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

STATE OF UTAH; UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION; and UTAH ASSOCIATION OF COUNTIES, Plaintiffs, vs. GALE NORTON, in her official capacity as SECRETARY OF THE INTERIOR; *et al.* Defendants.	2:96CV0870 B ORDER APPROVING STIPULATION AND GRANTING JOINT MOTION TO DISMISS THIRD AMENDED AND SUPPLEMENTED COMPLAINT Hon. Dee V. Benson

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The Court, having reviewed the parties' April 11, 2003 Stipulation and Joint Motion to Enter Order Dismissing Third Amended and Supplemented Complaint ("Stipulation and Joint Motion"), and acting pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure,

NOW HEREBY ORDERS, ADJUDGES AND DECREES AS FOLLOWS:

1. All the provisions in the Stipulation and Joint Motion are hereby incorporated by reference, approved, granted and expressly made an order of this Court as if set forth fully herein;

2. The terms and conditions of the Stipulation and Joint Motion are hereby APPROVED, and the Third Amended and Supplemented Complaint is hereby DISMISSED with prejudice subject to the terms and conditions of the Stipulation and Joint Motion.

3. Notwithstanding the "with prejudice" nature of this order of dismissal, this Court will retain continuing jurisdiction of this action for purposes of enforcing the terms of the Stipulation and Joint Motion.

4. The parties will each bear their respective costs and attorney fees incurred herein.

SO ORDERED this 14th day of April, 2003.

Dee Benson

Honorable Dee V. Benson
Chief United States District Judge

FILED

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IN THE UNITED STATES DISTRICT COURT DISTRICT OF UTAH, CENTRAL DIVISION	
STATE OF UTAH; UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION; and UTAH ASSOCIATION OF COUNTIES, Plaintiffs, vs. GALE NORTON, in her official capacity as SECRETARY OF THE INTERIOR; *et al.* Defendants.	**2:96CV0870 B** STIPULATION AND JOINT MOTION TO ENTER ORDER APPROVING SETTLEMENT AND TO DISMISS THE THIRD AMENDED AND SUPPLEMENTED COMPLAINT Hon. Dee V. Benson

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Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, the Parties, by and through their undersigned counsel, hereby stipulate, agree and jointly move the Court to dismiss the Plaintiffs' Third Amended and Supplemental Complaint as follows:

STIPULATED FACTS AND CONCLUSIONS OF LAW

Introduction

1. Plaintiffs State of Utah, Utah School and Institutional Trust Lands Administration (the "Trust Lands Administration"), and Utah Association of Counties ("UAC") brought the present action to challenge Defendants', Bureau of Land Management ("BLM") and Department of the Interior ("DOI"), adoption and implementation of the BLM Handbook entitled Wilderness Inventory and Study Procedures-2001 ("Wilderness Handbook") and related national and Utah directives, bulletins and policies alleging that the policies to be implemented by these documents effectively limit the management of an estimated 442,910 acres of Utah school trust lands ("Trust Lands") and millions of acres of BLM public lands in Utah, thereby adversely affecting the financial interests of Utah's public education system and its rural economies. These public lands were not identified as having the necessary wilderness character[1] and were not classified as wilderness study areas ("WSAs") during the wilderness review conducted between 1976 and 1993 by authority of Section 603 of the Federal Land Policy and Management Act ("FLPMA") ("Section 603 WSAs").

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[1] The term "wilderness character" is used to refer to the necessary collective characteristics or features of wilderness as defined in the Wilderness Act of 1964. 16 U.S.C. §1131(c); 43 U.S.C. §1782(a).

2. This agreement includes the public lands in the wilderness inventory areas identified in the 1999 Utah Wilderness Inventory Report, as amended, and other BLM public lands identified by the public or BLM after October 21, 1993 for wilderness study, classification or management (hereinafter collectively referred to as "Post-603 Lands").

3. Plaintiffs also have alleged that the "preservation" or *de facto* wilderness management policy and related policies and practices effectively withdraw or limit the statutorily mandated multiple use management of these Post-603 Lands as if they were classified as Section 603 WSAs.

