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# THE WILDERNESS ACT'S IMPACT ON MINING ACTIVITIES: POLICY VERSUS PRACTICE

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## INTRODUCTION

“[T]o secure for the American people of present and future generations the benefits of an enduring resource of wilderness,” Congress enacted the Wilderness Act of 1964.<sup>1</sup> The Wilderness Act established a National Wilderness Preservation System, which set aside 9.1 million acres of federal “wilderness” land<sup>2</sup> as a “down payment” to secure Congress’s commitment to preserve land—unimpaired—for the use and enjoyment of future generations.<sup>3</sup> In addition, the Wilderness Act directed the Secretaries of Agriculture and Interior to review all the land under their respective jurisdictions for suitability of classification as new wilderness areas within ten years, and to submit their recommendations to the President.<sup>4</sup> Today, even after thirty-five years, the Wilderness Act still stands as one of the most notable expressions of American preservationist policy.

The Wilderness Act was a product of congressional compromise between preservationists on the one hand and commercial interests on the other. The compromise did not come quickly or easily—nine years of

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1. Pub. L. No. 88-577, 78 Stat. 890 (codified as amended at 16 U.S.C. §§ 1131–1136 (1994)).

2. Beginning in 1929, the Forest Service classified wilderness-type areas into four categories: primitive, wilderness, wild, and canoe. See Kenneth D. Hubbard, *Ah, Wilderness! (But What About Access and Prospecting?)*, 15 ROCKY MTN. MIN. L. INST. 585, 587 (1969). The Wilderness Act took the latter three categories and designated them as “wilderness areas.” Wilderness Act § 2(a), 16 U.S.C. § 1131(a). Congress excluded “primitive” areas because the characteristics of this classification were not specifically defined; however, Congress felt that after a thorough review such lands would be eligible for inclusion. See Wilderness Act § 3(b), 16 U.S.C. § 1132(b).

3. CRAIG W. ALLIN, *THE POLITICS OF WILDERNESS PRESERVATION* 136 (1982).

4. See Wilderness Act § 3(c), 16 U.S.C. § 1132(c). Congress, however, retained the sole authority to establish new “wilderness” lands. See Wilderness Act § 3(b), 16 U.S.C. § 1132(b).

debate and sixty-five revisions preceded the passage of the Act.<sup>5</sup> Although mainly preservation-oriented, the final version of the Wilderness Act allowed for certain uses of wilderness areas typically considered incompatible with preservation, including limited mineral exploration and development.<sup>6</sup> As part of the compromise, Congress imposed several restrictions on mining activities in wilderness areas within national forest lands, while at the same time establishing protection for certain "valid existing rights" in designated wilderness areas.<sup>7</sup>

This article examines the influence of the Wilderness Act on the treatment of mining claims, including "valid existing rights," located in wilderness areas. Part I of this article discusses the mining industry's influence on development of the Wilderness Act during the Act's turbulent nine-year legislative history. Part II examines the Wilderness Act's impact on mineral exploration and development. Part III analyzes how the federal land management agencies and courts have applied the concept of valid existing rights to mining claims in wilderness areas. Part IV discusses current issues relating to mining claims and wilderness that are likely to continue to fuel debate and legal development.

## I. THE MINING INDUSTRY'S INFLUENCE ON THE WILDERNESS ACT

Prior to the passage of the Wilderness Act of 1964, preservation remained a secondary concern to the exploration and development of mineral deposits within the public domain.<sup>8</sup> The General Mining Law of 1872<sup>9</sup> (General Mining Law) allowed mining interests free access to national forest areas designated by the U.S. Forest Service as "wilderness," "wild," "canoe," and "primitive."<sup>10</sup> This continued free access under the mining laws, coupled with limited Forest Service regulation, motivated preservationists to establish a statutory wilderness system.<sup>11</sup> Preservationists wanted to pass legislation that would declare large areas of na-

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5. See SAMUEL TRASK DANA & SALLY K. FAIRFAX, *FOREST AND RANGE POLICY* 217 (2d ed. 1980).

6. See Wilderness Act § 4(d)(2)-(3), 16 U.S.C. § 1133(d)(2)-(3). The general rule is, "[e]xcept as otherwise provided in this Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use." Wilderness Act § 4(b), 16 U.S.C. § 1133(b). Exceptions to the general rule can include, in some regulated form or another, the use of aircraft and motorboats, as well as measures necessary to control fire, insects, or disease. See Wilderness Act § 2(d)(1), 16 U.S.C. § 1133(d)(1).

7. See Wilderness Act § 4(d)(3), 16 U.S.C. § 1133(d)(3).

8. See generally CHRISTOPHER MCGRORY KLYZA, *WHO CONTROLS PUBLIC LANDS? MINING, FORESTRY, AND GRAZING POLICIES, 1870-1990*, at 27-37 (1996) (discussing the ongoing tension between preservationists and mining advocates); Donna J. Loop, Comment, *Claiming the Cabinets: The Right to Mine in Wilderness Areas*, 7 *PUB. LAND L. REV.* 45, 45-46 (1986) (analyzing the complex relationship between the Mining Act and the Wilderness Act through a case study of the Cabinet Mountains in Montana).

9. General Mining Law of 1872, ch. 159, 17 Stat. 91 (codified as amended in scattered sections of 30 U.S.C.).

10. See KLYZA, *supra* note 8, at 37-38.

11. See *id.*

tional lands "wilderness" and make them off limits to all development, including mining.<sup>12</sup> Strong opposition from mining interests met the preservation movement, however, because any wilderness law precluding mining challenged the federal government's nearly century-old policy of open access to public lands for purposes of mining claim location, discovery, and patent.<sup>13</sup> As the movement to curtail mining on national forest lands gained momentum, these divergent philosophies came to a head in the late 1950s and early 1960s in the battle over the Wilderness Act.<sup>14</sup>

### A. *Early Legislation*

The Wilderness Act's turbulent history began in 1956 when Senator Hubert Humphrey of Minnesota introduced the nation's first wilderness bill.<sup>15</sup> Shortly thereafter, in June of 1957, the first congressional hearing on wilderness legislation took place.<sup>16</sup> Senator Humphrey's pro-preservation bill stated that "no portion of any area constituting a unit of the National Wilderness Preservation System shall be devoted to . . . prospecting, mining or the removal of mineral deposits."<sup>17</sup> Senator Humphrey and other wilderness backers thus began with a bill that contained no compromises for commercial interests.<sup>18</sup>

It was not long, however, before opposition to Senator Humphrey's bill surfaced. The American Mining Congress (AMC) testified against the bill at congressional hearings, arguing that the bill hurt both the mining industry in particular, and the nation as a whole.<sup>19</sup> During the hearings, the AMC and other mining industry representatives developed several objections to wilderness legislation that would permeate the entire debate over the Wilderness Act.<sup>20</sup> Foremost, the AMC argued that the withdrawal of land from public mineral exploration and development contradicted the historical policy of free access to public lands.<sup>21</sup> Mining industry supporters took the position that the Wilderness Act would un-

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12. *See id.* at 38.

