

## NATURAL RESOURCES POLICY IN THE BUSH (II) ADMINISTRATION: AN OUTSIDER'S SOMEWHAT JAUNDICED ASSESSMENT

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### I. INTRODUCTION

The Bush Administration's investiture in office, when combined with conservative Republican control of both houses of Congress and, increasingly, the federal courts, signaled a move to the right on public lands and natural resource issues. Security concerns in the wake of 9/11 and a decline in the prominence of environmental issues increased the likelihood of change.

Even so, conservationists have been taken aback by the breadth and depth of the administration's attack on some of their cherished goals. They've been even more confounded by the administration's success in avoiding a popular backlash like the Reagan Administration encountered when it started down that same path. All in all, it has been a remarkable three years.

The focus of this paper is federal natural resources, which comprise thirty percent of the nation's dry land and a much higher proportion of valuable things like fossil fuels, timber, water, and wilderness.<sup>1</sup> It does not attempt a comprehensive evaluation of the administration's policies in this area. Instead, it tries to capture (and illustrate with examples) the principal themes reflected in those policies.

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1. See GEORGE CAMERON COGGINS, CHARLES F. WILKINSON, AND JOHN D. LESHY, *FEDERAL PUBLIC LAND AND RESOURCES LAW* 7-17 (5<sup>th</sup> ed. 2002)

## II. THE ADMINISTRATION IS A CAPTIVE OF INDUSTRY

Ever since Theodore Roosevelt's administration, national policy toward management of the nation's natural resources has been strongly imbued with a sense of stewardship, of looking beyond short-term political and market imperatives to protecting the interests of future generations. The Bush Administration displays none of this. It is, instead, a throwback to the nineteenth century's Gilded Age. Sifting through its decisions in this area produces only a single common, explanatory thread, a sense that its political appointees ask one basic question—what does industry<sup>2</sup> want? The administration appears, in other words, to have no genuine policy agenda on natural resource issues other than this gut-level preference.

The tilt toward industry reflects the backgrounds of the President and the Vice President, their sources of campaign funds<sup>3</sup> and their appointments throughout the natural resource agencies. To be sure, reflexively regarding industry's preferences as the correct public policy carries with it some decided political advantages, ensuring a hard core of readily-mobilized support for administration initiatives and ample campaign funds for reelection.

For example, the administration has sharply rolled back environmental safeguards for the hardrock (primarily gold) mining industry on federal lands, mostly in the Rocky Mountain West.<sup>4</sup> Along the way, it has taken the position that the United States has no legal authority to say no to a proposed gold mine on its own lands, even when going forward would cause substantial and irreparable harm to other public resources. It followed up that remarkable ruling with another giving metal mining companies not merely the opportunity, but the legal right, to use as much federal land as they need for polluting

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2. By "industry," I mean not only industrial corporations (such as the petroleum, timber, and mining industries, off-road vehicle manufacturers and the like), but also other traditional users and beneficiaries of federal natural resources, such as public lands ranchers and farmers who receive subsidized water from federal projects. In some parts of the rural West (in diminishing numbers over time), local governments are strong promoters of industrial development and would fall within this definition.

3. Bush campaign contributions from the natural resources industries outpaced Gore campaign contributions by nearly tenfold. See *2000 Presidential Race Contributions by Sector*, at <http://www.opensecrets.org/2000elect/sector/AllCands.htm>, (last visited Feb. 7, 2004) (showing Bush's contributions from the Energy/Natural Resources sector at \$2,871,473 and Gore's contributions from the same sector at \$340,114).

4. 66 C.F.R. § 54834-01 (2001) (suspending Clinton imposed regulations mandating stricter environmental regulation of hardrock mining).

waste dumps.<sup>5</sup> Both of these overturned Clinton Administration rulings.<sup>6</sup> The strong bias favoring the hardrock mining industry is even more remarkable considering that relatively few jobs could be affected, almost all the industry's production goes to make jewelry rather than products of strategic significance; the industry pays the federal government nothing when it extracts minerals from federal lands, even though it pays states, private property owners and foreign governments when it mines on their lands; and it produces enormous amounts of waste and long-lasting pollution problems which historically have been left for the nation's taxpayers to clean up.<sup>7</sup>

The administration is also moving to roll back regulations seeking to promote good stewardship in the largest single use of the entire federal domain—livestock grazing, found on nearly 300 million acres of federal land. Its proposal, now out for public comment, is aimed at putting private ranchers, rather than the government, much more in charge of how those lands are managed.<sup>8</sup>

It has taken a similarly hard line even in areas where it has paid some lip service to stewardship, such as national park management.<sup>9</sup> It has weakened Clean Air Act regulations protecting visibility over national parks, and regulations on snowmobiles in the world's first national park, Yellowstone.<sup>10</sup> At the same time it has strengthened the hand of those outside the federal government who seek, for development purposes, control of rights-of-way across federal lands, including

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5. Roderick E. Walston, Interior Solicitor's Op. M-37007 (Oct. 7, 2001), at 40-41, *available at* <http://www.doi.gov/mill.html>.