4. Plaintiffs also have asked the Court to declare as *ultra vires* and unlawful Defendants' actions to adopt and implement the 2001 Wilderness Handbook and related policies and practices on the grounds that BLM's authority to establish WSAs is limited to Section 603 of FLPMA and that authority expired on October 21, 1991.

5. Plaintiffs also have asked the Court to find unlawful and to enjoin Defendants' management of these Post-603 Lands as de facto wilderness on the grounds that it violates FLPMA's mandatory withdrawal and management decision procedures.

6. This Court has jurisdiction over the parties and subject matter of this action and venue is proper in this Court.

BLM Wilderness Review and Related Guidance Documents

7. Enacted in 1976, FLPMA Section 603 required the Secretary to inventory roadless BLM lands of at least 5,000 acres for their wilderness characteristics and report the suitability or nonsuitability of the inventoried lands for wilderness designation to the President, who in turn

made recommendations to the Congress ("wilderness review"). BLM must manage the areas recommended to Congress for designation so as not to impair their suitability for preservation as wilderness pending action by Congress to decide whether to designate the area as part of the National Wilderness Preservation System. 43 U.S.C. § 1782(c).

8. FLPMA grants the Secretary broad discretion to manage BLM lands for multiple use according to land use plans. This includes, but is not limited to, the ability to give priority to the designation and protection of Areas of Critical Environmental Concern. 43 U.S.C. §§1702(a) and 1712(c)(3).

9. In 1978 and 1979, respectively, BLM issued guidance concerning the wilderness review and management of Section 603 WSAs. The 1978 Wilderness Inventory and Study Procedures Handbook expired on September 30, 1984, after completion of the Section 603 identification, study and recommendation processes.[2] BLM issued an Interim Management Policy ("IMP") on December 12, 1979, the purpose of which was to provide management guidance to BLM staff for Section 603 WSAs pending Congressional action. The IMP was modified on July 5, 1995 and a new Wilderness Handbook was issued on January 10, 2001. Additionally, the BLM Land Use Planning Handbook was modified on November 22, 2000, in a manner consistent with these modified and reissued guidance documents.

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[2] Instruction Memorandum No. 85-93, issued on November 8, 1984, reinstated the 1978 Wilderness Handbook due to appeals from the original wilderness inventory decisions. The IM noted that the 1978 Wilderness Handbook had expired and was never "manualized because it was designed for short-term use.""

10. The modified IMP:

a. defines "Wilderness Study Area" pursuant to Section 603 and then distinguishes "Section 202 Wilderness Study Areas" by defining this term separately as "a wilderness study area being studied under authority of section 202 of the Federal Land Policy and Management Act of 1976, which requires recurrent land-use planning by the Bureau of Land Management." (IMP - Glossary).

b. requires that Section 202 WSAs be managed under the IMP in accordance with the non-impairment standard applicable only to Section 603 WSAs (IMP at pp.1 and 7), and

c. recognizes FLPMA Sections 202 and 302 as authority to designate WSAs (IMP at p.2).

11. The new Wilderness Handbook issued on January 10, 2001:

a. defines Wilderness Study Areas as "a designation made through the land use planning process of a roadless area found to have wilderness characteristics as described in Section 2(c) of the Wilderness Act of 1964." (Wilderness Handbook - Glossary).

b. authorizes the designation of WSAs pursuant to FLPMA Sections 201 and 202 (Wilderness Handbook at § .01, .04.B.2),

c. requires the management of Section 202 WSAs pursuant to the IMP (Wilderness Handbook at §§ .04.C.9, .06.G),

d. requires the immediate evaluation of any information suggesting that existing land use plans do not adequately identify wilderness characteristics (Wilderness Handbook at §§ .06.E & F).

e. based on this information, precludes any action inconsistent with preserving Post-603 Lands with wilderness characteristics (Wilderness Handbook at § .06.F).

f. requires that land use plans be amended on an expedited basis to preserve Post-603 Lands with wilderness characteristics (Wilderness Handbook at § .06.F),

g. materially changes the criteria for the establishment of WSAs, and

h. identifies Sections 102(a)(2) & (8),201(a), 201, 202 and 205(b) as authority therefore (Wilderness Handbook at §08.B).

