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Growers Association

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UINTAH COUNTY, UTAH, a Utah political
subdivision, *et al.*,

Plaintiffs,

v.

KEN SALAZAR, in his official capacity as
SECRETARY OF THE INTERIOR, *et al.*,

Defendants,

) No. 2:10-cv-00970-CW
)
) **MOTION FOR LEAVE TO FILE**
) **BRIEF AMICUS CURIAE OF**
) **PACIFIC LEGAL FOUNDATION,**
) **GUARDIANS OF THE RANGE,**
) **NATIONAL CATTLEMEN’S**
) **BEEF ASSOCIATION,**
) **PETROLEUM ASSOCIATION**
) **OF WYOMING, PUBLIC LANDS**
) **COUNCIL, WASHINGTON**
) **CATTLEMEN’S ASSOCIATION,**

SOUTHERN UTAH WILDERNESS ALLIANCE, *et al.*,

Defendant-Intervenors.

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) **WYOMING ASSOCIATION OF**
) **CONSERVATION DISTRICTS,**
) **WYOMING COUNTY**
) **COMMISSIONERS**
) **ASSOCIATION, AND WYOMING**
) **STOCK GROWERS**
) **ASSOCIATION**

) Judge: The Hon. Clark Waddoups

Pacific Legal Foundation, Guardians of the Range, National Cattlemen's Beef Association, Petroleum Association of Wyoming, Public Lands Council, Washington Cattlemen's Association, Wyoming Association of Conservation Districts, Wyoming County Commissioners Association, and Wyoming Stock Growers Association hereby move for leave to file an amicus curiae brief in support of the plaintiffs in *Uintah County v. Salazar*, Case No. 2:10-cv-00970 (consolidated cases). Proposed Amici respectfully submit the accompanying amicus brief for the Court's benefit.

Plaintiffs Uintah County, Uintah County Board of Commissioners, and Utah Association of Counties consent to the filing of this motion and the accompanying brief. Federal Defendants take no position on this motion. And all other parties are presumed to take no position on this motion because they did not respond to Amici's request for consent. No party has indicated to Amici that it objects to the filing of this motion.

IDENTITY AND INTEREST OF AMICI

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest legal foundation of its kind. Founded in 1973, PLF provides a voice in the courts for Americans who believe in limited government, private property rights, individual freedom, and a balanced approach to environmental regulation. Thousands of individuals and organizations support PLF's efforts nationwide.

PLF's attorneys have participated in several cases involving the Federal Land Policy Management Act, and Administrative Procedure Act (APA). *See, e.g., Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990); *W. Watersheds Project v. Matejko*, 468 F.3d 1099 (9th Cir. 2006); *Forest Serv. Employees for Env'tl. Ethics v. U.S. Forest Serv.*, 397 F. Supp. 2d 1241 (D. Mont. 2005); *Sierra Club v. Penfold*, 664 F. Supp. 1299 (D.

Alaska 1987). PLF's litigation experience will lend a useful viewpoint on the issues presented in this case.

Guardians of the Range (Guardians) was formed in 2004 to promote sound science and community partnership in public land grazing management. Guardians assists its 160 members—many of whom are grazing permit holders—in working with the Bureau of Land Management (BLM), helping to resolve problems and facilitating range improvements. Guardians' members are livestock producers whose livelihoods are directly tied to the availability of public lands. Guardians also regularly participates in policy-making at the local, state, and federal levels, including land management regulations, which determine both access to public lands and the degree to which permit holders are allowed to steward range resources and their livestock. Guardians currently has members that graze livestock in areas that are identified as lands with wilderness characteristics under the Wild Lands policy.

The National Cattlemen's Beef Association (NCBA) has represented America's cattle producers since 1898, preserving the heritage and strength of the industry through its work in education and public policy. NCBA and its affiliates represent about 140,000 beef producers, in every state, and at all levels of production. The outcome of this litigation has the potential to either stifle economic growth in the beef industry through regulation, or provide much needed certainty to NCBA's members concerning BLM's authority to manage public lands.

The Petroleum Association of Wyoming (PAW) has been dedicated to the betterment of Wyoming's oil and gas industry since 1910. PAW serves approximately 250 members, ranging from large companies to small "mom and pop" operations throughout the state. PAW member companies employ over 20,000 people in the State of Wyoming, and provide substantial tax revenue as well. Because the federal government owns over two-thirds of the minerals in Wyoming, PAW's

members' ability to explore for oil and gas will be cut back if BLM makes federal land unavailable for use under the Wild Lands policy.

