

Subcommittee on Oversight and Investigations

Raúl R. Labrador, Chairman

Hearing Memorandum

May 22, 2017

To: All Subcommittee on Oversight and Investigations Members

From: Majority Staff, Subcommittee on Oversight and Investigations (x5-7107)

Hearing: Oversight hearing entitled “*Examining Impacts of Federal Natural Resources Laws Gone Astray*”

The House Committee on Natural Resources, Subcommittee on Oversight and Investigations will hold an oversight hearing entitled, “*Examining Impacts of Federal Natural Resources Laws Gone Astray*” on **Wednesday, May 24th at 9:00 a.m. in Room 1324 of the Longworth House Office Building.**

Policy Overview:

- This oversight hearing will examine the federal government’s implementation of the Indian Reorganization Act of 1934 (IRA), the Wilderness Act of 1964, and the Federal Land Policy and Management Act (FLPMA), with a specific focus of instances where federal agencies’ application of these three federal laws has strayed beyond their original purposes and intent, as passed by Congress decades ago.
- Certain actions taken by the federal government to implement these laws has resulted in burdensome regulations, costly litigation and other adverse consequences to American taxpayers.
- In addition to identifying abuses resulting from these federal laws, the hearing will identify potential clarifications and reforms to improve the effectiveness and efficiency of the acts.

Invited Witnesses (in alphabetical order):

The Honorable David Cook
Owner, DC Cattle Company, LLC
Globe, Arizona

The Honorable Diane Dillon
County Supervisor
Napa County, California

Ms. Celeste Maloy
Deputy Attorney
Washington County, Utah

Ms. Kendra Pinto
Counselor Chapter House Member
Nageezi, NM

Background:

Indian Reorganization Act of 1934

The Indian Reorganization Act of 1934 (IRA), also referred to as the Wheeler-Howard Act, was enacted in response to the practice of allotment authorized by the Indian General Allotment Act of 1887, also known as the Dawes Act. Under the Dawes Act, the federal government was permitted to allot 160 or 80-acre parcels of land on Native American Indian (Indian) reservations to individual tribe members, and sold unclaimed lands, thereby opening them up to non-Indian settlement.¹

Statutorily authorized allotment and divestment of Indian land resulted in a patchwork landscape of Indian and non-Indian owned land, primarily in the Western United States. In order to remedy the failed allotment policy of the Dawes Act, the IRA was enacted on June 18, 1934.² The IRA ended the allotment policy and established a federally-recognized right to form tribal governments.³ The IRA also encouraged Indian economic development by making Department of the Interior (DOI) loans available to Indian chartered corporations.⁴ Notably, section 5 of the IRA provides the Secretary of the Interior with virtually unbridled authority “to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.”⁵

The IRA does provide one limitation on the Secretary’s ability to place land into trust, restricting trust acquisitions only for members of tribes “now under Federal jurisdiction.”⁶ Therefore, pursuant to the plain language of the IRA, administrative land acquisitions to be held in trust are limited to the members of tribes, and their descendants, that were under federal jurisdiction when the IRA passed in 1934. However, despite the seemingly straightforward statutory language of the IRA, the DOI continued to accept land into trust on behalf of members of tribes that were recognized after the IRA was enacted.⁷

DOI’s disregard of the IRA’s limitation on its land acquisition authority was challenged before the U.S. Supreme Court in the landmark case of *Carciere v. Salazar* 555 U.S. 379 (2009). In *Carciere*, the Governor of Rhode Island argued against the federal government’s acceptance of a 31-acre parcel of land in Charlestown, Rhode Island into trust on the behalf of the Narragansett Tribe. According to the Court, the federal government’s acceptance of land into trust on behalf

¹ 25 U.S.C. § 336 (2015).

² 25 U.S.C § 461, et seq. (2015).

³ 25 U.S.C. § 476 (2015).

⁴ 25 U.S.C. § 470 (2015).

⁵ 25 U.S.C. § 465 (2015).

⁶ 25 U.S.C. § 479 (2015).

⁷ See, e.g., Grand Traverse Band of Chippewa and Ottawa Indians Establishment of Reservation, 49 Fed. Reg. 2025 (Jan. 17, 1984).

of the Narragansett Tribe, which gained federal recognition in 1983, almost half a century after the enactment of the IRA, violated the IRA.⁸ The Court agreed with the Governor and stated: “§ 479 unambiguously refers to those tribes that were under federal jurisdiction of the United States *when the IRA was enacted in 1934.*”⁹ The Court’s holding reinforced congressional intent to limit the DOI from acquiring or holding lands in trust for Indians whose tribes were not federally recognized when the IRA was enacted in 1934.