13. *See id.* at 39. Procedures for locating and patenting a mining claim under the General Mining Law are discussed in Part II of this article.

14. *See infra* Part I.A.

15. S. 4013, 84th Cong. (1956).

16. *See National Wilderness Preservation Act: Hearings on S. 1176 Before the Comm. on Interior and Insular Affairs*, 85th Cong. (1957) [hereinafter *S. 1176 Hearings*]. The hearings centered on Senator Humphrey's second bill, S. 1176, 85th Cong.

17. S. 1176, 85th Cong. § 3(b) (1957).

18. Senator Humphrey underscored the importance of preservation in commenting on the pending wilderness legislation, stating:

[The Wilderness Act] will help us insure that these federally owned wilderness lands . . . will be administered in such a way as to leave them unimpaired. And that is the crucial point, because once an act of destruction occurs in our wilderness areas, it cannot be undone. Prevention, in the form of a clear national policy, is far better than regret.

110 CONG. REC. S20,602 (1964).

19. *See KLYZA, supra* note 8, at 38.

20. *See id.*

21. *See id.*

duly burden their ability to develop property rights in mineral deposits—rights that were expressly granted under the General Mining Law.<sup>22</sup> Mining interests also argued that wilderness legislation was not necessary, and that it contradicted the traditional policy of multiple use of public lands.<sup>23</sup>

In addition, mining representatives launched effective attacks on wilderness legislation based on economic development and national security theories. The central theme of these intertwined theories was the “immorality of denying anyone the benefits of economic development simply in order to gratify the aesthetic sense of a few.”<sup>24</sup> The mining community further argued that reducing the land available for mineral exploration would slow mineral development and make the United States more dependent on imported minerals.<sup>25</sup> Tying this point to national security, mining proponents stressed the potential catastrophic effects of reliance on imported minerals during a time of war.<sup>26</sup> The Northwest Mining Association, for example, testified that “this bill would play into the hands of our foreign enemies by discouraging discovery and production of metals necessary to national defense.”<sup>27</sup>

As the legislative process continued, preservationists realized that the mining industry would be a chief obstacle to passage of a wilderness bill. During late 1958 and early 1959, the Senate conducted hearings throughout the West seeking input on the proposed wilderness legislation.<sup>28</sup> These hearings evidenced little support for any type of wilderness bill.<sup>29</sup> Mining industry representatives testified against the bill, reiterating the AMC’s economic development and national security arguments.<sup>30</sup>

22. See *S. 1176 Hearings*, *supra* note 16, at 328.

23. See ALLIN, *supra* note 3, at 110; KLYZA, *supra* note 8, at 38. The Forest Service also objected to early wilderness legislation fearing that the proposed legislation would “undermine ‘multiple use’ management of federal land.” Daniel Rohlf & Douglas L. Honnold, *Managing the Balances of Nature: The Legal Framework of Wilderness Management*, 15 *ECOLOGY* L.Q. 249, 257 (1988).

24. ALLIN, *supra* note 3, at 113. One opponent of the Wilderness Act opined, “when commercial resources are locked up, our economy is deprived of additional tax dollars, pay envelopes, and needed consumer products. Many, therefore, are deprived of economic sustenance so as to provide a very limited number of individuals with wilderness pleasures.” *S. 1176 Hearings*, *supra* note 16, at 152 (statement of A.Z. Nelson, National Lumber Mfrs. Ass’n).

25. The AMC testified, “We in the mining industry are unalterably opposed to the locking up of natural resources of any kind from development for the public good.” *S. 1176 Hearings*, *supra* note 16, at 329 (statement of W. Howard Gray, Chairman, AMC).

26. See KLYZA, *supra* note 8, at 39.

27. *National Wilderness Preservation Act: Hearings on S. 174 Before the Comm. on Interior and Insular Affairs*, 87th Cong. 368–69 (1961).

28. See KLYZA, *supra* note 8, at 40.

29. *Cf. id.*

30. For example, the Alaskan Commissioner of Mines asked the Senate panel, “What good are these resources if they must remain in their natural state?” *Id.*

As a result of the strong opposition mounted by the mining industry, Wilderness Act supporters decided to compromise in hopes of breaking the logjam. They proposed amendments to the bill aimed at appeasing mining interests. Although the new amendments still prohibited commercial activity in general, they did allow for presidential exceptions.<sup>31</sup> The amended bill authorized the President to allow prospecting and mining in wilderness areas located in national forests upon the determination that such uses would better serve the interests of the United States.<sup>32</sup> These concessions did not achieve their intended result, however. The AMC and state and local mining groups continued to oppose wilderness legislation. Mining supporters characterized the presidential exception as meaningless "because it would lead to little or no [mineral] exploration in fact."<sup>33</sup> Moreover, the mining industry argued, the presidential exception provided no incentive for exploration because, unlike the location system established under the General Mining Law, there was no guarantee that the locator of a valuable mineral deposit would be entitled to actually mine it under the proposed Wilderness Act exception.<sup>34</sup> The amended bill stalled in committee during the Eighty-Sixth Congress because mining and preservation interests were still so far apart.