The Public Lands Council (PLC) has represented ranchers who use public lands since 1968. PLC is focused on making sure that ranching can remain a viable business that can continue to feed the world, while also conserving the environment upon which that business depends. PLC's members represent 18,000 BLM permits and leases, and 21,000 BLM allotments throughout the western United States. These ranchers provide a tax base for rural governments, provide jobs on their ranches, and support rural businesses, such as parts stores, vehicle dealers, and other agriculture and livestock-related enterprises. Overbearing federal regulation, such as the Wild Lands policy, burdens PLC's members' ability to raise livestock and make a living, and creates an environment of uncertainty that stifles investment and economic growth.

Founded in 1925, the Washington Cattlemen's Association (WCA) is a statewide nonprofit trade organization in Washington State dedicated to promoting and preserving the beef industry through producer and consumer education, legislative participation, regulatory scrutiny, and legal intervention. WCA serves 1,550 members, many of whom utilize public lands for grazing cattle. WCA's members provide jobs and benefits to their employees, pay local, state, and federal taxes, and support schools, hospitals, churches, and libraries through taxation and donations. Regulations that restrict cattle production, such as the Wild Lands policy, increase operating expenses and in some cases cause cattle operations to go out of business. This has a negative effect on the beef industry, and the economy in general.

The Wyoming Association of Conservation Districts (WACD) works to conserve Wyoming's natural resources, including soil, water, wildlife habitat, and rangeland through conservation programs and projects. WACD was founded in 1945 to serve Wyoming's 34 conservation districts,

which are formed pursuant to state statute. WACD's member districts seek to implement conservation measures that allow for sustainable, multiple use of the state's natural resource base. WACD's member districts also work with private landowners and public agencies to implement conservation projects. The Wild Lands policy will severely impede the districts' ability to carry out these programs because erosion protection projects, livestock grazing projects, control of invasive plants, and wildlife enhancement projects cannot be implemented if maintaining wilderness characteristics is BLM's overriding land use objective.

The Wyoming County Commissioners Association (WCCA) was formed in 1984. It consists of the Boards of County Commissioners of all 23 Wyoming counties, and works to strengthen Wyoming's counties and the people who lead them through networking, education, and unified action. The Wild Lands policy will harm WCCA's membership by limiting uses of federal lands within Wyoming, resulting in a reduction of jobs related to uses that typically take place on federal lands, and subsequently, diminished revenues to Wyoming's counties.

The Wyoming Stock Growers Association (WSGA) is a nonprofit association formed in 1872 to advocate on issues affecting the cattle industry, Wyoming agriculture, and rural community life. WSGA promotes the role of the Wyoming cattle industry in resource stewardship, animal care, and production of high-quality, safe, and nutritious beef. WSGA represents over 1,200 members in Wyoming, about 35 percent of whom are actively engaged in livestock grazing on federal lands. Wyoming's agricultural sector annually accounts for over \$1 billion in production, with cattle comprising about two-thirds of total agricultural cash receipts. The Wild Lands policy will limit WSGA members' ability to maintain their ranching operations, and limit the ability to make improvements, such as water and fencing.

MEMORANDUM OF SUPPORTING AUTHORITIES

Proposed Amici seek to assist the Court in determining that the Secretary violated the APA in enacting the Wild Lands policy. The APA requires federal administrative agencies to promulgate new rules according to the APA's notice and comment procedures. 5 U.S.C. § 553. Secretary Salazar failed to follow these procedures; therefore, the Court should invalidate the Wild Lands policy.

This Court has broad discretion to permit a non-party's participation in a lawsuit as amicus curiae. *See Nat'l Ass'n of Homebuilders v. U.S. Army Corps of Engineers*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007) (finding Court would benefit from environmental organization's participation as amicus in support of government's interpretation of Clean Water Act); 4 Am. Jur. 2d Amicus Curiae § 3 ("The criterion for deciding whether to permit filing of an amicus brief is whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties' briefs."). An amicus brief is appropriate when it serves "the benefit of the court, assisting the court in cases of general public interest." *Newark Branch, N.A.A.C.P. v. Twp. of Harrison*, 940 F.2d 792, 808 (3d Cir. 1991); *see also Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1232 (9th Cir. 2010) (noting amicus brief was "helpful to the court"); *Peters v. Jenney*, 327 F.3d 307, 319 n.13 (4th Cir. 2003) (same). Proposed Amici's motion to file the accompanying amicus brief should be granted because Amici will provide unique and useful insight on the practical impact of the Wild Lands policy to a variety of individuals and industries.