6. *See* COGGINS, WILKINSON & LESHY, *supra* note 1, at 593-95, 637-39. The author helped draft and signed both of these opinions. A federal district court recently ruled that the first of these opinions was correct, and the Bush Administration's contrary opinion was inconsistent with the governing statute. *See* Mineral Policy Center v. Norton, 292 F. Supp. 2d 30 (D.D.C. 2003), which the Bush Administration decided not to appeal.

7. *See* U.S. SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS, 107TH CONGRESS, REWRITING THE RULES 55-67 (2002), *available at* [http://www.senate.gov/~gov\\_affairs/envrollbacksreport.pdf](http://www.senate.gov/~gov_affairs/envrollbacksreport.pdf) (outlining the history of hardrock mining legislation and the impacts of hardrock mining).

8. Grazing administration—Exclusive of Alaska, 68 Fed. Reg. 68452-01 (proposed Dec. 8, 2003) (to be codified 43 C.F.R. § 4100).

9. *See* Press Release, White House, Fact Sheet on the National Parks Legacy Project (May 30, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/05/20010530-2.html> (stating that the Bush Administration is committed to improving National Park stewardship).

10. Yellowstone National Park, 36 C.F.R. § 7.13 (1)(1-19) (2003) (setting guidelines for snowmobiles in Yellowstone National Park). Snowmobile regulation in Yellowstone is currently the subject of dueling district court decisions in the District of Columbia and Wyoming. *See* The Fund for Animals v. Norton, 294 F.2d 92 (D.D.C. 2003); Int'l Snowmobile Mfrs. Ass'n v. U.S. Department of the Interior, 2004 WL 240343 (D. Wyo., Feb. 10, 2004).

lands in national parks.<sup>11</sup> Its park policies have spurred outspoken, unprecedented criticism from former National Park Service career officials, who have formed an organization to protest.<sup>12</sup>

These are the tip of the iceberg, for the pro-industry policies permeate the administration's actions. It is difficult to find even one administration initiative that could be fairly deemed "pro-stewardship."

### III. THE ADMINISTRATION HAS BEEN PARTICULARLY HOSTILE TO PROTECTING WILD LANDS

For several decades, a cornerstone of federal stewardship policy has been the idea, fundamental to the notion of leaving a legacy for future generations, that substantial tracts of federal land ought to be preserved in their natural condition.<sup>13</sup> It is here, in its attitude toward the idea of preserving some remnants of land as "wilderness," that the Bush Administration has perhaps been most hostile. In the spring of 2001, the administration quickly decided to acquiesce in rather than appeal a ruling by an Idaho federal court judge enjoining operation of the Clinton Administration's "roadless rule," which protected nearly 60 million acres of remote national forest land from road-building and timber harvesting.<sup>14</sup> Conservation interests intervened in the lawsuit, which had been filed by the timber industry, and persuaded the court of appeals to reinstate the rule.<sup>15</sup> But then a Wyoming district judge, in a separate suit, disagreed with the Ninth Circuit and once again enjoined the rule. This time the Bush Administration not only failed to appeal the Wyoming ruling, but also has asked the court of appeals to

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11. See, e.g., Conveyances, Disclaimers and Correction Documents, 68 Fed. Reg. 494 (Jan. 6, 2003), amending 43 C.F.R. subpart 1864; Press Release, Department of the Interior, Interior and State of Utah Reach Landmark Agreement on RS 2477 Rights of Way Issue (April 9, 2003), available at <http://www.doi.gov/news/030409a.htm> (describing agreement between DOI and Utah to resolve disputed R.S. 2477 public lands grandfathered by the 1976 Federal Land Policy and Management Act); Christopher Smith, *Conservation Groups Protest Leavitt-Norton Wilderness Deal*, SALT LAKE TRIB., Apr. 23, 2003, available at <http://www.sltrib.com/2003/Apr/04252003/utah/51095.asp> (last visited Feb. 6, 2004). The Utah MOU was recently criticized as illegal in an opinion letter of the United States General Accounting Office. Anthony H. Gamboa, U.S. General Accounting Office Opinion, B-300912 (Feb. 6, 2004), available at [www.highway-robbery.org/documents/GAOPinion\\_coverletter.pdf](http://www.highway-robbery.org/documents/GAOPinion_coverletter.pdf).

12. See e.g., Campaign to Protect America's Lands, at <http://www.protectamericaslands.org> (last visited Aug. 20, 2004).

13. See, e.g., Robert L. Glicksman & George Cameron Coggins, *Symposium: Wilderness Act of 1964: Reflections, Applications, and Predictions: Wilderness in Context*, 76 DENV. U. L. REV. 383 (1999).

14. *Kootenai Tribe of Idaho v. Veneman*, 2001 WL 1141275 (D. Idaho 2001).