In 1961, the Senate once again took up consideration of a wilderness bill. Senator Clinton Anderson of New Mexico introduced Senate Bill 174,<sup>35</sup> a bill almost identical to those proposed earlier. Senate Bill 174 continued to prohibit commercial exploration and mining unless authorized by the President under the presidential exception.<sup>36</sup> In July 1961, Senate Bill 174 made it out of committee with the committee reporting that "in view of the vast unexploited land areas of the Nation that remain and the safeguards written into S[enate Bill] 174, the majority of the committee does not feel that the mining industry will actually be injured by the bill."<sup>37</sup> Although debate on the floor over the mining provisions was heated, Senate Bill 174 passed easily.<sup>38</sup>

### B. *The Mining Industry's New Strategy*

With the preservationists' victory in the Senate, the mining industry shifted its strategy as the debate moved over to the House. Although the mining industry still opposed a wilderness law in general, industry representatives concentrated on making wilderness legislation more accept-

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31. *See id.*

32. *See National Wilderness Preservation Act: Hearings on S. 4028 Before the Comm. on Interior and Insular Affairs, 85th Cong. 22 (1958).*

33. KLYZA, *supra* note 8, at 40.

34. *See id.*

35. S. 174, 87th Cong. (1961).

36. *See id.* § 6(a)(2).

37. KLYZA, *supra* note 8, at 41 & 168 n.34.

38. The final floor vote was 78 to 8 in favor of Senate Bill 174. *See* 107 CONG. REC. S18,400 (1961).

able to industry interests. When it became apparent that some form of wilderness legislation was likely to pass, industry representatives sought an exemption for mining activities, arguing that mining and wilderness preservation were not incompatible uses.<sup>39</sup> Mining industry representatives evidenced willingness to abide by special restrictions, as long as those restrictions were reasonable.<sup>40</sup>

As the wilderness bill moved through the House, mining interests were successful in influencing Congress to adopt a more miner-friendly bill. The new bill, House Bill 776,<sup>41</sup> originally provided for a ten-year exemption for mining within wilderness areas;<sup>42</sup> this exemption was later increased to twenty-five years.<sup>43</sup> During the exemption period, the mining laws would, in theory, apply fully to wilderness area lands, with the result that miners could locate, explore, and mine claims. House Bill 776 also called for periodic mineral reviews of wilderness areas and mandated that wilderness areas be reviewed every twenty-five years to determine if the designation was still appropriate.<sup>44</sup> As expected, proponents of wilderness preservation vehemently opposed House Bill 776, calling it a "perversion of wilderness preservation."<sup>45</sup> House Bill 776, like many of its predecessors, never made it to a floor vote before the Eighty-Seventh Congress adjourned. Mining interests had successfully blocked passage of a wilderness bill, rendering the preservationists' victory in the Senate moot.<sup>46</sup>

### C. *The Final Compromise*

In 1963, as the debate over wilderness legislation entered its eighth year, the Senate overwhelmingly passed another wilderness bill, Senate Bill 4<sup>47</sup> which, with respect to mining, was identical to Senate Bill 174.<sup>48</sup> Once again the AMC spoke out against any form of wilderness legislation, while at the same time trying to create a long-term mining exemption in the event the proposed legislation passed. Like the Senate, the House overwhelmingly passed a wilderness bill, House Bill 9070.<sup>49</sup> However, House Bill 9070 differed greatly from Senate Bill 4 in that House Bill 9070 contained the twenty-five year exemption for mining in

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39. KLYZA, *supra* note 8, at 42.

40. *Id.*

41. H.R. 776, 87th Cong. (1962).

42. *See id.* § 2(b).

43. *See* KLYZA, *supra* note 8, at 43.

44. *See id.*

45. *See id.*

46. *Cf.* ALLIN, *supra* note 3, at 127-29.

47. S. 4, 88th Cong. (1963).

48. S. 174, 87th Cong. (1961).

49. H.R. 9070, 88th Cong. (1963). House Bill 9070 passed by a vote of 374 to 1. *See* 110 CONG. REC. H17,458 (1964).

wilderness areas<sup>50</sup> that was added on to the ill-fated Senate Bill 174 two years earlier. Thus, it was up to the conference committee to broker a compromise that would be acceptable to both chambers.

Senate representatives and preservationists argued against inclusion of the twenty-five year mining exemption and sought input from the Forest Service. The Forest Service indicated it would impose even stronger regulations on mining activities for the duration of the mining exemption.<sup>51</sup> In addition, House negotiators assured the Senate that mining interests did not envision the use of mechanized access or permanent roadways to carry out their continued mineral exploration and development.<sup>52</sup> Based on these assurances, the Senate accepted the mining clause. In response, the House agreed to lower the time period of the exemption to nineteen years.<sup>53</sup> Both chambers approved the compromise, putting an end to the nine year battle over wilderness legislation.<sup>54</sup> Both sides could claim victory: preservationists had finally succeeded in passing comprehensive wilderness legislation, and the mining industry retained certain limited rights to explore and develop mineral deposits located in wilderness areas within national forests.

## II. THE WILDERNESS ACT'S IMPACT ON MINING IN WILDERNESS AREAS

### A. *Pre-Wilderness Act Acquisition of Mineral Rights*

Prior to enactment of the Wilderness Act, the General Mining Law governed the location and development of hard-rock mineral rights in wilderness areas.<sup>55</sup> During this period, the mining laws applied to wilderness areas as they did to all other public lands. Citizens were entitled to relatively unrestricted access to wilderness areas to "search for, discover, and develop valuable mineral deposits for their personal benefit."<sup>56</sup>

The general procedure for locating and developing mining claims in wilderness areas was essentially the same procedure applicable to public lands in general. Under the mining laws, certain steps must be performed in order to establish a valid mining claim. These steps derive from state and local customs concerning the location and recordation of mining

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50. See KLYZA, *supra* note 8, at 45.

51. See *id.*

52. See *id.*

53. See *id.*

54. Cf. *id.*

55. The General Mining Law declared that "[e]xcept as otherwise provided, all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." General Mining Law § 1, 30 U.S.C. § 22 (1994).