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Utah, Central Division by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.


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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
STATEMENT OF FACTS	2
A. Secretarial Order 3310	2
B. Manuals 6301, 6302, and 6303	3
ARGUMENT	5
I. SECRETARY SALAZAR FAILED TO FOLLOW APA NOTICE AND COMMENT PROCEDURES FOR PROMULGATING THE WILD LANDS POLICY	5
A. The APA Requires Notice and Comment, Which Secretary Salazar Failed To Provide	6
B. The Wild Lands Policy Is Not Exempt from APA Notice and Comment	7
II. NOTICE AND COMMENT IS NECESSARY TO ALLOW AFFECTED PARTIES TO TAKE PART IN THE RULE-MAKING PROCESS	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page
<i>Am. Fed’n of Government Employees, AFL-CIO v. Block</i> , 655 F.2d 1153 (D.C. Cir. 1981)	7
<i>Am. Hosp. Ass’n v. Bowen</i> , 834 F.2d 1037 (D.C. Cir. 1987)	7
<i>Buschmann v. Schweiker</i> , 676 F.2d 352 (9th Cir. 1982)	7
<i>Caraballo v. Reich</i> , 11 F.3d 186 (D.C. Cir. 1993)	7
<i>Chrysler Corp. v. Brown</i> , 441 U.S. 281 (1979)	7
<i>First Bancorporation v. Bd. of Governors of Fed’l Reserve System</i> , 728 F.2d 434 (10th Cir. 1984)	7-8
<i>Gibson Wine Co. v. Snyder</i> , 194 F.2d 329 (D.C. Cir. 1952)	8
<i>High Sierra Hikers Ass’n v. Blackwell</i> , 390 F.3d 630 (9th Cir. 2004)	3
<i>Knutzen v. Eben Ezer Lutheran Housing Center</i> , 815 F.2d 1343 (10th Cir. 1987)	8
<i>Natural Res. Def. Council v. EPA</i> , 643 F.3d 311, 2011 U.S. App. LEXIS 13390 (D.C. Cir. 2011)	9
<i>NLRB v. Wyman</i> , 394 U.S. 759 (1969)	6
<i>Norton v. S. Utah Wilderness Alliance</i> , 542 U.S. 55 (2004)	1-2, 10
<i>Reno-Sparks Indian Colony v. United States EPA</i> , 336 F.3d 899 (9th Cir. 2003)	7
<i>Rocky Mountain Helicopters, Inc. v. FAA</i> , 971 F.2d 544 (10th Cir. 1992)	9,11
<i>Shalala v. Guernsey Mem’l Hosp.</i> , 514 U.S. 87 (1995)	7
<i>White v. Shalala</i> , 7 F.3d 296 (2d Cir. 1993)	6-7

Federal Regulations

5 U.S.C.

§ 551(4) 6

§ 553 1

§ 553(b) 6

§ 553(b)(1)-(3) 6

§ 553(b)(A) 7

§ 553(c) 6

16 U.S.C.

§ 1131 2

§ 1131(a) 3

§ 1131(c) 2

43 U.S.C.

§ 1702(c) 10

§ 1782(c) 11

INTRODUCTION

Federal land is a public resource that supports many activities, including agriculture, energy exploration, recreation, and conservation. In enacting the Federal Land Policy Management Act (FLPMA) in 1976, Congress recognized that these uses should coexist, although they will sometimes conflict. *See Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (explaining FLPMA gives the federal government “the enormously complicated task of striking a balance among the many competing uses to which land can be put”). This difficult task of reconciling competing uses can be successfully accomplished only with the assistance of public input.

Interior Secretary Salazar’s Wild Lands policy changes the way the Bureau of Land Management (BLM) manages federal land. The policy is a transparent attempt to make more federal land off-limits to productive use, circumventing the formal congressional process for designating wilderness. The Secretary, moreover, failed to alert the public to this change in policy, and did not accept the public’s input before finalizing the policy, as required by the Administrative Procedure Act (APA). 5 U.S.C. § 553. This violation of the APA will harm thousands of individuals and industries, and the economy in general. Amici respectfully request that this Court invalidate the Wild Lands policy, as requested by the Plaintiffs.