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

stop the environmental groups from appealing too, so it can apply the Wyoming district judge's ruling to the rest of the country.<sup>16</sup> In July 2004 it proposed a rule essentially jettisoning the protections for roadless areas in the Clinton Administration rule and substituting a process that merely invites each state's governor to petition the Forest Service to protect specific roadless areas in the state (something they could do anyway). This was unveiled after the Bush Administration had announced interim steps to weaken the Clinton rule under a press release headlined: "USDA [the Department of Agriculture, which houses the Forest Service] *Retains* National Forest Roadless Area Conservation Rule."<sup>17</sup>

A similar if less prominent story has played out in the Interior Department's Bureau of Land Management ("BLM"), which has stewardship responsibility over more federal lands than any other agency. Under the four previous Presidents, BLM has exercised authority to review its 270 million acre land base and identify and protect the wilderness qualities of those of its lands that are eligible for permanent protection by Congress as wilderness. In April 2003, the Bush Administration suddenly adopted the position that legal authority no longer supported this policy, and it abandoned it in a secretly negotiated settlement with the State of Utah. The administration and the state immediately had the settlement approved by a federal district judge who had previously demonstrated hostility to conservationist claims.<sup>18</sup> More recently, the administration has made an even broader assault on wild areas by seeking and obtaining Supreme Court reversal of a lower court decision finding BLM's regulation of off-road vehicles in violation of Congress's directive to preserve wilderness study areas until Congress decides whether to protect them permanently. The administration's sweeping rationale, unfortunately

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16. See *Wyoming v. U.S. Dep't of Agric.*, 277 F. Supp. 2d 1197 (D. Wyo. 2003), *appeal docketed*, No. 03-8058, *Wyo. Outdoor Council v. Wyoming* (10th Cir. 2004); Brief of Amicus Curiae The United States, *Wyoming Outdoor Council* (No. 03-8058), *available at* [http://www.ourforests.org/documents/feds\\_amicus.pdf](http://www.ourforests.org/documents/feds_amicus.pdf) (last visited Feb. 6, 2004).

17. 69 Fed. Reg. 42,636-71 (2004); Press Release, U.S. Dep't of Interior, *USDA Retains National Forests Roadless Area Conservation Rule* (June 9, 2003), *available at* <http://www.usda.gov/news/releases/2003/06/0200.htm> (emphasis added).

18. See e.g., The Wilderness Society, *Bush Administration Record on Public Lands: Irresponsible Management of the People's Land*, *at* [www.wilderness.org/Library/Documents/Bushrecord.cfm](http://www.wilderness.org/Library/Documents/Bushrecord.cfm) (Aug. 8, 2003); Press Release, The Wilderness Society, *Backroom Deal Exposed, Illegal Wilderness Settlement Contested* (Apr. 5, 2004), *at* <http://www.wilderness.org/NewsRoom/Release/20040405.cfm>; National Resources Defense Council, *Interior Department Paves Way for New Roads on Federal Lands in Utah*, [http://www.nrdc.org/bushrecord/2003\\_04.asp](http://www.nrdc.org/bushrecord/2003_04.asp) (Apr. 9, 2003).

accepted by the Court, was that the federal courts lack authority to intervene in such federal land management matters<sup>19</sup>

The result is that many millions of acres of public lands, much of it in what's been called the "essential West," the spectacular Colorado Plateau, are now vulnerable to road-building, mining, logging and other activities that could forever destroy their wilderness character.

#### IV. THE ADMINISTRATION HAS BEEN SKILLFUL IN AVOIDING A BACKLASH

Over much of the last hundred years, most Americans have been reluctant to accept the proposition that industry and governmental interests are congruent. Yet the Bush (II) Administration seems to be getting away with that approach, at least so far. It plainly went to school on the experience of the first Reagan Administration, and particularly its flamboyant Secretary of the Interior James Watt, who was excoriated and ultimately deposed for his confrontational style on natural resource issues.

The stylistic contrast with Watt could not be sharper. Through the friendly persona of Secretary of the Interior Gale Norton (a Watt protégé early in her career), the administration has skillfully stage-managed its policies to avoid that kind of backlash.

The pattern was set in the 2000 campaign, where President Bush shrewdly put himself forward as an environmental moderate, supporting carbon dioxide emission regulations and full funding for protecting and improving the national park system.<sup>20</sup> Once in office, he quickly retreated on both these campaign promises, just about the only ones he made on the environment, and began a systematic assault on land conservation.

His administration has slavishly followed the advice of the now-famous leaked memo prepared by Republican strategist Frank Luntz, which explained in considerable detail how to soothe the public with happy talk about the environment.<sup>21</sup> Interior Secretary Norton's end-

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19. See *Norton v. Southern Utah Wilderness Alliance*, 124 S.Ct. 2870 (2004).

20. See Ron Hutcherson & William Douglas, *Bush Still has a lot of Vows Left to Keep*, AKRON BEACON JOURNAL, Jan. 18, 2004, at 6 (explaining Bush's promises regarding carbon dioxide emission); Lisa Stiffler & Matthew Craft, *Salmon or Parks—Bush Record in Dispute*, SEATTLE POST-INTELLIGENCER, Aug. 22, 2003, at A1 (explaining Bush's promises regarding national parks).