56. Kathryn Toffenetti, *Valid Mining Rights and Wilderness Areas*, 20 LAND & WATER L. REV. 31, 33 (1985).



claims as refined by judicial decisions and modified by the Federal Land Policy and Management Act of 1976 (FLPMA).<sup>57</sup>

The first step toward establishing a mining claim is the discovery of a valuable mineral deposit.<sup>58</sup> Discovery is followed, at least in theory, by location.<sup>59</sup> To properly locate a claim, the claimant must monument the claim's boundaries on-site and record the claim in the appropriate county land office and state Bureau of Land Management (BLM) office.<sup>60</sup> Upon satisfaction of these discovery and location requirements, the claimant has established an unpatented mining claim and has the right to mine the deposit.<sup>61</sup> Once a miner establishes an unpatented claim, the miner may hold and work the claim by performing at least \$100 worth of annual labor, called assessment work, to further develop the claim. (Currently, the assessment work requirement has been statutorily replaced by a requirement that the claimant file an annual "maintenance fee" of \$100 per claim).<sup>62</sup> As long as the claimant has a valid location and discovery, and has met applicable assessment/maintenance fee requirements, he has the right to mine his claim, even to exhaustion.<sup>63</sup> However, if the claimant wishes to obtain fee simple title to the claim, he must apply for a mineral patent.<sup>64</sup> The BLM administers the patent process and determines whether a patent will issue.<sup>65</sup> The BLM requires that a mineral survey and placement of permanent monuments be completed prior to formal submission of the patent application.<sup>66</sup> Once the BLM issues the patent, the patentee holds fee simple title to both the surface and subsurface resources.<sup>67</sup>

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57. Pub. L. No. 94-579, 90 Stat. 2744 (codified as amended in scattered sections of 7 U.S.C., 16 U.S.C., 30 U.S.C., 40 U.S.C., 43 U.S.C.); see *Loop*, *supra* note 8, at 48.

58. See General Mining Law § 2, 30 U.S.C. § 23. Some states also have a statutory discovery requirement covering the extent of discovery work that must be performed. See, e.g., Colo. Rev. Stat. § 34-43-109 (1998).

59. The mining law seems, on its face, to provide that discovery occurs first and location second, but as a practical matter, location usually occurs first. See *Toffenetti*, *supra* note 56, at 36. The location, however, is not valid until discovery. See *Union Oil Co. v. Smith*, 249 U.S. 337, 344, 346 (1919).

60. See *Toffenetti*, *supra* note 56, at 36. Section 3 of the General Mining Law requires compliance with state laws, all of which require recording of claims. See General Mining Law § 3, 30 U.S.C. § 26. Section 314 of FLPMA added the BLM filing requirement. FLPMA § 314, 43 U.S.C. § 1744 (1994 & Supp. II 1996).

61. See *Toffenetti*, *supra* note 54, at 40-41.

62. 30 U.S.C. § 28(f) (1994); 43 C.F.R. § 3833.1-5 (1998) (implementing regulation for maintenance fee statute).

63. 30 U.S.C. § 28(f); 43 C.F.R. § 3833.1-5. A small miner may perform assessment work or file an affidavit of labor in lieu of paying the maintenance fee. 43 C.F.R. § 3833.1-5.

64. See generally 43 C.F.R. pt. 3860 (1998) (setting forth application procedures for obtaining a mineral patent).

65. See *Clouser v. Espy*, 42 F.3d 1522, 1525 (9th Cir. 1994); 43 C.F.R. pt. 3860.

66. 43 C.F.R. §§ 3861.1-1 to -2.

67. *Clouser*, 42 F.3d at 1525 n.2.

### B. *The Wilderness Act's Impact on Mining Law*

Despite the exception Congress built into the Wilderness Act for commercial mining interests, in practicality the Act severely restricted hard-rock mining activities on wilderness areas within national forests.<sup>68</sup> Although, under section 4(d)(3) of the Wilderness Act, designated wilderness areas remained open to mining activity until December 31, 1983,<sup>69</sup> in reality, locating hard-rock claims in wilderness areas before 1984, and then developing those valid claims after that date was severely hampered by other restrictions contained in section 4(d)(3).<sup>70</sup> Section 4(d)(3) authorized the Secretary of Agriculture to impose surface restoration requirements and regulate ingress and egress from mining claims in order to protect the "wilderness character of the land."<sup>71</sup> Additionally, section 4(d)(3) imposed use restrictions on mining locations, limiting the use of such land solely to "mining or processing operations and uses reasonably incident thereto."<sup>72</sup> Section 4(d)(3) also altered the property rights associated with a patented mining claim.<sup>73</sup> Under the Wilderness Act, mining patents only convey title to the mineral deposits located within the claim, with the government retaining title to the surface rights.<sup>74</sup>

### III. TREATMENT OF MINING RIGHTS UNDER THE WILDERNESS ACT

Lands withdrawn from operation of the mining law under the Wilderness Act were no longer subject to the mining laws after December 31, 1983. Therefore, development in wilderness areas after that time could take place only if the claimant could show his claim qualified as a valid existing right that predated withdrawal.<sup>75</sup> As a result, despite the mining industry's hard-fought battle to win special treatment from Con-

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68. In contrast, however, the Wilderness Act is more lenient with respect to prospecting, allowing miners continued access to wilderness lands for the purpose of gathering information about mineral deposits as long as the activities are compatible with the preservation of the wilderness environment. See Wilderness Act § 4(d)(2), 16 U.S.C. § 1133(d)(2) (1994). It has been argued that this disparate treatment was the result of a congressional distinction between exploration and extraction of minerals. Extractive activity would only be allowed in times of genuine national need, while exploration would be allowed and encouraged, subject to regulation. Exploration advocates argued the necessity of continued exploration to determine the extent of mineral deposits which would then only be used as "bank accounts" in times of national need. See Loop, *supra* note 8, at 55.

69. See Wilderness Act § 4(d)(3), 16 U.S.C. § 1133(d)(3).

70. See John L. Watson, *Mineral and Oil and Gas Development in Wilderness Areas and Other Specially Managed Federal Lands in the United States*, 29 ROCKY MTN. MIN. L. INST. 37, 47 (1983).

71. See Wilderness Act § 4(d)(3), 16 U.S.C. § 1133(d)(3).

72. *Id.* This section was intended to preclude the practice of locating a mining claim, with no intention of developing the mineral interests, as a method of obtaining cheap land for use as vacation property or the like. See Gregory W. Edwards, Note, *Keeping Wilderness Areas Wild: Legal Tools for Management*, 6 VA. J. NAT. RESOURCES L. 101, 111-12 (1986).