12. The Land Use Planning Handbook requires Section 202 WSAs to be managed in accordance with the IMP (Land Use Planning Handbook at Apx. § III.B.1.a).

13. The guidance listed in paragraphs 10, 11, and 12 is inconsistent with BLM authority because:

a. Although the Secretary can prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values, is charged to give priority to areas of critical environmental concern, and must prevent unnecessary or undue degradation of public lands, the effect of the foregoing provisions in paragraphs 10 through 12 is to authorize additional WSAs pursuant to Section 202, require their management under the IMP, and preclude the use of Post-603 and other BLM lands as authorized under existing land use plans.

b. Any guidance that purports to change management of public lands based only on an inventory is inconsistent with the language of Section 201, which states: "The preparation and maintenance of such inventory or the identification of such areas shall not, of itself, change or prevent change of the management or use of public lands." 43 U.S.C. §1711(a). BLM is obligated to manage public lands based upon existing land use plans, as subsequently may be amended. *Id.* at §1732(a).

c. At all times, Congress has reserved solely to itself the authority to designate land for inclusion in the National Wilderness Preservation System. When Congress enacted the Wilderness Act of 1964, BLM was not included among the federal agencies mandated to identify roadless areas of more than 5,000 acres and to recommend to Congress those areas of land that were deemed to be suitable for inclusion in the National Wilderness Preservation System. In 1976, with enactment of FLPMA, Congress mandated that BLM conduct a wilderness review and gave BLM a fifteen-year window of authority to identify roadless lands of more than 5,000 acres that have wilderness characteristics, as defined in the Wilderness Act, 16 U.S.C. §1131(c). Only Section 603 authorized BLM to conduct a wilderness review for the purpose of identifying and preserving public lands (excluding Alaska) recommended to Congress for wilderness and that authority lapsed on October 21, 1993.

d. For each such roadless area so inventoried, Section 603(a) of FLPMA directed the Secretary to make recommendations to the President no later than October 21, 1991, as to that area's suitability or nonsuitability for preservation as wilderness. The President then

had two years after receiving the Section 603(a) recommendations on wilderness suitability to advise Congress of his recommendations for areas to be designated as wilderness. The Secretary reported to the President his recommendations of 22.8 million acres of BLM land as either suitable (9.66 million acres) or non-suitable (13.16) for wilderness designation. The President recommended the Secretary's report to Congress. The Section 603 WSAs must continue to be managed so as not to impair their suitability for preservation as wilderness, pending action by Congress to decide whether to designate the area as part of the National Wilderness Preservation System.

The FLPMA Section 603 Wilderness Review in Utah

14. After completion of the "intensive" FLPMA Section 603 wilderness inventory by Secretary Andrus, and subsequent administrative proceedings, BLM, acting pursuant to Section 603(a), classified about 3.2 million acres of public land in Utah as having wilderness character, leaving the remaining approximately 16.8 million acres of BLM lands in Utah to be managed in accordance with Section 202 land use plans. 45 Fed. Reg. 75602-606 (Nov. 14, 1980). Secretary Lujan then recommended approximately 1.9 million of the 3.2 million acres as suitable for wilderness designation in the Record of Decision for the Utah Statewide Wilderness Final Environmental Impact Statement[3] forwarded to Congress on June 22, 1992. By law, the President's wilderness recommendations do not become part of the National Wilderness Preservation System until such time as provided by Act of Congress. 43 U.S.C. § 1782(b).

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[3] The Record of Decision for the Utah Statewide Wilderness Study Report and Final Environmental Impact Statement expressly states "that 1,299,911 acres within 63 study areas should be released from wilderness study for uses other than wilderness."

Congress has not acted on the President's recommendations. Nonetheless, the 3.2 million acres appropriately continue to be managed so as not to impair their suitability for preservation as wilderness.