21. Jennifer Lee, *GOP Changes Environmental Message; Memo Shows Party How to Soften Words*, SEATTLE TIMES, Mar. 2, 2003, at A13. Some examples: "First, assure your

lessly repeated mantra of the “4 C’s,” “consultation, cooperation, and communication, all in the name of conservation,”<sup>22</sup> is a key part of the communications package.

Meanwhile, the administration makes one anti-conservation decision after another, often with little or no “consultation, cooperation or communication,” except with industry. Such decisions, are, moreover, often disclosed without fanfare in the slowest news cycle available, following standard political advice to release news the public might be uncomfortable with on Friday afternoon (preferably before a holiday weekend), when fewer people see it and those interests adversely affected cannot readily organize a response. Only lately has awareness of the administration’s penchant for late Friday “bad-news” announcements on the environment finally penetrated the mainstream media.<sup>23</sup>

The administration’s devotion to that pattern would seem comical if it were not so effective. Here are just a few of the administration’s late Friday announcements:

- a. opening 9 million acres of federal lands on Alaska’s North Slope (west of the Arctic Refuge) to oil and gas leasing;<sup>24</sup>
- b. giving mining companies the legal right, not just the opportunity, to use as much federal land as they need for polluting waste dumps;<sup>25</sup>
- c. adopting a very broad interpretation of federal court decisions to initiate a regulatory change to remove federal protection from 20 million acres of wetlands;<sup>26</sup> and

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audience that you are committed to ‘preserving and protecting’ the environment, but that ‘it can be done more wisely and effectively.’” “The three words Americans are looking for in an environmental policy . . . are ‘safer,’ ‘cleaner,’ and ‘healthier.’” “Absolutely do not raise economic arguments first.” “Stay away from ‘risk assessment,’ ‘cost-benefit analysis,’ and other . . . terminology used by industry and corporations.” ““Your plan must be put in terms of the future, not the past or present . . . [as in] we are trying to make things *even better* for the future.” Memorandum from the Luntz Research Companies, *Straight Talk* 132, at <http://www.luntzspeak.com/graphics/LuntzResearch.Memo.pdf> (2002).

22. See generally, U.S. Dep’t of Interior, *Implementing The Four C’s: Consultation, Cooperation, Communication, All in the Service of Conservation*, at <http://www.doi.gov/news.html> (last updated Aug. 13, 2004) (providing a list of the Bush Administrations claims of implementation of the “Four C’s”).

23. See Dana Milbank, *For Newshounds, TGIF* WASH. POST, Feb. 24, 2004, at A19, available at <http://www.washingtonpost.com/wp-dyn/articles/A491-2004Feb23.html>.

24. John Heilprin, *Another Energy Plan for Alaska; The White House Seeks Oil and Gas Development on 8.8 Million Acres, but not in a Wildlife Refuge*, PHILADELPHIA INQUIRER, Nov. 21, 2003, at A16, available at 2003 WL 66947528.

25. See Walston, *supra* note 5.

26. Theo Stein, *EPA Plan Shifts Oversight of 20% of U.S. Wetlands*, DENV. POST, Jan. 12, 2003, at A1, available at 2003 WL 5504386.

d. retreating on clean air requirements that aging power plants install pollution controls when they engage in major facility improvements.<sup>27</sup>

#### V. THE ADMINISTRATION HAS DEFTLY MANIPULATED CRISES TO SERVE INDUSTRY

Undeniably, the administration has so far proved very good at playing politics with natural resources. It has, for example, shrewdly manipulated concerns over fires and over energy security, using them as wedges to open up many more public lands to commercial logging and energy development and to tilt federal natural resource decision-making processes in industry's favor.

Although its efforts to open the Arctic Refuge in Alaska to oil and gas development has attracted the most attention, the administration has also sought to make oil and gas development the preferred use of hundreds of millions of acres of federal lands in the lower forty-eight, including many wild areas.<sup>28</sup> This pro-energy industry tilt is not surprising, considering the energy industry's dominance in the Vice President's energy task force deliberations early in the administration, the records of which the administration has managed to keep secret.<sup>29</sup>

But that was just the beginning. The administration has basically jettisoned the long-standing policy that national forests and public lands serve "multiple uses," by instructing land managers to come down on the side of the industry unless they have a compelling reason not to do so.<sup>30</sup> On the process side, it has moved to relax the requirements of the National Environmental Policy Act ("NEPA"), an icon of environmentally sensitive decision-making that has been widely copied over the globe, and to downplay the role of biological diversity in the Forest Service and BLM planning processes.<sup>31</sup> It has also challenged long-accepted notions that the public (and especially conserva-

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27. See Howard Kurtz, *The Sky Is Falling, Friday At Five; On the Environment, A Record of Extremes*, WASH. POST, June 24, 2002, at C1, available at 2002 WL 22783392.