STATEMENT OF FACTS

A. Secretarial Order 3310

On December 22, 2010, Interior Secretary Salazar issued Order 3310: “Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management.”¹ The order is informally known as the “Wild Lands policy.”

The Wild Lands policy brings sweeping change to federal land management. It equips BLM with new tools for restricting the use of federal land. Specifically, the order directs BLM to preserve “wilderness characteristics”² in federal areas not currently set aside as Wilderness Study Areas³ or units of the National Wilderness Preservation System.⁴ Order 3310 at 2. Where BLM determines

¹ Secretary of the Interior, Order No. 3310, *Protecting Wilderness Characteristics on Lands Managed by the Bureau of Land Management*, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/news_release_attachments.Par.26564.File.dat/sec_order_3310.pdf (Order 3310) (last visited Sept. 26, 2011).

² The Wild Lands policy borrows the concept of “wilderness characteristics” from the Wilderness Act, 16 U.S.C. § 1131 *et seq.*, which states: “A wilderness, in contrast with those areas where man and his own works dominate the landscape, is hereby recognized as an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain. An area of wilderness is further defined to mean in this Act an area of undeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man’s work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.” 16 U.S.C. § 1131(c).

³ Wilderness Study Areas are areas that possess “wilderness characteristics,” and which have been subjected to further examination and public comment in order to evaluate their suitability for designation as “wilderness” by Congress, pursuant to the Wilderness Act. *See S. Utah Wilderness Alliance*, 542 U.S. at 59 (2004).

⁴ The Wilderness Act established the National Wilderness Preservation System, which is composed of “wilderness areas” that are to be “administered for the use and enjoyment of the American people (continued...) ”

that protection of identified wilderness characteristics is appropriate, it must designate lands containing those characteristics as “Wild Lands.” *Id.* BLM must “protect” these new Wild Lands through land use planning and project-level decision-making. *Id.* “Protection” means avoiding impairment. *Id.* Thus, when BLM reviews applications for permission to engage in grazing or other productive activities on federal land, it must determine whether granting such permission is consistent with avoiding impairment of Wild Lands.

B. Manuals 6301, 6302, and 6303

To fully implement the Wild Lands policy, Order 3310 instructs BLM to create manuals that define and clarify “how public lands with wilderness characteristics are to be inventoried, described, and managed.” *Id.* at 2. BLM completed these manuals in February, 2011, and they are available as Manuals 6301, 6302, and 6303.

Manual 6301 guides BLM’s wilderness characteristics inventory process.⁵ The manual states that BLM must actively re-inventory land within its jurisdiction to identify lands with wilderness characteristics for Wild Lands designation. Manual 6301 at 4. The manual also provides that BLM must conduct a wilderness inventory before authorizing a proposed project when the project area “appears to have wilderness characteristics that have not been inventoried and analyzed,” and which may be “impaired” by the proposed project. *Id.* at 5. Whether an area qualifies as lands with wilderness characteristics depends on standards imported from the Wilderness Act, including

⁴ (...continued)

in such manner as will leave them unimpaired for future use and enjoyment as wilderness.” *High Sierra Hikers Ass’n v. Blackwell*, 390 F.3d 630, 646 (9th Cir. 2004). Inclusion of land within the National Wilderness Preservation System requires an Act of Congress. 16 U.S.C. § 1131(a).

⁵ See U.S. Dep’t of the Interior Bureau of Land Mgmt., *6301 - Wilderness Characteristics Inventory (Public)*, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.34706.File.dat/MS-6301.pdf (Manual 6301) (last visited Sept. 26, 2011).

size, naturalness, and “outstanding opportunities for solitude or a primitive and unconfined type of recreation.” *Id.* at 8-12.

Manual 6302 sets forth procedures for managing lands with wilderness characteristics in BLM’s land use planning process, and procedures for designating Wild Lands.⁶ It establishes a policy of “high priority” protection for wilderness resources, and instructs BLM to protect lands with wilderness characteristics when undertaking land use planning by avoiding impairment. Manual 6302 at 5. The manual also provides that BLM shall designate lands with wilderness characteristics as Wild Lands when BLM concludes that protection of wilderness characteristics on those lands is appropriate. *Id.* Factors for determining whether lands with wilderness characteristics should be designated as Wild Lands include the wilderness characteristics described in Manual 6301; manageability in light of valid existing rights; resource values and uses; and whether Congress has determined not to designate the area for inclusion in the National Wilderness Preservation System. *Id.* at 6-8. Manual 6302 also instructs BLM to make land use planning decisions that protect Wild Lands, such as recommending withdrawal from mineral entry, closing the area to leasing, prohibiting new roads, excluding commercial uses, and limiting construction. *Id.* at 11.

