Order Code IB10076

Issue Brief for Congress

Public (BLM) Lands and National Forests

Updated April 4, 2003

Ross W. Gorte and Carol Hardy Vincent, Coordinators
Resources, Science, and Industry Division

CONTENTS

Public (BLM) Lands and National Forests

SUMMARY

The 108th Congress is likely to address 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). A key issue is how to balance the protection and development of these lands. Questions relate to how to protect federal lands from catastrophic wildfires and whether to preserve undisturbed roadless areas. Other questions relate to whether and how to increase access to federal lands for energy and mineral development, and whether there are sufficient environmental safeguards for mining operations. Still other issues involve whether to limit presidential authority for creating national monuments and how to determine use of monument lands.

Wildfire Protection. Threats from wildfires seem to have become more severe. The Administration's proposed a Healthy Forests Initiative to protect communities from wildfires by reducing fuels. Numerous bills were introduced in the 107th Congress on this issue, but none was enacted; however, one provision was included in the FY2003 Omnibus Appropriations Act. Other aspects are being pursued through proposed regulatory changes.

Energy Resources. The Administration and the 108th Congress continue to examine whether to increase access to federal lands for energy and mineral development. The 107th Congress passed major energy legislation but the differences could not be resolved 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. Implementation was enjoined, but the appellate court reversed the decision. The Bush Administration has issued interim direction.

R.S. 2477 Rights of Way. Revised Statute (R.S.) 2477 granted rights of way for highways across unreserved federal lands. State law largely governs the validity of highways under R.S. 2477, but the extent of valid rights of way is not clear in some states. This might allow unrestricted public access across (and to) federal lands, including sensitive lands and potential wilderness. Congress prohibited R.S. 2477 regulations in 1996, but the Bush Administration recently finalized regulations on "disclaimers of interest" for clearing title to R.S. 2477 highway easements.

National Monuments and the Antiquities Act. The Antiquities Act of 1906 authorizes the President to establish national monuments on federal lands. Congress has considered limiting the authority of the President and amending particular monuments. Governors Island National Monument was conveyed to the National Trust for Historic Preservation and then back to the government; the President subsequently reestablished the Monument. The Administration also is developing management plans for some new monuments.

Hardrock Mining and Millsites. Two mineral issues have been controversial recently. The first is whether to clarify the General Mining Law of 1872 regarding the number and size of millsites per mining claim. Currently, the Department of the Interior is drafting a new opinion on this issue. The second issue relates to the Bush Administration's revisions of the hard rock mining regulations finalized by the Clinton Administration.

MOST RECENT DEVELOPMENTS

House and Senate committees are marking up energy bill drafts. The House draft includes provisions that would lead to demonstration technologies for oil and gas recovery in unproven, unconventional reservoirs on public and private lands. The Senate draft would require further analysis of resource assessments, land withdrawals, and impediments to oil and gas development on public lands. In other energy areas, the Interior Department is drafting a new opinion regarding the number and size of millsites per mining claim and is reviewing a decision on a proposed hardrock mining rule.

On January 31, 2003, Governors Island National Monument was conveyed to the National Trust for Historic Preservation and then back to the government. The President subsequently reestablished the Monument on February 7, 2003, with approximately 22 acres.

On December 12, 2002, the Ninth Circuit Court of Appeals reversed the district court's ruling on its preliminary injunction to prevent implementation of the Clinton regulations to protect roadless areas; Idaho has requested a rehearing and en banc review of the decision. On January 6, 2003, the Administration finalized regulations on "disclaimers of interest" to clear title to R.S. 2477 highway easements, possibly conflicting with a congressional prohibition on R.S. 2477 regulations unless explicitly authorized by law.

The lack of wildfire legislation in the 107th Congress led the Administration to propose categorical exclusions from the National Environmental Policy Act (NEPA) for fuel projects on December 16, 2002, and new administrative appeals regulations on December 18.

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.

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 FS and BLM wilderness issues, see 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 particular issues affecting BLM and FS lands that are likely to be examined during the 108th Congress. One issue not discussed in depth in this brief is land acquisition. The principal source of land acquisition funding for BLM and the Forest Service (and the Park Service and Fish and Wildlife Service as well) is the Land and Water Conservation Fund (LWCF). Under current law, the fund is authorized at $900 million annually, but only that portion of the total that is appropriated is available to the federal agencies. Most of the appropriations are earmarked to specific units of public land; in some instances congressional priorities agree with agency priorities, and in others, they do not. Recent Congresses have provided generally increasing amounts under this funding process. In addition, legislation has been introduced in the prior 3 Congresses to fully appropriate the fund annually and to make it mandatory funding, removing that discretion from the appropriators. One version of this legislation, known as CARA, passed the House in the 106th Congress, and a slightly different version was reported by the House Resources Committee in the 107th Congress. Action in the 108th Congress seems less likely, however, as the projection of a surplus has been replaced by a deficit, and as federal spending priorities change in the aftermath of 9/11. It is also unclear how these events will affect future funding levels under the current system. For more information, see CRS Issue Brief IB10015 and CRS Report RL30444.