28. Hal Herring, *Energy Officials Target American Serengeti: Natural Beauty, Drilling Push Clash in Montana*, HOUS. CHRON., Nov. 2, 2003, at 10, available at 2003 WL 57454274.

29. *Cheney v. U.S. Dist. Ct.*, 124 S.Ct. 2576 (2004).

30. J.R. Pegg, *Bush Guidelines Discard Wilderness Quality Public Lands*, ENV'T NEWS SERV., Sept. 30, 2003, available at 2003 WL 64603386.

31. Forests Forever, *National Forest Management Act Changes*, at <http://www.forestsforever.org/NFMAact.html> (May 15, 2003).



tionists) may have meaningful review of agency decisions in administrative tribunals and the courts.<sup>32</sup>

Yet on many of these matters, the administration's policies are not aimed at finding real solutions to real problems. On fire, for example, giving the timber industry access to stands of timber in remote areas is only loosely connected to the most pressing fire problem—protecting lives and dwellings in the so-called “urban-wildfire interface.” The Bush policy is practically silent on the key to any real progress in this area, leveraging federal firefighting dollars and insurance incentives to get stronger state and local building codes, vegetation management around structures, and related measures.

Likewise on energy, because the U.S. contains only three percent of the world's oil reserves while consuming 25% of world production,<sup>33</sup> no knowledgeable observer believes America's dependence on foreign oil can be meaningfully dented by domestic production, even if every single acre of federal land onshore were opened to unrestricted energy development.

VI. TRADITIONAL CONSERVATIVE PRINCIPLES,  
LIKE PROMOTING FREE MARKETS AND DEVOLVING  
GOVERNMENTAL RESPONSIBILITIES TO STATE AND LOCAL  
GOVERNMENTS, HAVE TAKEN A BACK SEAT WHERE THEY  
CONFLICT WITH INDUSTRY DESIRES

Perhaps the strongest indication of the administration's capture by industry is the manner in which it has kept the free-market ideologies of some of its key natural resource appointees firmly in check, readily sacrificing them where they conflict with industry demands.

For example, in recent years, ideological conservatives, among others, have touted the resolution of longstanding conflicts over the environmental impacts of livestock grazing on arid federal lands by buying the ranches in consensual, market-based transactions, and retiring the federal lands their cattle has been grazing from livestock grazing in the future.<sup>34</sup> This has provided the administration with a great opportunity to put in place the principles of so-called “free-market environmentalism” favored by many of the Bush Administration's right-wing supporters.

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32. *Id.*

33. Irwin Stelzer, *Dependence on Saudi Oil is Our Fatal Weakness*, SUNDAY TIMES (LONDON), Oct. 21, 2001.

34. Timothy Egan, *In Idaho, A Wily Opponent Who Takes On Ranchers*, N.Y. TIMES, July 21, 1995, at A12.

But when the Grand Canyon Trust, a conservation group, went into the marketplace to purchase grazing permits on nearly a million acres of public lands in the Grand Staircase-Escalante National Monument in southern Utah, and sought to retire those lands from grazing, the Bush Administration balked.<sup>35</sup> The Interior Solicitor (a former official of the National Public Lands Council, a rancher trade association) issued legal opinions throwing up roadblocks to retirement, and the retirement proposal continues to languish inside the Department.<sup>36</sup> Even though Interior has acknowledged that retirement will improve the health of the land,<sup>37</sup> the administration is more concerned about placating the cattlemen's association and hard-bitten local opponents of the national monument who do not want to see even market-based land conservation. The unhappy result is that philanthropic money to invest in grazing retirements is harder to come by, much to the chagrin of free-market environmental groups, one of who recently gave the administration a "C-" in its report card on this point.<sup>38</sup>

Another example is the administration's unwillingness to defer to state and local governments when their interests diverge from those of industry. Thus, the administration told a federal court in Nevada that federal mining law preempted efforts by a local county to regulate a proposed processing plant for federal minerals that would be located on *private* land.<sup>39</sup> The overriding federal interest here is somewhat mysterious, considering that the only use of the material being mined is to make kitty litter.<sup>40</sup> The administration has made a similar argument in opposing Los Angeles County's efforts to regulate a quarry on private land extracting sand and gravel owned by the federal government.<sup>41</sup> And it has aggressively (but so far unsuccess-

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35. See Brent Israelsen, *Grazing Permits to Retire*, SALT LAKE TRIB., Jan. 14 2003, at B1.

36. *Id.*

37. See Nancy Perkins, *Ranchers Blast the BLM Over Allotment Purchase*, DESERT NEWS (SALT LAKE CITY), Jan. 23, 2002, at B6.

38. The Property and Environment Research Center, *Mid-Term Report Card: Bush Administration's Environmental Policy* (Bruce Yandle and Jane S. Shaw, eds., 2003), available at [http://www.perc.org/publications/news/reportcard\\_execsum.php?s=2](http://www.perc.org/publications/news/reportcard_execsum.php?s=2).