73. Wilderness Act § 4(d)(3), 16 U.S.C. § 1133(d)(3).

74. See *id.*

75. Cf. *id.*; 36 C.F.R. § 228.15 (1998).

gress, the real issue became the extent to which regulatory agencies and courts would recognize mining rights within Wilderness Act lands. Thus, it became apparent that the commercial mining interests' hard fought victory existed primarily on paper.<sup>76</sup> Indeed, the Wilderness Act's policies, regulations, and modifications to the mining law all work to restrict the establishment of valid existing rights of mining claims located in wilderness areas. To better understand the treatment of mining rights after the passage of the Wilderness Act, it is necessary to examine each of these factors in turn.

### A. Declared Policies

The Wilderness Act presents wilderness preservation as its primary purpose, with certain limited allowances for nonconforming uses.<sup>77</sup> Section 2 of the Wilderness Act declares the policy of the United States as follows:

[Wilderness] areas . . . shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future uses and enjoyment as wilderness, and so as to provide for the protection of the areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness.<sup>78</sup>

This policy articulates two interrelated yet conceptually distinct purposes for wilderness preservation. First, Congress wanted "to protect land in its essentially natural state from 'expanding settlement and growing mechanization.'"<sup>79</sup> Second, Congress wanted to preserve wilderness areas for use by future generations.<sup>80</sup>

Regulations promulgated by the Forest Service and the BLM restate the dual goals of wilderness preservation, but make clear that preservation must override human use and enjoyment of wilderness lands. Forest Service regulations state that "[i]n resolving conflicts in resource use, wilderness values will be dominant."<sup>81</sup> Furthermore, case law has reinforced the "preservation first" policy. For example, the Tenth Circuit in

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76. See KLYZA, *supra* note 8, at 46.

77. Upon signing the Wilderness Act into law, President Johnson commented that "the [W]ilderness [Act] preserves for our posterity, for all time to come, 9 million acres of this vast continent in their original and unchanging beauty and wonder." President's Remarks Upon Signing the Wilderness Bill and the Land and Water Conservation Fund Bill, II PUB. PAPERS 554 (Sept. 3, 1964). The inclusion of non-conforming uses suggests that the accommodation of local and commercial interests was an implied purpose of the Wilderness Act. See Rohlf & Honnold, *supra* note 23, at 257-58.

78. See Wilderness Act § 2(a), 16 U.S.C. § 1131(a).

79. See Rohlf & Honnold, *supra* note 23, at 255.

80. *Id.* at 255-56 (quoting Wilderness Act § 2(a), 16 U.S.C. § 1131(a)).

81. 36 C.F.R. § 293.2(c) (1998).

*Parker v. United States*<sup>82</sup> described the general purpose of the Wilderness Act as "simply a congressional acknowledgment of the necessity of preserving one factor of our natural environment from the progressive, destructive and hasty inroads of man."<sup>83</sup> A federal district court put it more bluntly: "When there is a conflict between maintaining the primitive character of the area and between [sic] any other use . . . the general policy of maintaining the primitive character of the area must be supreme."<sup>84</sup>

### B. Regulatory Restrictions

Both the BLM and the Forest Service have regulations in place that govern surface impacts of mining operations within wilderness areas in their respective jurisdictions.<sup>85</sup> The wilderness-specific regulations work in concert with general BLM and Forest Service regulations governing mining operations within all lands under their respective jurisdictions, whether designated as wilderness or not.<sup>86</sup> Generally, both agencies require approval of a plan of operations before mining operations commence.<sup>87</sup> The plan of operations is the agency's key tool for causing the operator to meet the standards articulated in the BLM and Forest Service wilderness-specific regulations.

The two sets of wilderness-specific regulations contain common elements. Both reserve to the agency the authority to limit the means of access to mining claims: the Forest Service regulations limit access to means "consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness";<sup>88</sup> and the BLM regu-

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82. 448 F.2d 793 (10th Cir. 1971) (upholding an injunction against timber harvesting on public lands that bordered a wilderness area).

83. *Parker*, 448 F.2d at 795.

84. *Minnesota Pub. Interest Research Group v. Butz*, 401 F. Supp. 1276, 1331 (D. Minn. 1975), *rev'd on other grounds*, 541 F.2d 1292 (8th Cir. 1976). The Eighth Circuit reversed the trial court because the region at issue, the Boundary Waters Canoe Area, was not intended by the Wilderness Act to be treated as "pure wilderness area." *Butz*, 541 F.2d at 1298; see Jennie Bricker, Comment, *Wheelchair Accessibility in Wilderness Areas: The Nexus Between ADA and the Wilderness Act*, 25 ENVTL. L. 1243, 1260-62 (1995) (discussing preservation as the primary purpose of the Wilderness Act).

85. See generally 36 C.F.R. § 228.15 (1998) (containing special standards for mining operations within national forest wilderness areas); *id.* pt. 293 (giving general Forest Service regulations governing activities in wilderness areas); 43 C.F.R. pt. 8560 (1998) (detailing BLM regulations governing management of wilderness areas); *id.* § 8560.4-6 (specifying BLM regulations governing mining operations within BLM wilderness areas).

86. In practicality, the agencies also tend to apply their general mining regulations more strictly in wilderness areas than in nonwilderness areas. See, e.g., Toffenetti, *supra* note 56, at 62-63. The agencies' tendency to do so is to some extent reflected in their guidance policies, but it is also embodied in subjective decisions made regarding the sufficiency of plans of operations, etc. See *id.* at 62 n.217.

87. See 36 C.F.R. § 228.4 (listing Forest Service requirements); 43 C.F.R. pt. 3809 (providing BLM surface management regulations containing plan of operations requirement).