Utah Wilderness Reinventory

15. In 1996, Defendants undertook a "reinventory" of public lands in Utah that had been deemed by Secretary Andrus not to have wilderness character based on the Section 603 wilderness inventory. Defendants' reinventory evaluated more than 3.1 million acres of public land and for the first time inventoried more than 529,260 acres of state school Trust Lands. The 1996 reinventory determined that 2.6 million acres of federal land and 442,910 acres of Trust Lands had wilderness character, and identified these as "wilderness inventory areas" ("WIAs"). The 1999 Utah Wilderness Inventory report omits significant public information and uses criteria different from that contained in the Wilderness Act and prior federal practices and policies. As a result, the 1999 Utah Wilderness Inventory will be evaluated for its validity and utility at such time as changes are made to the appropriate land use plan.

16. The IMP, Wilderness Handbook, Land Use Planning Handbook and related directives remain in effect and Defendants have continued to implement them up to the present time.

17. Management of Post-603 Lands to preserve their alleged wilderness character is inconsistent with FLPMA's Section 603 limited delegation of authority, and as a result, BLM may not have managed these lands for multiple use purposes in accordance with the land use plans that apply to BLM public lands, which is the statutory mandate of FLPMA. Only Section 603 authorized BLM to conduct a wilderness review for the purpose of identifying and

preserving public lands (excluding Alaska) recommended to Congress for wilderness. However, nothing herein is intended to diminish BLM's authority under FLPMA to prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values, as described in FLPMA Section 201. These resources and other values may include, but are not limited to characteristics that are associated with the concept of wilderness.

18. The above-described actions have affected the interests of Plaintiffs by (a) interfering with UAC member counties' ability to perform governmental functions, (b) reducing or precluding generation of revenue from state school trust lands due to the lack of access to state and private lands based on land use restrictions on adjacent federal lands, and (c) reducing or preventing the generation of revenues.

19. The parties agree it is in the public interest to resolve this controversy and enter into a stipulation with respect to all Post-603 Lands, consistent with the Congressional retention of sole authority to decide whether additional public lands, if any, should be subject to wilderness review or designated as WSAs, for the following reasons:

a. The litigation of this case has taken more than six years and the legal positions of the parties have been briefed in this Court and before the Tenth Circuit Court of Appeals. The parties have been represented by counsel who have vigorously represented their respective positions.

b. BLM has expended significant resources while resource management plan decisions remain uncertain pending resolution of the issues posed by this litigation.

c. Plaintiffs allege that the *de facto* management of Post-603 Lands for preservation of wilderness character has harmed the ability of the State of Utah and its Counties to access and make use of State land and improperly precluded Utah and its Counties from uses authorized in BLM land use plans for federal lands adjacent to state school trusts lands and Post-603 Lands in general.

d. FLPMA and current policy challenged by Plaintiffs require BLM to incorporate the 1999 Utah Wilderness Inventory results in all land use planning notwithstanding the underlying controversy.

e. The parties also agree that this Agreement is consistent with the language of FLPMA and other applicable law and regulation. This agreement does not change any rule that has been the subject of APA rulemaking.

f. This Agreement respects the right of Congress to reach a final resolution of Utah wilderness issues, allows the Trust lands to be managed to achieve their congressionally authorized purposes, and returns land management decisions to the FLPMA planning process.

20. For these and other reasons, the parties agree that entering into this Settlement Agreement will provide certainty and clarity in the management of public and state trust lands in Utah, protect the fiscal interests of the State of Utah, Utah counties, and the Trust Lands Administration, promote improved state and federal relations and allow BLM land use planning to proceed with less controversy and uncertainty and in accordance with statutory requirements,

including BLM's authority to give priority to designating and protecting areas of critical environmental concern.

NOW THEREFORE, THE PARTIES STIPULATE AND AGREE AS FOLLOWS:

In consideration of the mutual promises and agreements herein, and for other good and valuable consideration, the parties stipulate and agree as follows:

1. This Agreement and Stipulation[4] is hereby made a part of this joint motion for an order approving the settlement and to dismiss the present action with prejudice, as set forth below. All of the following terms of this Agreement and Stipulation shall be enforced as a condition of the dismissal, and the failure of any party to perform fully any of the following terms shall be grounds for any other party to file a motion to enforce the terms of the settlement or to ask the Court to rescind and revoke any order of dismissal and fully reinstate the present action as if never dismissed. The parties also agree that this Court should retain jurisdiction to enforce this Agreement.