Manual 6303 establishes BLM policy for project-level decisions not addressed in Manual 6302.⁷ Generally, Manual 6303 governs BLM’s decision-making process for areas where BLM has

⁶ See U.S. Dep’t of the Interior Bureau of Land Mgmt., *6302 - Consideration of Lands with Wilderness Characteristics in the Land Use Planning Process (Public)*, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.46960.File.dat/MS-6302.pdf (Manual 6302) (last visited Sept. 26, 2011).

⁷ See U.S. Dep’t of the Interior Bureau of Land Mgmt., *6303 - Consideration of LWCs for Project-Level Decisions in Areas Not Analyzed in Accordance with BLM Manual 6302 (Public)*, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Information_Resources_Management/policy/blm_manual.Par.36094.File.dat/MS-6303.pdf (Manual 6303) (last (continued...))

not conducted a wilderness inventory or made a Wild Lands designation at the time an applicant proposes a project. If an applicant proposes a project for an area where wilderness characteristics are not clearly lacking, Manual 6303 directs BLM to conduct a wilderness characteristics inventory before BLM may make a decision allowing or disallowing the project. Manual 6303 at 6. Manual 6303 also provides that BLM may deny, condition, or postpone a proposed project if it determines the project might impair wilderness characteristics in the project area. *Id.*

In sum, the Wild Lands policy, as expressed in Order 3310 and Manuals 6301, 6302, and 6303, represents a major change in BLM land management practices because it provides BLM with a new method for restricting access to individuals and industries seeking to make productive use of federal lands.

ARGUMENT

I

SECRETARY SALAZAR FAILED TO FOLLOW APA NOTICE AND COMMENT PROCEDURES FOR PROMULGATING THE WILD LANDS POLICY

The Wild Lands policy grants BLM new, expansive authority to deny or condition permission to use federal land. The parties dispute whether this policy violates FLPMA because it allows BLM to set aside large areas of federal land as untouchable wilderness while bypassing the congressional process for placing lands in the National Wilderness Preservation System. Regardless of the Court's ultimate decision on that question, however, the Wild Lands policy must be invalidated because Secretary Salazar did not follow APA notice and comment procedures when he issued it.

⁷ (...continued)
visited Sept. 26, 2011).

**A. The APA Requires Notice and Comment,
Which Secretary Salazar Failed To Provide**

The APA requires federal agencies to provide notice of proposed rule-making through publication in the Federal Register. 5 U.S.C. § 553(b). Such notice must include (1) a statement of the time, place, and nature of the rule-making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. 5 U.S.C. § 553(b)(1)-(3). These notice provisions apply to “rules,” which the APA defines in part as “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of any agency.” 5 U.S.C. § 551(4). After the agency publishes notice, it must give interested persons an opportunity to participate in the rule-making process through submission of comments. 5 U.S.C. § 553(c).

The APA notice and comment procedures serve two important purposes. They “reintroduce public participation and fairness to affected parties after governmental authority has been delegated to unrepresentative agencies,” *White v. Shalala*, 7 F.3d 296, 303 (2d Cir. 1993), and they assure “that the agency is presented with all information and suggestions relevant to the problem at issue.” *Id.*; see *NLRB v. Wyman*, 394 U.S. 759, 764 (1969) (“The rule-making provisions of [the APA] . . . were designed to assure fairness and mature consideration of rules of general application.”).

The Plaintiffs assert that the Wild Lands policy must be set aside because the government failed to promulgate it through adherence to the required APA notice and comment procedures. State of Utah’s Compl. ¶¶ 126-31. None of the defendants contend that the agency followed APA rule-making procedures in promulgating the Wild Lands policy. The government’s failure to abide by the APA thus deprived the public, including Amici, of the opportunity to comment on the Wild

Lands policy in its early stages before it became final and binding on the agency. The appropriate remedy where the government fails to follow APA procedures for promulgating a new rule is invalidation of the rule. *See Buschmann v. Schweiker*, 676 F.2d 352, 355 (9th Cir. 1982) (“A regulation is invalid if the agency fails to follow procedures required by the [APA].”). The Court should therefore set aside the Wild Lands policy.