39. Amicus Brief for the United States at 2, *Oil Dri Corp. v. Washoe County*, Civ. No. 02-0186 (D. Nev. Feb. 22, 2003) (on file with journal).

40. *Id.* at 3.

41. See Heather MacDonald, *State Joining Fight Against Gravel Mine*, L.A. DAILY NEWS, Jul. 17, 2003, at SC1 (stating that the federal government intervened in a case between Santa Clarita and Cemex Inc. to assert the supremacy of federal law).

fully) pushed the Congress to give it authority to preempt state regulation of rights-of-way for energy facilities.<sup>42</sup>

A third example is where the administration has favored industry over private property rights. It has, for example, tried to facilitate recognition of rights-of-way across federal lands to facilitate industrial development, even though the effect puts a cloud over private property rights, because many of these purported rights-of-way across federal lands also cross private lands.<sup>43</sup> Unsuspecting private property owners in rural Utah, for example, have been disconcerted to find the federal government arguing they have no right to exclude people from their own lands, because of the presence of old rights-of-way claims that the administration has put on a fast track for confirmation.<sup>44</sup>

#### VII. EVEN WHERE THE ADMINISTRATION HAS LEFT CONSERVATION MEASURES IN PLACE, IT HAS WORKED BEHIND THE SCENES TO UNDERMINE THEM.

Early on, the administration made lots of noise about undoing or rolling back some of the twenty-two national monuments President Clinton created on federal land during his time in office. Its efforts to open these monuments up to oil and gas leasing came a cropper when, in 2001, Congress legislated to keep them closed.<sup>45</sup> But now the administration is moving quietly to weaken monument protections by watering down management land use and resource management plans, gutting monument management staffs, and other means.<sup>46</sup> Simi-

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42. Katherine Fraser, *Energy Bill Stalled in Senate; Supporters Vow to Renew Effort this Week*, INSIDE F.E.R.C., Nov. 24, 2003, at 1.

43. See generally Property Owners for Sensible Roads, *Real Life Stories*, at <http://www.posrp.org/Stories.htm> (last updated May 15, 2004) (providing examples of the impact on private land of granting right-of-ways to industry).

44. See *Bingaman Assails Interior Deal With Utah Over Rights-of-way*, INSIDE ENERGY/WITH FEDERAL LANDS, Apr. 28, 2003, at 8 (describing "an Interior Department agreement with Utah that would allow the state to claim rights-of-way on public lands"); Theo Stein, *Controversy Arise Over Land Use; Western Owners Clash with Public*, CHI. TRIB., Aug. 24, 2003, at 8 (describing the effect of the agreement between the Interior Department and Utah on property owners in Utah and Colorado).

45. Dep't of the Interior and Related Agencies Appropriation Act, 2002, Pub. L. No. 107-68 § 331, 115 Stat. 471 (2001); see also, Press Release, Murray Helps Prevent Oil and Gas Drilling in the Hanford Reach National Monument (July 11, 2001), at <http://murray.senate.gov/news.cfm?id=189467>.

46. The Wilderness Society, *New BLM Management Plans Would Open More than 80 Percent of Affected Lands to Oil And Gas Development*, at <http://www.wilderness.org/NewsRoom/Release/20040804.cfm> (Aug. 4, 2004); The Sierra Club, *Grand Canyon-Parashant National Monument (Arizona) Threat: National Monument Management, ORV Damage*,

larly, while it has left formally intact most of the Clinton Administration's Northwest Forest Plan, which reduced timber harvest levels in the Pacific Northwest to levels that are sustainable and consistent with preservation of the biodiversity of these magnificent forests over the long term, it is undermining it by opening up areas to logging under the banner of fire policy.<sup>47</sup>

#### VIII. THE ADMINISTRATION HAS SOUGHT REMARKABLY LITTLE FROM CONGRESS, WHILE AGGRESSIVELY USING EXECUTIVE AUTHORITY

On this score, the administration has taken pages from its predecessor's book. But the Clinton Administration acted largely out of necessity, facing a hostile Congress for most of its term. President Bush has chosen to follow the same path even though for nearly all his term the Republicans have been in firm control of both Houses of Congress.<sup>48</sup> While Republican majorities there have controlled the legislative agenda and protected the administration from hostile oversight or investigations, the administration has apparently calculated that the Congress is not sufficiently in tune with its pro-industry policies to enlist its affirmative support. The problem, from the administration's standpoint, is that a few moderate Republican Senators and 30-50 moderate Republicans in the House are not dependable allies of the administration on many federal lands and natural resource issues.<sup>49</sup>

The result is that, with very few exceptions, the administration has not been interested in expending political capital to get natural resources legislation through the Congress. For example, the administration has paid lip service to the idea of legislative reform of the antiquated Mining Law of 1872, but it has never sent a reform bill to Congress. It has concentrated instead on greasing industry's path

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*Underfunding*, at <http://www.sierraclub.org/wildlands/wildlandsatrisk/grandcanyon.asp> (last visited August 19, 2004) (explaining underfunding by the Bush Administration at national monuments).