Another issue not examined in this brief is federal land management planning. 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.

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 RL31306. 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 IB10094. For information on 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 environmentalists 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. The legislative proposal accompanying this initiative proposed a fuel reduction program to reduce the buildup of hazardous fuels. The program would have given priority to the "wildland-urban interface," municipal watersheds, and areas affected by insects and diseases. The proposal sought to expedite consultations on endangered species and establish a collaborative process for public involvement. However, it would not have allowed the public to request an administrative review of project proposals, would have constrained judicial review, and would have prohibited restraining orders and injunctions. It also directed the courts to consider the effect of not reducing fuels and defer to agency findings that the short-term harm from fuel reduction activities is outweighed by the long-term harm of not taking action. In addition, the proposal would have authorized stewardship (goods-for-services) contracts, essentially allowing the agencies to use timber, instead of cash, to pay contractors for various land management services, e.g., thinning, noxious weed control, and road and trail maintenance.

Because such legislation was not enacted in the 107th Congress, the Administration proposed two changes in the rules and regulations to facilitate fuel reduction. One is a proposal (67 Fed. Reg. 77038, Dec. 16, 2002) to add two new categories of actions to be excluded from NEPA analysis and documentation: fuel reduction and post-fire rehabilitation activities. These categorical exclusions would not be allowed in wilderness or wilderness study areas. Projects could not include herbicide or pesticide use or new permanent road construction, but the exclusions could encompass timber sales if fuel reduction were the primary purpose of the sale.

The second change is a proposal to revise the administrative appeals process (67 Fed. Reg. 77451, Dec. 18, 2002). Among the many changes is a clarification that actions in emergency situations are to be implemented immediately, without stays of action during the appeal. The proposal 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. It also would exclude notice and opportunity for the public to comment on or to appeal actions categorically excluded from NEPA, such as the fuel reduction activities discussed above.

These proposed changes must be read in conjunction with other proposed regulatory changes to understand the potential consequences for fuel reduction, public involvement, and

environmental impacts. New forest planning regulations were proposed on December 6, 2002 (67 Fed. Reg. 72770)[1], 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. Numerous bills were introduced late in the 107th Congress to address the wildfire threats on federal lands. Bills focused on several issues — on environmental concerns, especially NEPA analysis, endangered species consultation, and large tree retention; public involvement and challenges to decisions, including public participation under NEPA, administrative appeals, and judicial challenges; priorities for action, such as the wildland-urban interface and municipal watersheds; and limitations for action, such as total acreage treated and areas excluded from possible action. (See CRS Report RL31679, *Wildfire Protection: Issues in the 107th Congress*.) None was enacted, and various proposals seem likely to be reintroduced in the 108th Congress. Congress also continues to address wildfire protection through annual agency appropriations. The FY2003 Consolidated Appropriations Act (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.

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 U.S. Geological Survey (USGS) estimates that significant oil and gas resources exist below some federal lands now off-limits, particularly in the Rocky Mountain region. The industry contends that entry into these areas 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

[1] 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.

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. The underlying 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. 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 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.

Legislative Activity. The House and Senate passed comprehensive energy legislation in the 107th Congress (*H.R. 4*) but the measure stalled in conference. Conferees reached agreement on several issues but agreement on the most controversial issues—such as ANWR, reforming electricity regulations, and energy tax incentives—remained elusive. Passing comprehensive energy legislation is considered a priority in the 108th Congress. House and Senate committees are currently marking up energy bill drafts. The House draft includes provisions that would lead to demonstration technologies for oil and gas recovery in unproven, unconventional reservoirs on public and private lands. The Senate draft would require further analysis of resource assessments, land withdrawals, and impediments to oil and gas development on public lands.

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). New rules were finalized with respect to: (1) the roadless areas; (2) the NFS roads that make up the Forest Development Transportation System, and (3) the FS planning process. These rules were intertwined and each part affects the others. On December 6, 2002, the Bush Administration proposed new rules for the planning process. Congressional and public attention have focused on roadless areas, and that issue is discussed here. (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. President Clinton's approach 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.

Environmentalists and those favoring less developed recreation generally supported the regulations and urged greater protections, while the extractive industries and those favoring greater access (e.g., for developed recreation and hunting) generally opposed them.

On May 10, 2001, a U.S. district court judge issued a preliminary injunction postponing implementation of the 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, noting that the district court had wrongfully concluded the plaintiffs were likely to succeed on the merits and accepted a minimal showing of irreparable harm, and thus incorrectly issued the injunction. On December 26, 2002, the State of Idaho filed a motion for a rehearing and *en banc* review of the decision, but there has not yet been a decision on this motion.