B. The Wild Lands Policy Is Not Exempt from APA Notice and Comment

The Defendants might contend that the Wild Lands policy fits within the narrow APA notice and comment exemption for “interpretive rules.”⁸ The APA exempts interpretive rules from the notice and comment rule-making provisions. 5 U.S.C. § 553(b)(A). An interpretive rule is a “rule ‘issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers.’” *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 99 (1995) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979)); *see First Bancorporation v. Bd. of Governors of Fed’l Reserve System*, 728 F.2d 434, 438 (10th Cir. 1984) (defining “interpretive rule” as “merely clarification or explanation of an existing statute or rule”). As one court explained, “the function of [the interpretive rule exemption] is to allow agencies to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.” *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987). Interpretive rules are to be contrasted with “substantive” or “legislative” rules, which “create law, usually complementary to an existing law,” as opposed to

⁸ Courts have concluded that the APA’s interpretive rule exemption must be construed narrowly. *See, e.g., Reno-Sparks Indian Colony v. United States EPA*, 336 F.3d 899, 909 (9th Cir. 2003) (“We construe narrowly the APA’s interpretive rule exception.”); *Caraballo v. Reich*, 11 F.3d 186, 195 (D.C. Cir. 1993) (“[W]e have been careful to construe § 553(b)(A)’s exceptions to the rulemaking requirements narrowly.”); *Am. Fed’n of Government Employees, AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (holding exception is “narrowly construed and only reluctantly countenanced”).

merely explaining what an “administrative officer thinks the statute or regulation means.” *Id.* (quoting *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952)).

Tenth Circuit case law demonstrates that the Wild Lands policy is *not* an interpretive rule. The Tenth Circuit’s test for determining whether an agency rule requires APA notice and comment comes from *Knutzen v. Eben Ezer Lutheran Housing Center*, 815 F.2d 1343 (10th Cir. 1987). In that case, several handicapped adults argued that the federal Department of Housing and Urban Development (HUD) failed to comply with APA notice and comment procedures before issuing a memo that formed the basis of Eben Ezer’s decision to refuse to lease apartments to the plaintiffs. *Id.* at 1345. The memo set forth HUD’s policy that certain public housing facilities were unavailable to mentally impaired and developmentally disabled people, a group which included the plaintiffs. *Id.* The Court held that the APA requires agencies to follow notice and comment procedures only for rules that “*affect a change in existing law or policy.*” *Id.* at 1352 (emphasis added). Finding that HUD’s memo did not constitute a change in any law or policy, the court rejected the plaintiffs’ APA claims.

Knutzen’s “change in existing law or policy” rule built on the court’s prior decision in *First Bancorporation*. See 728 F.2d at 435. In that case, the plaintiff bank holding company challenged the Federal Reserve’s decision to force it to comply with restrictive conditions for acquiring an industrial loan company. *Id.* *Bancorporation* argued that the company it wanted to acquire—Foothill Thrift & Loan Company—did not qualify as a “bank” under the federal Bank Holding Company Act and, therefore, *Bancorporation* was not subject to the Reserve’s regulations. *Id.* at 435-36. *Bancorporation* also argued that the Reserve’s treatment of Foothill as a bank was based on a prior adjudication involving a company called Beehive Financial Corporation, and that the Reserve’s “Beehive order” constituted a rule that the Reserve failed to publish pursuant to APA

rule-making procedures. *Id.* at 437. The court found that the Reserve treated its Beehive order as a “broad policy announcement,” noting that the Reserve had relied on it to evaluate several acquisitions, including the Foothill matter. *Id.* at 437-38. The Reserve argued that the Beehive order constituted an interpretive rule and was therefore exempt from APA notice and comment, but the court ruled for Bancorporation because the Beehive order constituted a “significant policy change” that did not undergo notice and comment. *Id.* at 438.