88. 36 C.F.R. § 228.15(c); *cf. id.* § 293.13 (giving identically worded access limitation applicable to all "valid occupancies" within national forest wilderness areas).

lations note that the claimant must comply with all "reasonable stipulations"<sup>89</sup> imposed and that "[w]here the use of mechanized transport, aircraft and motorized equipment is essential, these stipulations shall control their use."<sup>90</sup> Both agencies impose reclamation requirements<sup>91</sup>—the BLM going so far as to require that "reclamation shall restore the surface to a contour which appears to be natural, although this may not be the original contour."<sup>92</sup> And, both agencies restrict the mining operator's use of government-owned timber located on the claim to that necessary for operations if timber is "not otherwise reasonably available."<sup>93</sup>

The key difference between the sets of regulations is that the BLM requires that a BLM mineral examiner assess mining claim validity in two circumstances: (1) prior to the approval of any plan of operations for mining activities within a wilderness area, and (2) prior to "allowing previously approved operations to continue on unpatented mining claims after the date on which the lands were withdrawn from appropriation under the mining laws."<sup>94</sup> The mineral examiner is to determine whether "the claim was valid prior to withdrawal" from appropriation under the mineral laws, and whether it remains valid at the time of the examination, and is to produce a mineral examination report containing his conclusions as to these matters.<sup>95</sup>

### C. *Wilderness Restrictions As Affecting Claim Validity*

Statutory, regulatory, and policy restrictions specific to mining activities in wilderness areas have arguably raised the bar for establishing the validity of mining claims within wilderness areas in ways neither wilderness supporters nor the mining industry would have predicted. By and large, the judiciary has turned a deaf ear to the mining industry's complaints that these restrictions have unduly heightened the showing a claimant must make to prove claim validity.

For example, surface use and access restrictions have limited the ability of miners to do discovery work necessary to validate their claims, and the courts have refrained from interfering. The recent case of *Clouser v. Espy*<sup>96</sup> provides an illustration. In *Clouser*, lack of motorized access to mining claims compromised the three claimants' discovery

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89. 43 C.F.R. § 8560.4-6(e) (1998).

90. *Id.*

91. See 36 C.F.R. § 228.15(d) (stating Forest Service reclamation requirements); 43 C.F.R. § 8560.4-6(f)-(g) (stating BLM reclamation requirements).

92. 43 C.F.R. § 8560.4-6(f).

93. 36 C.F.R. § 228.15(e) (detailing Forest Service regulations); 43 C.F.R. § 8560.4-6(i) (detailing BLM regulations).

94. 43 C.F.R. § 8560.4-6(j).

95. *Id.*

96. 42 F.3d 1522 (9th Cir. 1994).

efforts.<sup>97</sup> Two of the mining claims were located on Forest Service land that was subsequently withdrawn from mineral exploration and development under the Wilderness Act.<sup>98</sup> The Forest Service denied the plaintiffs motorized access to these claims.<sup>99</sup> As a result, the plaintiffs either had to use pack animals or walk to transport themselves and their equipment to the claim.

The plaintiffs challenged the Forest Service decision on the grounds that the regulation of ingress to and egress from the claims affected the validity of the claims and, thus, was solely a decision for the BLM, which is the agency entrusted with determining the validity of mining claims located on Forest Service lands.<sup>100</sup> The plaintiffs argued that the Forest Service regulation materially affected the commercial viability<sup>101</sup> of the claims which, in turn, affected the BLM's legal determination of whether there was a valid discovery.<sup>102</sup> A finding of no valid discovery would prevent the plaintiffs from establishing a valid existing right to mine the claims. The Ninth Circuit, however, rejected the plaintiffs' claim and held that the Forest Service had authority under the Wilderness Act to impose ingress and egress restrictions on the plaintiffs' mining claims despite the "collateral consequences" the decision may have on claim validity.<sup>103</sup>

Another way in which wilderness-specific restrictions can hinder a mining claimant's efforts to establish its claim stems from the way wilderness can impact the "marketability" test for claim validity. As mentioned previously, the General Mining Law requires a discovery of "valuable mineral deposits."<sup>104</sup> The Mining Act, however, did not define the word "valuable" in the discovery context. In response to this missing definition, the Land Department (the precursor to the Department of Interior) formulated the "prudent man" test in 1894.<sup>105</sup> Under this test a discovery of valuable mineral occurs:

[When] minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable pros-

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97. See *Clouser*, 42 F.3d at 1524. *Clouser* was the result of the consolidation of three separate claims brought to challenge Forest Service decisions regarding operating plans. See *id.*

98. See *id.* at 1524-25.

99. See *id.* at 1524.

100. See *id.* at 1528.

101. The commercial viability of an alleged mining claim is one of the factors that the BLM considers when evaluating whether a valuable discovery has occurred. See *United States v. Coleman*, 390 U.S. 599, 602-03 (1968). For a more thorough discussion of the issues raised by *Clouser* with respect to the standards for determining a valuable discovery, see Cameron Elliot, Recent Development, *Clouser v. Espy and the Environmental Regulation of Mining Claims*, 19 HARV. ENVTL. L. REV. 553, 564-65 (1995).

102. See *Clouser*, 42 F.3d at 1528.

103. *Id.* at 1529.

104. General Mining Law § 1, 30 U.S.C. § 22 (1994).

105. See *Castle v. Womble*, 19 Pub. Lands Dec. 455, 457 (1894).

pect of success, in developing a valuable mine, the requirements of the [General Mining Law] have been met.<sup>106</sup>

In a later case, the United States Supreme Court held that "profitability is an important consideration in applying the prudent-man test."<sup>107</sup> The Court went on to fashion what is now called the "marketability" test, often cited as a refinement of the prudent man test. The marketability test requires the claimant to show "the deposit is of such value that it can be mined, removed and disposed of at a profit."<sup>108</sup> "One of the primary elements of this rule is the existence of a present market or demand for the minerals in question."<sup>109</sup> In determining the marketability of a claim, the claimant may consider historic trends in prices and costs, and prove profitability by showing that "as a present fact, considering historic price and cost factors and assuming that they will continue, there is a reasonable likelihood of success that a paying mine can be developed."<sup>110</sup>

Thus, the Wilderness Act can play an important role in the marketability of claims located within wilderness areas as the costs associated with environmental regulation must be taken into account. The Wilderness Act's surface use and access restrictions and the reclamation requirements all work together to create a higher cost of production than otherwise would be true for claims located in nonwilderness areas.<sup>111</sup> Moreover, a claimant may have difficulty proving that a viable market exists for minerals removed from a wilderness site due to negative publicity associated with mining in wilderness areas.<sup>112</sup> Indeed, in *United States v. Marion*,<sup>113</sup> the Interior Board of Land Appeals (IBLA) found it significant that a prospective buyer canceled a sale contract upon learning that the mine was located in a "sensitive area."<sup>114</sup> However, despite a perhaps growing recognition of the extent to which wilderness restrictions can impact mining rights, the judiciary and the IBLA have shown no significant interest to date in blunting that impact.