Following the May, 2001 court injunction, the Bush Administration expanded the debate over protection of roadless areas. In an advance notice of proposed rulemaking (66 Fed. Reg. 35918), the Forest Service asked for public comment on whether and how to change the Clinton Administration's roadless rules. On July 26, 2002, the Administration published a report on the comments received, but no new roadless rules have been proposed.

While considering new rules, the Bush Administration has issued a series of directives constituting interim guidance on roadless area management. The most recent direction (66 Fed. Reg. 65796, Dec. 20, 2001) places most decisions on roadless area management 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 also the position taken in the proposed planning regulations. In addition, the Forest Service has proposed three changes in categorical exclusions to NEPA compliance: (1) allowing decisionmakers to determine whether the presence of extraordinary circumstances necessitates an environmental analysis (66 Fed. Reg. 48412, Sept 20, 2001), (2) adding a categorical exclusion for fuel reduction and fire rehabilitation activities (67 Fed. Reg. 77038, Dec. 16, 2002), and (3) adding a categorical exclusion for small timber sales (68 Fed. Reg. 1026, Jan 8, 2003). If finalized in their current form, they could allow some activities in roadless areas without environmental studies, public notice and comment, or appeals.

Legislative Activity. Congress may consider legislation on forest management in general or on the roadless areas issue in particular. One bill in the 107th Congress would have directed management of inventoried roadless areas in accordance with the final rule promulgated by the Clinton Administration; another would have prohibited road construction and timber harvesting in inventoried roadless areas. No action occurred on either bill.

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 lands, including sensitive lands and potential wilderness. 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 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 changed some of the relevant definitions. However, the Secretary 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 clears title to property or interests in property with respect to possible interests of the United States. The regulations expand those who can apply for a disclaimer to include states, subdivisions of states, and "creations" of states. It is not clear what entities might be included in this last group, but it might include special commissions. It is anticipated that disclaimers will be used to clear title to lands beneath navigable waters and to R.S. 2477 highway rights-of-way. BLM asserts in the explanatory material accompanying the new regulations that they do not trigger the congressional direction that regulations "pertaining to" R.S. 2477 are not effective unless authorized by Congress, because the disclaimer regulations address only the procedures for obtaining disclaimers. Critics note that the BLM itself indicates an awareness that the newly-broadened process will be used for increased R.S. 2477 filings and the critics therefore conclude that the regulations violate the congressional prohibition.

Legislative Activity. Congress has not addressed the issue since 1996. The language in §108 of the FY1997 Interior Appropriations Act — prohibiting final regulations on R.S. 2477 rights of way without express authorization in an Act of Congress — has been characterized as permanent law, and thus re-enactment of the provision in subsequent appropriations acts has been seen as unnecessary. Nonetheless, in light of the new disclaimer regulations, Congress might again address the issue.

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, has been controversial. 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.

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. P.L. 108-7, which includes FY2003 funds for Interior and related agencies, bars funds in the law 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 monuments. A similar provision was enacted for FY2002. A 108th Congress bill (H.R. 1629) seeks to exclude private property from the boundaries of the Upper Missouri River Breaks National Monument; a similar bill was introduced last Congress.

In the 107th Congress, several monument-related measures were considered but only one was enacted—to allow hunting in the expanded portion of the Craters of the Moon National Monument (P.L. 107-213). Among those considered was a bill to 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 have established a process for input into presidential monument designations, and required monument management plans to be developed in accordance with the National Environmental Policy Act of 1969. The Bush Administration testified in support of this bill. Three bills would have governed management, and transferred management, of Governors Island National Monument. Another would have modified the boundaries of the Agua Fria National Monument and governed the monument's expansion and management.

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 on-going mining operations from this decision. The Bush Administration is drafting a new opinion. (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.

Also on October 30, 2001 (66 Fed. Reg. 54863), BLM 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. Currently, a new millsite opinion has been drafted, but has not received final approval. DOI is not releasing information regarding its focus, specific contents, or time frame for consideration.

Legislative Activity. The millsite issue and hardrock mining regulations were not addressed in 107th Congress laws and have not been addressed in 108th Congress bills to date.

LEGISLATION

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 Committees on Agriculture and on Resources.

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.

H.R. 1042 (Udall, M.)

The Forest Restoration and Fire Risk Reduction Act would authorize 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 Committees on Agriculture and on Resources.

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.

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.

FOR ADDITIONAL READING

CRS Report RL31096, *Bush Energy Policy: Overview of Major Proposals and Legislative Action*, by Robert L. Bamberger and Mark E. Holt, coordinators.

CRS Issue Brief IB10080, *Energy Policy: Setting the Stage for the Current Debate*, by Robert L. Bamberger.

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

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

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 RL31427, *Omnibus Energy Legislation: H.R. 4 Side-by-side Comparison*, by Mark Holt and Carol Glover, coordinators.

CRS Report RL31679, *Wildfire Protection: Legislation in the 107th Congress and Issues in the 108th Congress*, by Ross W. Gorte.