Additionally, *Rocky Mountain Helicopters, Inc. v. FAA*, 971 F.2d 544 (10th Cir. 1992), sheds light on how to apply the “change in law or policy” test. In that case, the FAA instructed Rocky Mountain’s pilots to cease using night vision goggles during emergency medical evacuation flights due to safety concerns. *Id.* at 546. Rocky Mountain alleged that this restriction amounted to rule-making without APA notice and comment. *Id.* The court, however, found that the use of night vision goggles had never been allowed in civil aviation, meaning that the FAA’s prohibition did not amount to a *change* in existing law or policy. *Id.* at 547. Because the anti-night-vision-goggle rule did not effect a change in existing law or policy, the court determined that the APA did not require the FAA to conduct notice and comment prior to enforcing its night vision goggle restriction on Rocky Mountain Helicopters.⁹ *Id.*

These cases all demonstrate that the pivotal consideration for determining whether a rule must be promulgated pursuant to APA notice and comment procedures is whether the challenged agency action “changes existing law, policy, or practice.” *Id.* at 546-47; *accord Natural Res. Def. Council v. EPA*, 643 F.3d 311, 2011 U.S. App. LEXIS 13390, at *24-*25 (D.C. Cir. 2011) (holding EPA was required to issue Clean Air Act guidance document through APA notice and comment

⁹ The court struck down the FAA’s rule because the agency failed to support the night vision goggle ban with sufficient evidence. *Rocky Mountain Helicopters*, 971 F.2d at 548.

procedures because the “document changed the law”). Under this standard, the Wild Lands policy is not a mere interpretive rule and cannot escape the notice and comment requirement. Rather, the Wild Lands policy effects major changes in existing law, policy, and practice in at least three ways: (1) It creates a new land use designation and instructions for determining where to apply that designation; (2) it enacts a new, heightened standard for protection of certain lands; and (3) it establishes new criteria for denying or conditioning permits.

First, and most obviously, the Wild Lands policy represents a change from current law, policy, and practice because it creates a new “Wild Lands” land use designation. BLM has not heretofore employed that designation in its land management activities. Indeed, the Secretary’s primary purpose for issuing Order 3310 is to create a new designation for wilderness areas within BLM’s jurisdiction, but separate and apart from Wilderness Study Areas or units of the National Wilderness Preservation System.¹⁰ That the Secretary chose to use a new name for such areas is strong evidence that the Wild Lands policy is a shift away from old practices, and toward a new land management regime.

Next, the Wild Lands policy instructs BLM to manage Wild Lands for non-impairment. The non-impairment standard is more protective than FLPMA’s general “multiple use and sustained yield” standard, which requires “striking a balance among the many competing uses to which land can be put, ‘including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.’” *S. Utah Wilderness Alliance*, 542 U.S. at 58 (quoting 43 U.S.C. § 1702(c)). Prior to the Wild Lands policy, the non-

¹⁰ See U.S. Dep’t of the Interior Bureau of Land Mgmt., *Salazar, Abbey Restore Protections for America’s Wild Lands*, available at http://www.blm.gov/wo/sit/en/info/newsroom/2010/december/NR_12_23_2010.html (last visited Sept. 26, 2011).

impairment standard applied only to specially designated lands, such as Wilderness Study Areas under FLPMA § 603. *See* 43 U.S.C. § 1782(c). But the Wild Lands policy now places this higher level of protection on Wild Lands, and thus represents a change in law, policy, and practice.

Finally, the Wild Lands policy establishes a new standard for denying permission to use federal lands. Order 3310 directs BLM to protect Wild Lands through its decision-making at the project permit level. Manual 6303 fleshes out that requirement by authorizing BLM to deny, condition, or postpone a proposed project if BLM determines that the project might impair Wild Lands. Manual 6303 at 6. This new requirement grants BLM substantially more flexibility in denying projects in Wild Lands, which did not exist prior to Order 3310.

The Wild Lands policy is a change in existing law, policy, or practice, and is therefore not merely an interpretive rule. *See Rocky Mountain Helicopters*, 971 F.2d at 547. As such, the Wild Lands policy is subject to APA notice and comment procedures for rule-making, such that Secretary Salazar's failure to issue Order 3310 pursuant to those requirements violates the APA.

II

NOTICE AND COMMENT IS NECESSARY TO ALLOW AFFECTED PARTIES TO TAKE PART IN THE RULE-MAKING PROCESS

The Wild Lands policy will have a major impact on numerous individuals and industries seeking to utilize federal lands because it threatens to close off large areas from entry and use. Yet Secretary Salazar issued Order 3310 without giving notice to affected parties, or providing opportunity for those parties to comment.

The Amici, for example, have much to lose if the Wild Lands policy is upheld. Amici involved in the livestock industry represent thousands of individuals and businesses raising livestock on federal lands within BLM's jurisdiction throughout the western United States. The National

Cattlemen's Beef Association represents 140,000 beef producers. The Public Lands Council counts holders of 18,000 BLM permits and leases among its membership. And the Washington Cattlemen's Association and Wyoming Stock Growers Association represent a livestock industry that accounts for millions, if not billions, of dollars in annual revenue in their respective states. These operations provide food for the nation, jobs for the public, and tax revenue for local, state, and the federal government. But the Wild Lands policy threatens to reduce the amount of land available for grazing, thereby reducing the productivity of these businesses.