Instead of applying the IRA on its plainly-read terms as directed by the Supreme Court, the DOI’s Solicitor issued a 26-page legal guidance memorandum in 2014 entitled “*The Meaning of ‘Under Federal Jurisdiction’ for Purposes of the Indian Reorganization Act.*”¹⁰ The memorandum provides DOI’s own opinion and focus of the Court’s holding in *Carcieri* to ultimately justify accepting land into trust on behalf of tribes that were not formally recognized by 1934.¹¹

The IRA has not been significantly amended since its enactment nearly 83 years ago. The burden of the federal government’s power to transfer land into trust is generally realized by local and state governments, and their taxpayers. This burden occurs because transferred land is exempted from state and local taxation in addition to other jurisdictional exemptions, resulting in loss of local and state revenue. Ensuring proper application of the IRA and identifying potential legislative reforms is expected to remain an important undertaking for Congress.

Wilderness Act of 1964

Over 50 years ago, Congress enacted the Wilderness Act in 1964 (Act) to create a National Wilderness Preservation System that would “secure for the American people of present and future generations the benefits of an enduring resource of wilderness.”¹² Pursuant to the Act, only public lands can be designated as wilderness and such designations can only come from Congress.¹³ Such designations are usually made through stand-alone legislation, rather than amending the Act itself.

Under the Act, if Congress designates public land as wilderness,¹⁴ the relevant federal land management agency is responsible for “preserving the wilderness character of the area.”¹⁵ However, the Act’s definition of wilderness and the resulting responsibility to preserve

⁸ 48 Fed. Reg. 6177 (Feb. 10, 1983).

⁹ *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (emphasis added).

¹⁰ U.S. Dep’t of Interior, Office of the Solicitor, M-37029 (Mar. 12, 2014) available at <https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37029.pdf>

¹¹ *Id.*

¹² 16 U.S.C. § 1131(a) (2015).

¹³ 16 U.S.C. § 1131(b) (2015).

¹⁴ Section 2(c) of the Wilderness Act defines wilderness as “[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 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, education, scenic, or historical value.” *See*, 16 U.S.C. § 1131(c) (2015).

¹⁵ 16 U.S.C. § 1133(b) (2015).

Lands identified as wilderness study areas are to be managed “in a manner . . . so as to not impair the suitability of such preservation as wilderness.”²⁵ Unlike the Wilderness Act, FLPMA does not proscribe any activities on administratively designated wilderness study areas. Instead, FLPMA authorizes DOI to act in order “to prevent unnecessary or undue degradation of the lands . . .” in these areas in case they should be designated as wilderness areas in the future.²⁶ In practice, however, wilderness study areas are generally managed with the same degree of restriction on activities that are applied to congressionally designated wilderness areas. This restrictive management effectively forecloses any type of multiple use on these administratively identified lands.

Public and commercial access to wilderness areas and wilderness study areas has become increasingly restricted in recent years. For example, the 2001 Forest Service Roadless Rule prohibits road construction, maintenance, and timber harvest within 58.5 million acres of national forest lands, some of which is designated wilderness. Much litigation and division between state and federal governments has resulted, and the burden of maintaining “roadless characteristics” while abiding by National Environmental Policy Act, Endangered Species Act, Wilderness Act, and the Roadless Rule guidelines has been placed squarely upon states and localities.²⁷

Federal Land Policy and Management Act of 1976

The Property Clause of the Constitution grants Congress the authority to acquire, dispose of, and manage land in the United States.²⁸ This authority is administered by a number of government agencies, predominantly by the Bureau of Land Management (BLM). BLM was formed in 1946 when the General Land Office, originally established in 1812 within the Department of the Treasury, and the U.S. Grazing Service, were consolidated.²⁹ Nearly 40 percent of the approximately 640 million acres of public land in the United States are managed by BLM. More than **248 million acres of BLM-managed lands** are scattered in communities across the American West.³⁰

Similarly, the statutory authority to acquire, dispose of, and manage federal land has been, and continues to be, governed by various statutes. In 1976, however, Congress enacted the Federal Land Policy and Management Act (FLPMA)³¹ which comprehensively codified the management authority and responsibilities of BLM for the public lands under its jurisdiction.

²⁵ 43 U.S.C. § 1782(c) (2015).

²⁶ *Id.*

²⁷ See, Daniel Timmons, *Roadless Rule Litigation Reaching End of the Road*, MARTEN LAW (2013) available at, <http://www.martenlaw.com/newsletter/20130211-roadless-rule-litigation>

²⁸ U.S. Const. art. IV, § 3, cl.2.