47. See, The Wilderness Society, *Bush Administration Record on America's National Forests*, at <http://www.wilderness.org/Library/factsheets.cfm> (July 2004) (providing a framework of the Bush Administration's forest policy).

48. The only exception being the few months in 2002 when the Senate was effectively in Democratic control after Senator Jeffords became an independent.

49. See, e.g., 'Clear Skies' Seen Positioned for Inclusion in Hill Energy Bill, *Congress Daily AM*, Sept. 23, 2003 (describing opposition to Bush Administration proposal by House and Senate Republicans).

through executive interpretation.<sup>50</sup> Indeed, with the exception of energy (where legislation is necessary to open up Arctic Refuge) and fire policy (where some process changes require legislation), almost no significant administration initiative in this area has required congressional action.

The explanation seems obvious enough: The administration is more pro-industry than even the Republican majorities in the Congress, and it does not want the kind of public debate on its policy initiatives in this area that is practically inevitable in the congressional process. Its reluctance to go to Congress, then, is consistent with its penchant for announcing natural resource decisions late on Fridays.

#### IX. THE ADMINISTRATION HAS SHREWDLY USED COURT SETTLEMENTS AND OTHER MEANS TO MAKE ITS DECISIONS HARDER TO REVERSE IN THE FUTURE

For example, when the administration decided to strip BLM of authority to protect roadless lands under its jurisdiction so that Congress might preserve them as wilderness, it did not do it by formal rulemaking, policy pronouncement, or even press release. Flouting the Secretary Norton's "four C's" mantra, it chose instead to wrap its decision in a legally binding settlement of a seven-year-old, previously moribund lawsuit brought by the State of Utah, and to get a friendly local federal judge (a former staff member to Senator Orrin Hatch who had been appointed by the first President Bush) to approve it the next day.<sup>51</sup>

Another telling example is found in the administration's approach to the Endangered Species Act ("ESA"). Although the ESA has been a thorn in the side of some industry interests, the administration has been reluctant to ask Congress to reform it, perhaps because of concern about undermining its base in the religious right, where species preservation resonates with overtones of Noah and the flood. But that has not stopped the administration from finding less direct ways to undermine the Act. In one recent case, the administration told the federal courts the ESA gives it no authority to reduce deliveries of subsidized water from federal water projects where necessary to protect endangered species. This new, radical position contradicts that taken by previous administrations, including those of

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50. See COGGINS, WILKINSON & LESHY, *supra* note 1, at 641-42 (discussing letter from Secretary of the Interior Gale Norton to congressional leaders regarding Mining Law reform).

51. See Smith, *supra* note 11.

Ronald Reagan and the first President Bush, and also flies in the face of numerous prior court decisions.<sup>52</sup>

Here and elsewhere, the administration's narrow view of regulatory authority and broad view of property and contract rights gives it a way to bind future administrations and Congresses to its conservative views. In the area of federal natural resources, the policy effectively achieves a subtle "privatization"—a disguised throwback to the nineteenth century's Gilded Age.

#### X. THE ADMINISTRATION HAS NOT HESITATED TO MANIPULATE SCIENCE OR FACTS TO SERVE INDUSTRY

There are numerous examples of the Bush Administration's manipulation of facts and science for dubious purposes. The following are a few of numerous examples of the Bush Administration's manipulation of science or facts to serve its goals (the italicized phrases being the gist if not exact quotations of the administration's assertions).<sup>53</sup>

a. *We believe in sound science in government decision-making.* Recently a nonpartisan group of more than sixty prominent scientists, including a dozen Nobel laureates, stated that the administration had ignored and manipulated scientific knowledge in order to advance its political agenda.<sup>54</sup>

b. *The government has irrationally locked up large onshore energy supplies.* Congressionally mandated studies have shown that the vast majority of federal lands with oil and gas potential are open to leasing and development without special restrictions.<sup>55</sup>

c. *Obstructionist environmental appeals have jeopardized public safety and healthy forests by slowing down desperately needed forest thinning projects.* The General Accounting Office and others have done studies which show that only a small fraction of forest thinning

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52. See Brief of Appellant, U.S. Fish and Wildlife Service, *Rio Grande Silvery Minnow v. Keys*, 355 F.3d 1215 (10th Cir. 2004) (02-2254, 02-2255, 02-2267) (claiming the government's water contracts bind it so tightly as to leave no room for ESA compliance).

53. See, e.g., The Wilderness Society, *President Bush's Environmental Rhetoric versus His Record*, at [http://www.wilderness.org/Library/Documents/RhetoricVsRecord\\_08\\_08\\_03.cfm](http://www.wilderness.org/Library/Documents/RhetoricVsRecord_08_08_03.cfm) (July 8, 2003).

54. See Union of Concerned Scientists, *Restoring Scientific Integrity in Policymaking*, available at [http://www.ucsusa.org/global\\_environment/rsi/page.cfm?pageID=1320](http://www.ucsusa.org/global_environment/rsi/page.cfm?pageID=1320) (last updated Sept. 18, 2004).

