁹

In addition, the Administration made several regulatory changes reportedly to facilitate fire protection activities. First, additional categories of actions — including fuel reduction and post-fire rehabilitation activities³⁰ — could be excluded from analysis and documentation under the National Environmental Policy Act (NEPA; 42 U.S.C. §§ 4321-4347). (See “FS NEPA Application and Categorical Exclusions,” below.) Second, the administrative review processes were revised to clarify that some emergency actions may be implemented immediately, and others may be implemented after complying with public notice requirements. Other changes to the administrative review process expanded “emergencies” to include those “that would result in substantial loss of economic value to the Government if implementation of the proposed action were delayed.”³¹

Other regulatory changes, such as new NEPA categorical exclusions for small timber harvesting projects and new regulations for FS planning, could affect fuel reduction, public involvement, and environmental impacts. The total impact of the regulatory changes seems likely to be greater discretion for FS action.

Legislative Activity. The 110th Congress has held hearings on aspects of wildfire protection, particularly on wildfire preparedness, cost containment, and the effects of global climate change on wildfires. Several bills on forest health restoration to reduce wildfire threats have been introduced. Companion bills (H.R. 5263 and S. 2593), titled the Forest Landscape Restoration Act, would provide a collaborative (diverse, multi-party) process for geographically dispersed, long-term (10-year), large-scale (at least 50,000-acre) strategies to restore forests, reduce wildfire threats, and utilize the available biomass. The authorization for the fund is \$40 million annually for ten years, and the bills require multi-party monitoring of and reporting on activities. This language also has been included in Title IV of S. 3213, the Omnibus Public Lands Management Act of 2008. The Senate Committee on

²⁸ See CRS Report RS21880, *Wildfire Protection in the Wildland-Urban Interface*, by Ross W. Gorte.

²⁹ See CRS Report RS22024, *Wildfire Protection in the 108th Congress*, by Ross W. Gorte.

³⁰ 68 *Fed. Reg.* 33814 (June 5, 2003).

³¹ FS at 68 *Fed. Reg.* 33582 (June 4, 2003); BLM at 68 *Fed. Reg.* 33794 (June 5, 2003).

Energy and Natural Resources reported S. 2593 on June 16, 2008; the House Committee on Natural Resources held hearings on H.R. 5263 on July 10, 2008. Another bill, Saving American Lives and Investing in Protecting Land and Nature (H.R. 4245), would categorically exclude fuel reduction projects from NEPA analysis if they are consistent with forest plans and “extraordinary circumstances” regulations, covered in a community wildfire protection plan, and within 1½ miles of nonfederal land in the wildland-urban interface and conditions pose a threat to those lands. Other bills are geographically limited, and commonly respond to insect epidemics that threaten to exacerbate wildfire threats. Additional pending legislation would expand or support programs to utilize biomass fuels for electricity, heat, or transportation fuel production.

The 110th Congress also is considering wildfire funding issues.³² For FY2008, the National Fire Plan was funded at \$4.46 billion, including \$1.71 billion in three emergency supplemental appropriations. For FY2009, the Administration requested \$2.83 billion, \$1.63 billion (37%) less than the FY2008 funding. The request included a 17% increase for FS and BLM fire suppression, a 12% decrease for FS fire preparedness, a 9% decrease in other FS wildfire operations, and no emergency funds. Funding for wildland fire management has not yet been determined for FY2009. The Continuing Appropriations Resolution, 2009 (Division A, P.L. 110-329), generally extended funding through March 6, 2009, at the amounts provided in the FY2008 *regular* appropriations act (\$2.75 billion).

Because wildfire funding now constitutes nearly half the FS budget and the FS and BLM may use other unobligated funds after wildfire appropriations are exhausted, some are concerned that wildfire control efforts are delaying or preventing other agency activities, including land management and cooperative assistance. Two bills have been introduced in the House and two in the Senate to establish a separate fund for major wildfire suppression efforts. The Federal Land Assistance, Management and Enhancement (FLAME) Act (H.R. 5541/S. 3256) establishes a separate fund for severe wildfires of at least 300 acres that threaten lives, property, or critical resources. H.R. 5541 was passed by the House on July 9, 2008. The bills express the intent that the annual appropriations to the fund are at the five-year average of emergency fire suppression expenditures, with transfers from the Treasury and any unused fire suppression appropriations. The Emergency Wildland Fire Response Act of 2008 (H.R. 5648) would amend the Cooperative Forestry Assistance Act of 1978 (16 U.S.C. §§ 2101-2111) to establish a fund from appropriations, emergency appropriations, other transferred funds, and earned interest. The fund may be used for declared emergency incidents for wildfires where a cooperative agreement exists and that either are 300 acres with potential for extreme fire behavior or could cause life, property, or other losses. The bill also provides assistance to “fire-ready communities” and authorizes “good neighbor partnerships” for states to implement HRFA projects on federal lands. The House Committee on Natural Resources held hearings on the bill (as well as on H.R. 5541) on April 10, 2008. In the Senate, the Stable Fire Funding Act (S. 1770) would establish separate funds for the BLM and FS to pay 80% of suppression costs that exceed annual appropriations, authorized at \$200 million for the BLM and \$600 million for the FS for FY2008.