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106. *Castle*, 19 Pub. Lands Dec. at 457. The "prudent man" test was adopted by the United States Supreme Court in *Chrisman v. Miller*, 197 U.S. 313, 322-23 (1905).

107. *United States v. Coleman*, 390 U.S. 599, 602 (1968).

108. *Foster v. Seaton*, 271 F.2d 836, 838 (D.C. Cir. 1959) (quoting *Layman v. Ellis*, 54 Interior Dec. 294, 296 (1933)).

109. *Schlosser v. Pierce*, 93 Interior Dec. 211, 219 (1986).

110. *See In re Pacific Coast Molybdenum Co.*, 90 Interior Dec. 352, 360 (1983) (addressing the process of determining a mine's validity).

111. *See Toffenetti*, *supra* note 56, at 61.

112. *See id.* at 64.

113. 37 I.B.L.A. 68 (1978).

114. *Marion*, 37 I.B.L.A. at 77.

#### IV. CURRENT ISSUES RELATING TO MINING AND WILDERNESS

##### A. *Buffer Zones*

One issue that has repeatedly arisen in connection with wilderness, and that has gained increased notoriety as of late, is whether buffer zones should or can be established, formally or informally, on public or private lands that surround wilderness areas. The concept is that activities within the buffer would be regulated based at least in part on the compatibility of the activities with the character and management of the core wilderness area. In practicality, this means that the buffer zones themselves might be managed essentially as *de facto* wilderness. For purposes of this article, the issues that arise with respect to buffer zones relate to how mining claims are to be handled in these areas. The most obvious issue is whether the land management agencies have the authority to establish buffer zones without express legislative authorization—and even in direct conflict with statutory and policy prohibitions.

Resistance to the concept of buffer zones crystallized in the 1980s and continues in force. The federal government party line is that there are no buffer zones and there will be no buffer zones. Congress has routinely included prohibitions against the creation of buffer zones in enabling legislation for specific wilderness areas. A quick check of the Westlaw public laws database turned up some twenty federal laws containing the following boilerplate prohibition against buffer zones:

Congress does not intend that designation of wilderness areas in the State of [———] lead to the creation of protective perimeters of buffer zones around each wilderness areas [sic]. The fact that non-wilderness activities or uses can be seen or heard from areas within the wilderness shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.<sup>115</sup>

The stated opposition to establishment of buffer zones has filtered down to the agency level, as well. The Forest Service has a formal policy prohibiting the establishment of buffer zones;<sup>116</sup> and BLM policy parrots the congressional boilerplate prohibition.<sup>117</sup>

Industry and other groups, however, remain unmollified by the federal government's assurances that wilderness designation will not result in a sort of "wilderness-plus" that includes generous buffer zones covering substantially more acreage than Congress intended. As one local government representative put it:

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115. See, e.g., Arkansas Wilderness Act of 1984 § 7, Pub. L. No. 98-508, 98 Stat. 2349, 2352; Washington State Wilderness Act of 1984 § 9, Pub. L. No. 98-339, 98 Stat. 299, 305.

116. See FOREST SERV., U.S. DEP'T OF AGRIC., FOREST SERVICE MANUAL ch. 2320.3 (1990) (stating in part, "[d]o not maintain buffer strips of undeveloped wildland to provide an informal extension of wilderness.").

117. See BLM Notice of Availability of Final Wilderness Study Policy, 47 Fed. Reg. 5,098, 5,108 (1981); BLM Final Wilderness Management Policy, 46 Fed. Reg. 47,180, 47,187 (1981).



[I]t is claimed that there will be no buffer zones around wilderness designated on the BLM land in Utah. . . . However, recent Interior Board of Land Appeals and federal court cases clearly demonstrate that nonwilderness uses on adjacent nondesignated lands will be governed and regulated according to what is necessary to protect the adjacent wilderness resources. A rose by any other name can smell as sweet, and a restriction on adjacent use because of proximity to designated wilderness has the same effect as a buffer zone, whether it is called a buffer zone or not.

Again, wilderness proponents claim there will be no buffer zones, yet in effect there are. . . . What does that portend for economies in the areas where vast acreage is proposed for wilderness areas? We don't know because wilderness advocates, and even the BLM, have denied that this is going to happen.<sup>118</sup>

In practicality, land management agencies clearly take into account effects on wilderness of activities proposed for adjacent nonwilderness areas. How can the agencies do this in the face of clear statutory and policy prohibitions against establishing buffer zones? The answer appears to lie in the gray area between making management decisions about a nonwilderness area *solely* to protect wilderness values on an adjacent wilderness area, and making the same management decisions based only *in part* on the adjacent wilderness. Congress routinely states only that "[t]he fact that non-wilderness activities or uses can be seen or heard from areas within the wilderness shall not, *of itself*, preclude such activities."<sup>119</sup> Where additional justifications exist, as they frequently do, for managing adjacent lands in such a way as to protect wilderness values on the wilderness area itself, the agency is free to make management decisions intended *in part* to protect the wilderness area. Thus, for example, the Forest Service can close certain forest trails in a nonwilderness area to off-road vehicle use partly to protect an adjacent wilderness area, as long as the closure is also justified in part on remediating "user conflicts" on the forest trails.<sup>120</sup> Characterizing some management decisions as only partly based on protecting adjacent wilderness, and therefore permissible, while characterizing other management decisions as wholly based on protecting adjacent wilderness, and therefore impermissible, seems to some extent a distinction without a difference. However, this is the line that Congress has drawn and that the courts have upheld.<sup>121</sup>

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118. Rod Greenough et al., Symposium Panel Discussion, *Issues in Wilderness Designation on the Colorado Plateau*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 393, 400 (1993) (statement of William Howell, Southeastern Utah Ass'n of Local Governments) (alluding to WILLIAM SHAKESPEARE, *THE TRAGEDY OF ROMEO AND JULIET*, act 2, sc. 2).