55. See Bruce Driver, *Power Hungry: What Kind of Energy Policy Does America Need? Proposed Legislation Ignores the Basics*, DENV. POST, Feb. 18, 2004, at E01, available at 2004 WL 59318650.

proposals have been appealed, and only one percent of such projects have been enjoined.<sup>56</sup> The facts have not muffled the administration's drumbeat that many communities are imperiled by foolish environmental injunctions.

d. *We can still protect wilderness values, we just can't protect wilderness.* In the Utah wilderness settlement, the administration told the court it had no legal authority to protect additional tracts of federal lands as wilderness study areas.<sup>57</sup> Simultaneously, Secretary Norton released a letter to the press in which she said the administration can, despite the settlement, still protect wilderness values. But actions (and a court settlement) speak louder than words in a press release, and the administration has made it clear to the BLM that it is not interested in protecting such areas, and has moved aggressively to lease them to oil and gas companies.<sup>58</sup> In fact, Utah Governor Leavitt was so taken aback by the administration's eagerness to lease oil and gas in these wild areas that he was moved to protest, even as the ink was drying on the agreement he had signed that made such aggressive steps possible.<sup>59</sup>

e. *Our generous policy promoting roads across many federal lands does not threaten national parks, wildlife refuges, wilderness areas, or private property.* Another court settlement the administration reached with Utah Governor Leavitt created a special process for resolving claims to rights-of-way across federal lands in that state. The

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56. See The Sierra Club, *Action Alert: June 27, 2002*, available at [http://arizona.sierraclub.org/pr\\_and\\_alerts/pr\\_and\\_alerts\\_2002/alert\\_06-27-02.asp](http://arizona.sierraclub.org/pr_and_alerts/pr_and_alerts_2002/alert_06-27-02.asp).

57. *Assaulting Wilderness*, SALT LAKE TRIB., Apr. 20, 2003, at AA1, available at 2003 WL 3679986; Juliet Eiperin, *Utah Oil and Gas Leases Stir Criticism: Sensitive Wildlife Habitats Auctioned to Bush Contributors, Environmentalists say*, WASH. POST, March 1, 2004, at A2.

58. See Press Release, Southern Utah Environmental Alliance, *Utah Public Lands First Victim of Bush Administration Anti-Wilderness Policies* (Oct. 30, 2003), at [https://www.xmission.com/~suwa/entry.php?entry\\_id=460](https://www.xmission.com/~suwa/entry.php?entry_id=460). The legality of the administration's action is now before the Tenth Circuit Court of Appeals, in an odd procedural posture. Conservation interests had moved to intervene in pending (but moribund) litigation in the Utah federal district court between the Interior Department and the State of Utah that dated back to the Clinton Administration. In its eagerness to embed its view of the applicable law in cement, the Bush Administration seized on this old case as a vehicle for incorporating its agreement with the State of Utah. The friendly district judge approved the settlement the day after it was filed, without addressing the conservationists' motion to intervene (indeed, it has not done so to this day). The conservationists appealed this treatment, but both Interior and the State of Utah are now in the court of appeals claiming the conservationists cannot appeal, but must await further action by the district judge, which given his track record could be a very long wait indeed. Wilderness Society, *Backroom Deal Exposed*, *supra* note 18.

59. Leavitt was subsequently appointed by President Bush to head the Environmental Protection Agency. Michael Kilian, *Utah Governor Nominated to Head EPA*, CHI. TRI., Aug. 12, 2003, at 1, available at 2003 WL 61476217.

administration and the Governor have touted this settlement as “excluding” national parks, wildlife refuges, wilderness, and private lands.<sup>60</sup> But many of the claims to be considered during this process do not conveniently end at the borders of these protected lands, but instead to proceed into them. If, as the administration seems bent on doing, these claims are resolved on generous terms, it is like pointing a loaded gun at these protected areas and giving the claimants the power to pull the trigger.

### CONCLUSION

The Bush Administration has compiled a remarkably strident pro-industry record. It has acted mostly unilaterally, Congress accommodating by staying out of its way. It has also so far escaped serious resistance in the courts, although litigation unfolds slowly and it is too soon to tell whether the courts will be as compliant as the Congress. Meanwhile, the administration’s shrewd messaging and the lack of congressional resistance have avoided triggering a serious public backlash.

But we are in a national election campaign, where the administration’s record will be held up for scrutiny. Its pro-industry policies, of which the natural resource issues addressed in this paper are a piece, will likely have some prominence in the debate. Indeed, it is possible the election will constitute some sort of popular referendum on its policy direction. It may help answer the question whether this twenty-first century Gilded Age continues, or whether we move back toward the stewardship ethic that dominated twentieth century federal policy in this area. The outcome could have a dramatic effect on the future of federal lands and natural resources.

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60. Press Release, Department of the Interior, Interior Department and the State Of Utah Reach Landmark Agreement on R.S.2477 Rights-of-Way Issue (Apr. 9, 2003), *available at* <http://www.doi.gov/news/030409a.htm>.