³² See CRS Report RL33990, *Wildfire Funding*, by Ross W. Gorte.

FS NEPA Application and Categorical Exclusions

(by Ross W. Gorte and Kristina Alexander)

Background. The FS historically has identified certain activities as not having significant environmental impacts, and has exempted them from analysis and associated public participation under NEPA, except in extraordinary circumstances. Proponents see such *categorical exclusions* (CEs) as a way to expedite actions and reduce agency costs. Opponents charge that some of the excluded actions could have significant impacts, especially if extraordinary circumstances are present, and should be examined and subject to public involvement.

Administrative Action. In 2008, the FS shifted many of its NEPA policies from the *Forest Service Handbook* (FSH) to the *Code of Federal Regulations* (C.F.R.).³³ As part of the rulemaking to make the switch, some regulations were modified. For example, the NEPA process would incorporate “incremental alternative development,” to allow FS decision-making to change while developing alternatives without issuing versions for notice and comment.³⁴ The rule also allows the FS to consider only one alternative when preparing an environmental assessment (EA), if there are no unresolved conflicts concerning alternative uses of available resources.³⁵ Further, the rule limits consideration of cumulative impacts to only those past actions found to be “relevant and useful.”³⁶

Since 2003, the FS has expanded the types of activities that can be conducted without environmental review, increasing the number of types from 18 to 27.³⁷ Some of the nine newer CEs include biomass fuel reduction projects, “small” timber sales, and forest plans.³⁸ Additionally, the FS has modified its application of extraordinary circumstances.³⁹ Previously, the rules appeared to preclude automatic use of a CE in the presence of extraordinary circumstances (e.g., roadless areas or endangered species habitat). The new rule gives the responsible official discretion to determine whether extraordinary circumstances warrant NEPA analysis and public involvement in otherwise exempt projects. Finally, the FS issued new regulations, in 36 C.F.R. Part 215, changing its notice, comment, and appeals procedures for land management planning, particularly including a change that a decision to use a CE could not be administratively appealed.⁴⁰

³³ 73 *Fed. Reg.* 43084 (July 24, 2008).

³⁴ 36 C.F.R. § 220.5(e).

³⁵ 36 C.F.R. § 220.7(b)(2).

³⁶ 36 C.F.R. § 220.4(f).

³⁷ *Forest Service Handbook* (FSH) 1909.15, ch. 30, §§ 30.12, 31.2. Under the rule, the CEs are found at 36 C.F.R. § 220.6.

³⁸ 68 *Fed. Reg.* 33814 (June 5, 2003); 68 *Fed. Reg.* 44598 (July 29, 2003); and 70 *Fed. Reg.* 1023 (Jan. 5, 2005) respectively.

³⁹ 67 *Fed. Reg.* 54622 (Aug. 23, 2002).

⁴⁰ 68 *Fed. Reg.* 33581 (June 4, 2003); 36 CFR part 215.

Legislative Activity. Little legislation has been introduced addressing CEs, and none addressing CEs generally. Two bills (H.R. 2057 and H.R. 2337) would repeal the authority to use CEs for certain energy leases, enacted in the Energy Policy Act of 2005 (P.L. 109-58). Another bill (H.R. 4245) would authorize use of CEs for certain wildfire protection projects.

Judicial Action. The new CE appeals regulation (at 36 C.F.R. Part 215) was challenged. In 2005, a California federal court ruled that the regulation violated the Forest Service Decision Making and Appeals Reform Act (ARA; P.L. 102-381, § 322; 16 U.S.C. § 1612, note) by excluding decisions from the public comment and appeals process and for other reasons.⁴¹ On appeal, the Ninth Circuit reversed the lower court, holding that the challenges to the regulations in Part 215 were premature, except for § 215.12(f).⁴² That section — which provided that CE projects could not be appealed — had been applied by the FS, and therefore was ripe for review. The court held that the rule violated the ARA. The action was brought before the U.S. Supreme Court, which heard arguments on the issue in early October 2008.