119. Arkansas Wilderness Act § 7, 98 Stat. at 2352 (emphasis added).

120. See Northwest Motorcycle Ass'n v. United States Dep't of Agric., 18 F.3d 1468, 1481 (9th Cir. 1994).

121. In rejecting challenges to agency approval of resource development activities on lands adjacent to or near wilderness areas, courts have cited the congressional boilerplate anti-buffer zone

It remains to be seen how the creation of buffer zones will impact mining activities on lands adjacent, or near to, wilderness areas or wilderness study areas. Issues are likely to arise concerning the inevitable conflict between mining operations on nonwilderness lands and protection of wilderness values on wilderness areas or wilderness study areas.<sup>122</sup> In the Senate Report accompanying the Arizona Desert Wilderness Act of 1990,<sup>123</sup> the Senate Committee on Energy and Natural Resources attempted to clarify how mining activities adjacent to one wilderness area should be handled:

[D]esignation of wilderness areas does not imply the creation of "protective perimeters" or buffer zones around any of the areas. The Committee is aware that this language may have particular significance for the proposed White Canyon wilderness area. The Committee understands that there is potential for the development of large-scale mining activities relatively close to the boundary of the proposed wilderness area. The boundary of the wilderness area was drawn so as to exclude this potential mining area from wilderness designation. The Committee recognizes that noise, dust, and other non-wilderness activities may impact the proposed wilderness area if significant mining operations on adjacent lands proceed. This subsection clarifies that such mining activities are not to be limited *solely* because they can be seen or heard within the White Canyon wilderness.<sup>124</sup>

Whether this more specific language from Congress is likely to affect agency management of mining activities adjacent to the White Canyon wilderness area remains to be seen. The fact that the Senate Committee sought to prevent limitations of mining activities *solely* due to effects on adjacent wilderness suggests that this particular injunctive may not add much protection to mining operations adjacent to the White Canyon wilderness area. However, the Senate Committee's willingness to directly address the potential conflict between mining operations and adjacent wilderness signals is at least an acknowledgment of the issue and gives general direction to the agency on how to approach the issue.

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language in the wilderness authorization statutes. *See, e.g.,* Newton County Wildlife Ass'n v. Rogers, 141 F.3d 803, 810 (8th Cir. 1998) (rejecting challenge to Forest Service timber sale based on Arkansas Wilderness Act's prohibition against creation of buffer zones); Park County (Wyoming) Resource Council v. United States Bureau of Land Management, 638 F. Supp. 842, 845 (D. Wyo. 1986) (denying application for a preliminary injunction which would restrain oil drilling on federal lands based on the Wyoming Wilderness Act of 1984 prohibition against creation of buffer zones).

122. Additionally, issues are likely to arise regarding prospectors' rights to continue exploration, location, and discovery activities within the buffer zones and, if these activities are disallowed, how valid existing rights would be protected.

123. Pub. L. No. 101-628, 104 Stat. 4469 (1990) (codified at 16 U.S.C. § 1132 note (1994)).

124. S. REP. NO. 101-359, at 15 (1990) (emphasis added) (interpreting the standard boilerplate prohibition against the creation of buffer zones).

## B. BLM Wilderness Reinventory

In the 1970s and 1980s, pursuant to the Wilderness Act and FLPMA, the Department of the Interior (DOI) conducted an inventory of public lands to identify lands suitable for wilderness designation. In 1980, the DOI completed its task of identifying lands appropriate for designation as wilderness. Congress still has not approved or disapproved the areas proposed as wilderness.

In the 1990s, environmental groups requested the DOI to review its 1980 decisions excluding land in Utah and Colorado from wilderness consideration. The DOI is doing so in both states. Industry fears that the reinventory will result in additional lands being included on the list of lands identified as appropriate for wilderness designation and, therefore, make them off-limits for resource exploitation. Industry-backed federal lawsuits in both states challenging the reinventory have to date been unsuccessful.<sup>125</sup> In Colorado, the DOI went so far as to enter into an official Memorandum of Understanding with the Colorado Environmental Coalition<sup>126</sup> regarding reinventory. This DOI action particularly concerned industry representatives, who tend to see the reinventory as a direct challenge to their ability to conduct mining and oil and gas activities on the subject lands.<sup>127</sup> There are signs that the industry's concerns are well founded. For example, in both states the BLM has held mineral leasing in abeyance on the public lands at issue.

For purposes of this article, the reinventory raises several issues. First, real questions exist as to whether the DOI has the power, under FLPMA, the Wilderness Act, or any other authority, to conduct the reinventory.<sup>128</sup> So far, the courts have answered this question in the affirmative; however, there may be further legal challenges to the reinventory. The second question is whether the BLM will attempt to suspend mining activities in areas covered by the reinventory, as it has done with mineral leasing. So far, the BLM has not done so. The mining industry is keeping a careful watch on the agency's actions in this regard. Third, if the rein-

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125. See, e.g., *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998) (vacating preliminary injunction against reinventory in Utah, ruling that plaintiffs did not have standing to challenge reinventory, and remanding to district court for resolution of issue whether DOI is imposing a *de facto* wilderness management standard on nonwilderness lands in violation of FLPMA); *Marathon Oil Co. v. Babbitt*, 966 F. Supp. 1024 (D. Colo. 1997) (granting motion to dismiss Marathon's challenge to DOI's refusal to make lands subject to reinventory available for competitive oil and gas leasing).

126. The Colorado Environmental Coalition is the leading Colorado environmental group requesting reinventory.

127. In fact, the most vocal opposition to the wilderness reinventory has come from the oil and gas industry, as opposed to the mining industry. Although mining interests certainly could be hurt by designation of additional wilderness areas, the mining industry has taken more of a "wait and see" approach to the reinventory.

128. See generally H. Michael Anderson & Alike Moncrief, *America's Unprotected Wilderness*, 76 DENV. U. L. REV. 413 (1999) (discussing wilderness reinventory in detail and taking the position that legal authority exists for the reinventory).

ventory results in additional lands being proposed for wilderness classification, it becomes necessary to ask how valid existing rights in mining claims will be protected.

#### CONCLUSION

Although the Wilderness Act is now more than three decades old, numerous issues remain unresolved with respect to its effect on mining activities in and around wilderness areas. While it is clear that the Act's impact on the mining industry, through policy, regulation, and judicial development, has been substantial—probably even more so than either wilderness supporters or the mining industry expected—it is unclear to what extent preservation of wilderness values will continue to dominate over resource development on and around wilderness lands. The answer may lie in part in how the agency resolves, and the courts interpret, current conflicts between mining and preservation of wilderness values. Key among these conflicts are the current debates over buffer zones and wilderness reinventory.