Other Amici, such as the Wyoming Association of Conservation Districts and the Wyoming County Commissioners Association, represent the interests of local government. These organizations' members will suffer at the hands of the Wild Lands policy because regulating away productive businesses that use federal land will destroy the enterprises that form the tax base needed to fund important government activities, including conservation programs.

Amici involved in the oil and gas industry, such as the Petroleum Association of Wyoming, also should have been given the opportunity to weigh in on the Wild Lands policy before final release. According to BLM, 63,000 onshore oil and gas wells on federal lands produce 11 percent of the nation's natural gas supply, and 5 percent of its oil.¹¹ In fact, the sales value of the oil and gas produced from public lands totals over \$10 billion dollars yearly. *Id.* The potential impact of the Wild Lands policy on the energy industry clearly demonstrates that APA notice and comment rule-making should have been provided. Without notice and comment, the Secretary lacks vital information for making an informed decision about the proper balance between energy exploration and wilderness preservation.

¹¹ U.S. Dep't of the Interior Bureau of Land Mgmt., Oil and Gas, *available at* http://www.blm.gov/wo/st/en/prog/energy/oil_and_gas.html (last visited Sept. 26, 2011).

Furthermore, lands within BLM jurisdiction will be essential for production of renewable energy in the future. BLM manages 22 million acres with solar potential in 6 western states.¹² BLM also manages 20.6 million acres of land with wind energy potential in 11 states. *Id.* Seven wind projects with the capacity to power 280,000 homes were on track for approval by the end of 2010. *Id.* But the expansion of alternative energy projects on federal lands could slow dramatically under the Wild Lands policy. Notice and comment is thus necessary to determine potential impacts to renewable energy projects that could come about as a result of Order 3310.

FLPMA's goal of multiple-use management recognizes that federal lands are potentially valuable for a variety of different uses, and that such uses should be balanced with an eye toward optimizing the land's benefit to the public. Secretary Salazar's decision to bypass the public process in enacting the Wild Lands policy is in direct contravention to Congress' goals for public input under both FLPMA and the APA.

CONCLUSION

The Amici have demonstrated that Secretary Salazar should have promulgated the Wild Lands policy pursuant to APA notice and comment procedures. His failure to do so is an APA violation requiring invalidation of the policy. Should the Secretary seek to reestablish the Wild Lands policy in the future, he must give notice to affected parties, and incorporate those parties' comments into his final decision. Only then can the Secretary ensure that he is accountable to the public, and that he has enough information to make appropriate land management policy.

¹² See BLM Fact Sheet, *Renewable Energy and the BLM*, available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/MINERALS_REALTY_AND_RESOURCE_PROTECTION/_energy/renewable_references.Par.95879.File.dat/2010%20Renewable%20Energy%20headed.pdf (last visited Sept. 26, 2011).

For the foregoing reasons, Amici respectfully request that this Court set aside the Wild Lands policy, as requested by the Plaintiffs.

DATED: October 7, 2011.

Respectfully submitted,

M. REED HOPPER
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By /s/ DANIEL A. HIMEBAUGH
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CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Utah, Central Division by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.



PAMELA SPRING

Motions

2:10-cv-00970-CW Uintah County et al v. Salazar et al
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Case Name: Uintah County et al v. Salazar et al
Case Number: 2:10-cv-00970-CW
Filer: Pacific Legal Foundation
Guardians of the Range
National Cattlemen's Beef Association
Petroleum Association of Wyoming
Public Lands Council
Wyoming Association of Conservation Districts
Wyoming County Commissioners Association
Wyoming Stock Growers Association

Document Number: 89

Docket Text:

MOTION to File Amicus Brief by Pacific Legal Foundation filed by Movants Guardians of the Range, National Cattlemen's Beef Association, Pacific Legal Foundation, Petroleum Association of Wyoming, Public Lands Council, Wyoming Association of Conservation Districts, Wyoming County Commissioners Association, Wyoming Stock Growers Association. (Attachments: # (1) Exhibit AC Brief)(Bernard, William)

2:10-cv-00970-CW Notice has been electronically mailed to:

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