Five of the new CE types, including those for fire management activities and limited timber harvesting, were challenged in the U.S. District Court for Alabama.⁴³ In January 2007, the court upheld the regulations, finding that the FS complied with NEPA in adopting the CEs.⁴⁴ The court also considered the regulations under Part 215. It did not expressly consider § 215.12(f), which had been invalidated in August 2006 by the Ninth Circuit, although it refers to the Ninth Circuit decision. The Alabama court held that the issuance of the Part 215 rule followed NEPA. It refused to consider ARA challenges to the Appeal Rule, finding they were not ripe for review because the rule had not been applied yet.

Despite the Alabama District Court's holding, the hazardous fuels reduction CE is not in effect. In December 2007, the Ninth Circuit Court of Appeals ruled that the CE violated NEPA.⁴⁵ The court found that the FS had failed to consider the environmental consequences of such a broad program. Thus, after all the relevant court decisions, the new appeals regulations in Part 215 remain in place, except for § 215.12(f) — that is, invoking a CE is *not* exempt from administrative appeal — and the FS cannot use the hazardous fuels reduction CE.

Other Issues

Other federal lands topics are of interest to the 110th Congress. They include national forest roadless areas, national forest planning, national forest county payments, BLM land sales, and grazing management.

⁴¹ Earth Island Institute v. Pengilly, 376 F. Supp. 2d 994 (E.D. Cal. 2005).

⁴² Earth Island Institute v. Ruthenbeck, 459 F.3d 954 (9th Cir. 2007).

⁴³ The challenged regulations are found at FSH 1909.15, ch. 30, §§ 31.2(10) through (14).

⁴⁴ Wildlaw v. U.S. Forest Service, 471 F. Supp. 2d 1221, 1242-43 (M.D. Ala. 2007).

⁴⁵ Sierra Club v. Bosworth, 510 F.3d 1016 (9th Cir. 2007).

Roadless Areas in the National Forest System. (by Ross W. Gorte and Kristina Alexander)⁴⁶ Potential wilderness areas in the National Forest System were examined in the 1970s and early 1980s; 60 million acres of *roadless areas* were inventoried in the process. Some believe that the remaining roadless areas (that have not been designated as wilderness by Congress) should be protected from development, while others contend that the areas should be available for development-type uses.

The principal Clinton Administration rule affecting roadless areas, issued in 2001, resulted in a nationwide approach that curtailed most road building and timber cutting in roadless areas.⁴⁷ The Bush Administration issued a final rule in 2005 to replace the Clinton rule, allowing governors 18 months to petition the FS for a special rule for roadless areas in all or part of their state.⁴⁸ Until such a new regulation was finalized or until each forest plan was amended or revised, the FS was to manage roadless areas in accordance with interim directives that place most decisions with the regional forester or the Chief. Even though the Bush rule was enjoined and the 18-month period has expired, the Administration has stated that under the Administrative Procedure Act (5 U.S.C. §§ 701, et seq.) states can still petition for a special rule. A final rule for Idaho was published on October 16, 2008.⁴⁹

Numerous lawsuits have tracked the roadless rules' course. In April 2001, the Clinton roadless rule was enjoined by the U.S. District Court for Idaho,⁵⁰ but that decision was overturned by the Ninth Circuit.⁵¹ In July 2003, the U.S. District Court for Wyoming stopped application of the Clinton roadless rule — the second injunction, after the first was overturned.⁵² In September 2006, the U.S. District Court for Northern California found that the Bush roadless rule violated NEPA and the Endangered Species Act (ESA; 16 U.S.C. §§ 1531-1540). The court set aside the Bush roadless rule and reinstated the Clinton rule.⁵³ The FS filed an appeal in the Ninth Circuit, challenging the September 2006 decision. After a new suit was filed, the U.S. District Court for Wyoming found the Clinton roadless rule had violated NEPA and the Wilderness Act, and enjoined it.⁵⁴ The Wyoming court said it had the authority to do this despite the California court's order because it (the Wyoming court) was the only court to consider the legality of the Clinton roadless rule, and so there was no conflict between the court decisions. Because of these conflicting court

⁴⁶ For more detailed information, see CRS Report RL30647, *National Forest System Roadless Area Initiatives*, by Kristina Alexander and Ross W. Gorte.