2. Notwithstanding the with-prejudice nature of this dismissal the parties agree to submit to the jurisdiction of this Court to resolve all disputes regarding the interpretation, validity or enforceability of this Agreement and Stipulation for a period of nine months.

3. The authority of Defendants to conduct wilderness reviews, including the establishment of new WSAs, expired no later than October 21, 1993, with submission of the wilderness suitability recommendations to Congress pursuant to Section 603. As a result,

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[4] This Stipulation and Settlement does not modify Defendants' obligations or authority under the provisions of 43 U.S.C. §1784.

Defendants are without authority to establish Post-603 WSAs, recognizing that nothing herein shall be construed to diminish the Secretary's authority under FLPMA to:

a. manage a tract of land that has been dedicated to a specific use according to any other provision of law (Section 302(a)),

b. utilize the criteria in Section 202(c) to develop and revise land use plans, including giving priority to the designation and protection of areas of critical environmental concern (Section 202(c)(3)), or

c. take any action necessary, by regulation or otherwise, to prevent unnecessary or undue degradation of public lands (Section 302(b)).

4. The 1999 Utah Wilderness Inventory shall not be used to create additional WSAs or manage public lands as if they are or may become WSAs, and the inventory information will be evaluated for its validity and utility at such time as changes are made to the appropriate land use plan. Nothing in this Agreement precludes acceptance of information or data from any person or entity providing recommendations and other information regarding resource values on public lands as set forth in FLPMA Section 102(d).

5. Accordingly, Defendants will rescind the new Wilderness Handbook entitled "Wilderness Inventory and Study Procedures, H-6310-1" (Information Bulletin 2001-043) and the following direction, decisions, policies and bulletins: Information Bulletin 2001-042 and attachments, Information Bulletin 2001-043, Instruction Memorandum 2001-075, and Instruction Memorandum UT 2001-092.

6. The affected information bulletins, instruction memoranda, and handbooks have been issued as guidelines and policies that bind only BLM and, as a result, the change contemplated in this Agreement need not follow Administrative Procedure Act rulemaking procedures or other public notice and comment procedures.

7. Defendants will not establish, manage or otherwise treat public lands, other than Section 603 WSAs and Congressionally designated wilderness, as WSAs or as wilderness pursuant to the Section 202 process absent congressional authorization. Within 30 days of execution of this Agreement and Stipulation, Defendants will deliver to the Government Printing Office for publication, the appropriate notices in the Federal Register amending the notices of intent to prepare an environmental impact study for Utah BLM resource management plans in the Vernal, Price, Richfield, Monticello and Moab Districts to remove any and all references or plans to create additional "WSAs," and to remove any and all references or plans to classify or manage BLM lands (other than the Section 603 WSAs) as if they are or may become WSAs. The parties will agree within 60 days as to additional related planning notices and other documents and drafts issued in the resource management plan review process that may require rescission or modification to conform to this Agreement. However, nothing herein is intended to diminish BLM's authority under FLPMA to prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values, as described in FLPMA Section 201. These resources and other values may include, but are not limited to characteristics that are associated with the concept of wilderness.

8. Defendants will refrain from applying the IMP, H-8550-1. to BLM lands other than Section 603 WSAs. Defendants will also amend the IMP and Use Planning Handbook to conform to this Agreement.

9. Defendants are not precluded from managing public lands consistent with the law, nor are they precluded from managing public lands in the lawful exercise of discretion. Furthermore, Defendants may prepare directives, guidance and policies consistent with the Secretary's authority to develop and revise land use plans utilizing the criteria in FLPMA Section 202(c), which includes relying to the extent it is available on the inventory of public lands, their resources, and other values pursuant to FLPMA Section 202(c)(4).

11. Each party shall bear its own costs and attorneys fees associated with this litigation, including this stipulation, joint motion and subsequent action of the Court in response thereto.

BASED ON THE FOREGOING STIPULATION, THE PARTIES RESPECTFULLY MOVE THE COURT TO EXECUTE AND ENTER THE PROPOSED ORDER OF DISMISSAL SUBMITTED HEREWITH.

Respectfully submitted this 11th day of April, 2003.

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