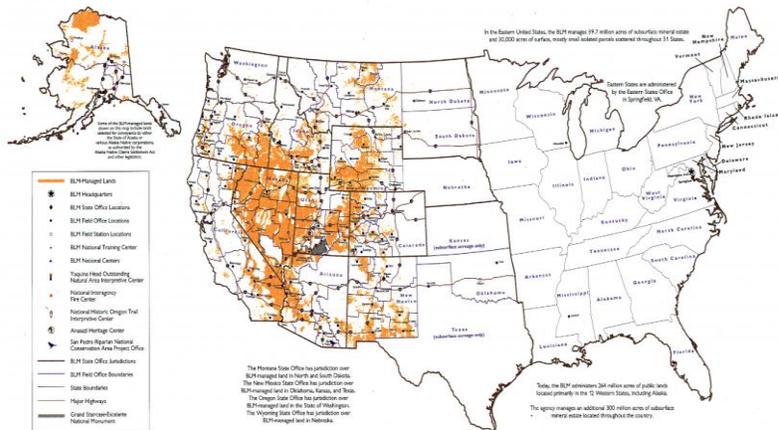
²⁹ Carol Hardy Vincent, et al., CONG. RESEARCH SERV., RL32393, FEDERAL LAND MANAGEMENT AGENCIES: BACKGROUND ON LAND AND RESOURCES MANAGEMENT (2004).

³⁰ Carol Hardy Vincent, et al., CONG. RESEARCH SERV., RL34273, FEDERAL LAND OWNERSHIP: ACQUISITION AND DISPOSAL AUTHORITIES (2016).

³¹ 43 U.S.C. §§ 1701, et seq. (2015).

At its core, FLPMA codified congressional intent to manage public lands on the basis of multiple use and sustained yield.³² This policy ensures that public land can be utilized by the American people to boost the economy and stabilize communities via the development of energy, mineral, agricultural, livestock, and water resources. However, BLM has routinely curtailed multiple use on public lands by prohibiting mineral extraction, or by designating lands as wilderness study areas or areas of critical environmental concern.³³

Public Lands Managed by the Bureau of Land Management (BLM)



Map 2: Source: [BLM](#)

For many states and counties throughout the West, BLM’s management decisions—and how it conducts land use planning that shapes those decisions—is critically important. In general, the use of public lands is governed by federal Resource Management Plans (RMPs).³⁴ Although BLM has some discretion in developing RMPs under FLPMA, Congress expressed its clear intent that the public be meaningfully involved in the development process.³⁵ Further, in developing RMPs, BLM must generally:

coordinate the land use inventory, planning, and management activities . . . with the land use planning and management programs of other federal departments and agencies, and of the state and local governments within which the lands are located . . . by, among other things, considering the policies of approved State and tribal land resource management programs.³⁶

Recently, BLM advanced a controversial policy shift through its 2016 RMP rule, called “BLM 2.0.”³⁷ This new rule made substantive changes to the RMP process by shifting planning responsibility away from local BLM field offices, to its headquarters in Washington, D.C.³⁸ The changes contravened congressional intent by creating obstacles for local communities to influence the development of RMPs. Additionally, BLM limited the comment period to just 90

³² 43 U.S.C. § 1701(a)(5) (2015).
³³ See generally, listing of Bureau of Land Management-designated areas of critical environmental concern available at, https://www.blm.gov/sites/blm.gov/files/planningandnepa_aceclist.xlsx
³⁴ 43 U.S.C § 1712 (2015).
³⁵ 43 U.S.C. § 1712(a) (2015), 43 U.S.C. § 1702(d) (2015).
³⁶ 43 U.S.C. § 1712(c)(9) (2015).
³⁷ Kellie Lunny, *Trump Signs Resolution Repealing BLM Planning 2.0 Rule*, E&E NEWS, Mar. 27, 2017, <https://www.eenews.net/eenewspm/2017/03/27/stories/1060052142>
³⁸ BLM Resource Management Planning, 81 Fed. Reg. 89580 (Dec. 12, 2016).

days in spite of numerous state and local requests to reasonably extend the comment period by 30-120 days.³⁹

Congress recently repealed the BLM 2.0 rule through the Congressional Review Act process, and this repeal was ratified by the President. However, many remain concerned that BLM is not fully or sufficiently enforcing statutory principles of multiple use and sustained yield are enforced on our public lands.⁴⁰

³⁹ Resource Management Planning, 81 Fed. Reg. 9674 (proposed Feb. 25, 2016) (to be codified at 43 C.F.R. pt. 1600). *See also*, *Local and State Perspectives on BLM's Draft Planning 2.0 Rule Before the H. Comm. on Natural Res. Subcomm. on Oversight and Investigations*, 114th Cong. (2016) and *State Perspectives on BLM's Draft Planning 2.0 Rule Before the H. Comm. on Natural Res. Subcomm. on Oversight and Investigations*, 114th Cong. (2016).

⁴⁰ *See*, Press Release, U.S. House Comm. on Natural Res., Statement on President Trump Signing Repeal of BLM Planning 2.0 Rule (Mar. 27, 2017) available at, <http://naturalresources.house.gov/newsroom/documentsingle.aspx?DocumentID=401757>