⁴⁷ 66 *Fed. Reg.* 3244 (Jan. 12, 2001).

⁴⁸ 70 *Fed. Reg.* 25654 (May 13, 2005).

⁴⁹ 73 *Fed. Reg.* 61456-61496 (Oct. 16, 2008).

⁵⁰ *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231 (D. Idaho 2001).

⁵¹ *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094 (9th Cir. 2002).

⁵² *Wyoming v. U.S. Dept. of Agriculture*, 277 F. Supp. 2d 197 (D. Wyo. 2003).

⁵³ *California v. U.S. Dept. of Agriculture*, 459 F. Supp. 2d 874 (N.D. Cal. 2006).

⁵⁴ *Wyoming v. U.S. Dept. of Agriculture*, 570 F. Supp. 2d 1309 (D. Wyo. 2008).

rulings, it is not clear what rules currently govern roadless area management and protection.

Two bills have been introduced in the 110th Congress addressing roadless area management. H.R. 2516 would direct implementation of the Clinton roadless rule. S. 1478 would have a similar effect, but would largely enact the provisions of the Clinton rule rather than directing that the rule be implemented. Both bills were introduced on May 24, 2007; no further action has been taken. Two additional bills, H.R. 1975 (the Northern Rockies Ecosystem Protection Act) and H.R. 7090 (the Act to Save America's Forests), would require identification and protection of roadless areas as part of broader legislation. Hearings were held on H.R. 1975 on October 18, 2007; H.R. 7090 was introduced on September 25, 2008.

National Forest Planning. (by Ross W. Gorte and Kristina Alexander) The FS is required to prepare comprehensive, integrated land and resource management plans for the national forests.⁵⁵ The plans are to be developed and revised with public involvement (16 U.S.C. § 1604(d)), must provide for the multiple use and sustained yield of goods and services (§ 1604(e)), and must be prepared in accordance with NEPA (§ 1604(g)(1)). Regulations to implement forest planning were adopted in 1979 and substantially revised in 1982.⁵⁶

The Clinton Administration finalized new rules (to be phased in over three years) that emphasized planning for the biological sustainability of the national forests.⁵⁷ The Bush Administration delayed the effective date of the Clinton rules three times, then replaced them before they went into effect.

The Bush Administration promulgated final rules in 2005 to balance biological and socioeconomic sustainability, to make fewer decisions at the national level by reducing regulatory guidelines, and to alter public input in the planning process. The rules also would have exempted plans from NEPA and ESA, because the Administration views plans as guides to decision-making that would not include site-specific decisions.⁵⁸ The Bush planning rules were challenged, with plaintiffs asserting that the rules reduced environmental protection without adequate opportunities for public comment and consideration of the effects on endangered species. On March 30, 2007, the U.S. District Court for Northern California remanded the Bush rules to the agency because the rules violated NEPA, ESA, and APA.⁵⁹ The Administration appealed the decision, but later withdrew the appeal. The FS reissued the 2005 rule as a proposed rule to meet the court's requirement to

⁵⁵ The requirement is in the Forest and Rangelands Renewable Resources Planning Act of 1974, as amended (16 U.S.C. §§ 1600-1614). Substantial detail on the considerations and analysis to be included in the plans was added in the National Forest Management Act of 1976 (NFMA). Hence, forest planning is also often called NFMA planning.

⁵⁶ 47 *Fed. Reg.* 43037 (Sept. 30, 1982).

⁵⁷ 65 *Fed. Reg.* 67514 (Nov. 9, 2000).

⁵⁸ 70 *Fed. Reg.* 1022 (Jan. 5, 2005).

⁵⁹ *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 481 F. Supp. 2d 1059 (N.D. Cal. 2007).

provide notice.⁶⁰ To comply with the court's other mandates, the FS issued a draft environmental impact statement (DEIS) and consulted with the Fish and Wildlife Service under the ESA. The final planning rules were issued in April 2008.⁶¹ Two lawsuits have been filed challenging the rules, again alleging that the rules reduced environmental protection without adequate opportunities for public comment and consideration of the effects on endangered species.

National Forest County Payments. (by Ross W. Gorte) The Secure Rural Schools and Community Self-Determination Act of 2000 (SRS; 16 U.S.C. § 500, note)⁶² provided an alternative to two major programs that compensate counties for the tax-exempt status of certain federal lands.⁶³ Payments under SRS expired at the end of FY2006, but the FY2007 emergency supplemental appropriations act (P.L. 110-28)⁶⁴ extended the payments for one year (\$525 million). Bills to extend the SRS payments have been introduced, but legislation that creates new or extends existing mandatory spending (like SRS payments) generally must be offset by new revenues or other changes in mandatory spending programs. A four-year extension (FY2008-FY2011), with complex modifications to shift more of the payments toward counties with large federal landholdings but low historic revenues from those lands, was enacted in the Emergency Economic Stabilization Act of 2008 (P.L. 110-343, in Title VI of Division C). The enacted provision also provides five years (FY2008-FY2012) of mandatory spending for the Payments-In-Lieu-of Taxes (PILT) program.

BLM Land Sales. (by Carol Hardy Vincent) The President's FY2009 budget request included a proposal to extend and amend BLM's authority to sell or exchange land under the Federal Land Transaction Facilitation Act (FLTFA, 43 U.S.C. § 2301). The law currently provides for the sale or exchange of land identified for disposal under BLM's land use plans "as in effect" at enactment. That authority will expire on July 24, 2010. Proceeds from the sale or exchange of public land are to be deposited into a separate Treasury account. Funds in the account are available to both the Secretary of the Interior and the Secretary of Agriculture to acquire inholdings and other nonfederal lands (or interests therein) that are adjacent to federal lands and contain exceptional resources. The law's purposes included allowing for the reconfiguration of land ownership patterns to better facilitate resource management, improving administrative efficiency, and increasing the effectiveness of the allocation of fiscal and human resources.

⁶⁰ 72 *Fed. Reg.* 48513 (Aug. 23, 2007).

⁶¹ 73 *Fed. Reg.* 21467 (Apr. 21, 2008).

⁶² See CRS Report RL33822, *The Secure Rural Schools and Community Self-Determination Act of 2000: Forest Service Payments to Counties*, by Ross W. Gorte.

⁶³ FS and some BLM payments have traditionally been based on revenues — 25% of FS gross revenues returned to the states for use on roads and schools in the counties where the FS lands are located; and 50% of BLM revenues from the Oregon & California (O&C) grant lands returned to the counties containing the O&C lands. FS and BLM revenues declined precipitously in the early 1990s due to declining timber sales to protect northern spotted owls, water quality, and other resources.

⁶⁴ The U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007.

The President's proposal would extend FLTFA until January 1, 2018. It would direct using updated land management plans for determining which lands to sell or exchange. Further, the proposal would change the distribution of the proceeds to allow 70% of the net proceeds to be deposited in the general fund of the Treasury, with "a portion" available to the BLM for restoration projects. It would cap receipts retained by Interior at \$60 million annually. The Administration had estimated that these changes would generate \$193 million in total revenue for the Treasury from FY2008 through FY2012. The Administration made a similar proposal in its FY2007 and FY2008 budgets. The changes were promoted to reduce the federal deficit, to ensure that the public will benefit from land sales, and to reduce the amount of money not subject to oversight during the appropriations process. Legislation would be needed to effect these changes, and no such legislation has been introduced in Congress to date.

On February 5, 2008, the Government Accountability Office released a report on land sales and acquisitions under FLTFA.⁶⁵ The agency was asked to determine the amount of money raised by sales/exchanges under the act and the amount spent on subsequent acquisitions. The agency also was asked to identify challenges to future land sales and acquisitions. The agency concluded that BLM faces several challenges to conducting land sales, including insufficient realty staff and little emphasis on selling land identified as available for disposal. GAO also concluded that there are several challenges to completing land acquisitions. They include the requirement of FLTFA that most revenues raised through land sales/exchanges be used for acquisitions in the same state, and the lack of an effective mechanism for determining which lands to acquire.

Grazing Management. (by Carol Hardy Vincent and Kristina Alexander) The BLM issued new grazing regulations, effective August 11, 2006.⁶⁶ The U.S. District Court for Idaho enjoined all the 2006 regulations from taking effect.⁶⁷ The court found that the BLM had violated three laws in promulgating the regulations — NEPA, ESA, and FLPMA. In particular, the court criticized the 2006 regulations' reduction of public input into BLM day-to-day decisions such as allotment boundaries and temporary permits. It also found that the BLM should have consulted with the Fish and Wildlife Service regarding the changes, as it had done for the 1995 changes to grazing regulations. Further, the court criticized the BLM for eliminating comments by DOI scientists from a NEPA document. Before the regulations could be reinstated, the BLM would have to satisfy the court that it had examined the environmental impacts under NEPA, performed a § 7 consultation under ESA, and restored the FLPMA public comments provisions. The court did not require the BLM to use the 1995 grazing regulations, leaving that decision to the BLM. The

⁶⁵ U.S. Government Accountability Office, *Federal Land Management: Federal Land Transaction Facilitation Act Restrictions and Management Weaknesses Limit Future Sales and Acquisitions*, GAO-08-196, (Washington, DC: GPO, February 5, 2008). Available on the GAO website at [http://www.gao.gov/docsearch/locate?searched=1&o=0&order_by=rel&search_type=publications&keyword=GAO-08-196&Submit=Search].

⁶⁶ The new grazing regulations, and related information about the reform effort, are available at [<http://www.blm.gov/grazing/>].

⁶⁷ *Western Watersheds Project v. Kraayenbrink*, 538 F. Supp. 2d 1302 (D. Idaho 2008).

BLM currently is operating under those regulations, which were in effect before the 2006 changes. However, the provisions on conservation use permits that were enjoined in 1996 are not in effect.⁶⁸

The BLM had revised its grazing regulations (in 2006) on the grounds that changes were needed to comply with court decisions, increase flexibility for managers and permittees, improve administrative procedures and business practices, and promote conservation. While lauded by some, the reform effort had been criticized by others as unnecessary or harmful. Some of the regulatory changes would (1) allow title to range improvements to be shared by the BLM and permittees, (2) allow permittees to acquire water rights for grazing if consistent with state law, (3) change the definition of *grazing preference* to include an amount of forage, (4) eliminate conservation use grazing permits, (5) extend the time to remedy rangeland health problems, and (6) reduce occasions where the BLM is required to consult with the public. The BLM did not address some controversial issues, such as revising the grazing fee. The BLM had expected to return to the consideration of related grazing policy changes once the new regulations were in effect.

Additional Reading: Current and Historical

CRS Report RL33872, *Arctic National Wildlife Refuge (ANWR): New Directions in the 110th Congress*, by M. Lynne Corn, Bernard A. Gelb, and Kristina Alexander.

CRS Report RL34273, *Federal Land Ownership: Current Acquisition and Disposal Authorities*, by Ross W. Gorte and Carol Hardy Vincent.

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

CRS Report RL32244, *Grazing Regulations: Changes by the Bureau of Land Management*, by Carol Hardy Vincent.

CRS Report RL34461, *Interior, Environment, and Related Agencies: FY2009 Appropriations*, coordinated by Carol Hardy Vincent.

CRS Report RS21967, *Land Exchanges: Bureau of Land Management Process and Issues*, by Carol Hardy Vincent.

CRS Report RL33014, *Leasing and Permitting for Oil and Gas Development on Federal Public Domain Lands*, by Aaron M. Flynn and Ryan J. Watson.

CRS Report RL33908, *Mining on Federal Lands: Hardrock Minerals*, by Marc Humphries.

⁶⁸ See the BLM instruction memorandum on the agency's website, at [http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2007/im_2007-137__0.html].

CRS Report RL30647, *National Forest System Roadless Area Initiatives*, by Kristina Alexander and Ross W. Gorte.

CRS Report RL33806, *Natural Resources Policy: Management, Institutions, and Issues*, coordinated by Carol Hardy Vincent, Julie Jennings, and Nicole T. Carter.

CRS Report RS22928, *Oil Development on Federal Lands and the Outer Continental Shelf*, by Marc Humphries.

CRS Report RL34772, *Proposals to Merge the Forest Service and the Bureau of Land Management: Issues and Approaches*, by Ross W. Gorte.

CRS Report RL33525, *Recreation on Federal Lands*, coordinated by Kori Calvert and Carol Hardy Vincent.

CRS Report RL33822, *The Secure Rural Schools and Community Self-Determination Act of 2000: Forest Service Payments to Counties*, by Ross W. Gorte.

CRS Report RL34690, *Wild Horse and Burro Issues*, by Carol Hardy Vincent.

CRS Report RL33827, *Wilderness Laws: Permitted and Prohibited Uses*, by Ross W. Gorte.

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

CRS Report RL34517, *Wildfire Damages to Homes and Resources: Understanding Causes and Reducing Losses*, by Ross W. Gorte.

CRS Report RL33990, *Wildfire Funding*, by Ross W. Gorte.

CRS Report RS21880, *Wildfire Protection in the Wildland-Urban Interface*, by Ross W. Gorte.