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A CHANGING LANDSCAPE

Recasting Wilderness as Open for Business

A Bush administration policy reversal ends decades of shielding the nation's untamed areas.

By Henry Weinstein

Times Staff Writer

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PRICE, Utah — The sculpted buttes of Wild Horse Mesa, the vast escarpment of the Book Cliffs and the soaring ramparts of Upper Desolation Canyon near here have become a prime battleground in the Bush administration's campaign to curb wilderness protection throughout the country. advertisement

In 1999, the federal government acknowledged the unique character of the area, where 150 million years of the earth's geologic history unfolds and the forces of nature continue to shape the rugged landscape. The Bureau of Land Management put more than 440,000 acres off-limits to industrial development.

The protection was short-lived.

Within four years, the area was opened to oil and gas exploration. Under the Bush administration, 2.6 million acres of Utah land that had been shielded from development were suddenly open for business.

The actions were part of a sweeping policy shift by Interior Secretary Gale A. Norton with implications far beyond Utah. Not only does the new policy cancel protection of the Utah land, it withholds the interim safeguards traditionally applied to areas with wilderness potential until Congress decides whether to make them part of the national wilderness system.

But what most distinguishes the administration's position is its claim that under applicable law the Interior Department is barred — forever — from identifying and protecting wild land the way it has for nearly 30 years.

The nation's wilderness system takes up less than 3% of the lower 48 states. Adding to it often has been a struggle. But if the Bush argument prevails, say conservationists and many Democratic members of Congress, much of America's unprotected wild heritage would be lost to development.

Norton said the changes were necessary to restore balance to the way federal lands would be managed

by ensuring that wilderness would not take primacy over other important uses such as energy development.

'No more wilderness'

The Bush policy was set forth in the April 2003 settlement of a lawsuit brought by Utah against the Clinton administration. Utah had lost that case in federal appeals court in 1998 but was allowed to file an amended complaint five years later.

The state sought to revoke wilderness protection for the 2.6 million acres. But, with Bush in office, Utah pursued a more ambitious land-use agenda — one shared by like-minded politicians in many Western states. That agenda was spelled out by the state's lead lawyer in a memo shortly before the settlement with the Bush administration.

"We need a clear statement," the lawyer, Connie Brooks, wrote to an Interior Department attorney. "No more wilderness."

The memo was obtained recently by environmental lawyers Ted Zukoski of Earthjustice and Leslie Jones of the Wilderness Society through Freedom of Information Act litigation.

The environmentalists, who were kept out of the settlement talks, say the state got what it wanted, and so did wilderness protection opponents everywhere.

The environmental groups have since challenged the accord, arguing that it was an illegal backroom deal that allowed Norton and Mike Leavitt, Utah's governor at the time, to emasculate national wilderness policy. Four months later, Bush appointed Leavitt head of the Environmental Protection Agency.

The case is back in federal appeals court. The outcome, which could affect the course of wilderness policy for years to come, may hinge on an interpretation of the Federal Land Policy Management Act.

The court in 1998 ruled that the "plain language" of the act required the Interior Department's Bureau of Land Management to continually review land under its control to see if it merited wilderness protection.

In contrast, the Bush administration has emphasized another section of the act that says federal officials had 15 years after the 1976 act was passed to make recommendations to Congress on what lands should be formally protected.

A definitive interpretation may depend on a ruling by the Supreme Court.

In the meantime, Norton is moving ahead with new plans for proposed wilderness areas, including 43,600 acres in western Colorado that she has opened to oil and gas leasing.

In addition, P. Lynn Scarlett, the Interior Department's assistant secretary for policy management and budget, said the department would no longer provide interim protection for lands nominated for wilderness designation, as it had been doing for decades. Only Congress has that right, she said, and if Congress can't make up its mind about an area, the administration doesn't have the right to manage it indefinitely as a sort of unofficial wilderness.

Scarlett said in an interview that the BLM, as part of its land-use planning responsibilities, could still look for areas with wilderness character. But she emphasized that any protection extended to such places prior to congressional approval would be more flexible and subject to change and even nullification.

Shock waves

Tom Finger, a BLM wilderness specialist in Utah, characterized the policy change this way: "We went from a capital W to a very small w."

Norton's policy reversal sent shock waves through the world of organized conservation and beyond.

To a lot of people, including many members of Congress, the Bush policy looked like an abdication of a responsibility carried out by every president since Lyndon B. Johnson: to add to America's inventory of wilderness for the sake of wildlife, clean water sources, scientific study and human enjoyment.

Michael Blumm, a professor of environmental law at Lewis & Clark Northwestern School of Law in Portland, Ore., said it was "unparalleled" for a government agency to relinquish "for all time" authority that the agency had previously exerted.

"I think they gave up the store," said University of Kansas law professor George Coggins, the author of two books on public land law.

Last year, 100 members of Congress, led by Rep. Maurice D. Hinchey, a New York Democrat, signed a letter of protest to Norton saying she had slammed the door on future wilderness designations.

"The [Interior] Department has effectively and inappropriately taken away a key management tool to preserve Congress' prerogative to designate Wilderness Areas on the public lands," the letter said. "Because these areas will now be opened to a variety of development activities, such as road construction, mining and oil and gas exploration, the wilderness qualities of such areas likely will be destroyed, precluding their future designation as Wilderness by Congress."

Early this year, Hinchey, joined by 103 members of Congress, including 23 from California, again wrote Norton. They beseeched her not to allow development on a portion of the 9.1 million acres of Utah land that the lawmakers, all but one of whom were Democrats, were trying to protect through a bill called America's Red Rock Wilderness Act. Hinchey's bill covers all the land that the BLM, under President Clinton, found to have wilderness character and much more.

Last month, for the third time this year, the bureau sold leases to oil and gas companies within the proposed Red Rock wilderness area.

While public opinion polls indicate strong pro-wilderness sentiment among most Americans, the attitude in communities that border wilderness areas is often very different.

"Any county would want the least amount of wilderness we could have. We need it for economic development," said Jerry McNeely, a Grand County commissioner in Moab, Utah, which is flanked by two national parks — Arches and Canyonlands.

Judy Bane, the county administrator, added: "What's irritating is congressmen from back East who have not been here are trying to determine our future" with expansive wilderness bills. "That's not right. People are trying to make a living here."

But Denise Oblak of Canyon Outfitters in Moab, which specializes in rafting trips, said she was troubled that county commissioners were pushing oil and gas development. She said "tourism is driving this economy. If you ask 95% of the visitors, they came because" of the beautiful wild areas. "We need to protect what we have." If the county commissioners "supported more wilderness, it would strengthen the existing businesses here."

The Bush administration has been courting rural voters as part of a strategy that helped it win all but one of the eight Rocky Mountain states in 2000. It also has made clear that oil and gas development is a priority on federal lands in the West.

Nonetheless, Interior officials insist wilderness protection is part of their mandate.

"The Department of Interior stands firmly committed to the idea that we can and should manage our public lands to provide for multiple use, including protection of those areas that have wilderness characteristics," Norton wrote last year to Republican Sens. Pete V. Domenici of New Mexico and Robert F. Bennett of Utah.

The Bush administration is supporting bills that would set aside more than 700,000 acres of wilderness in Nevada and New Mexico. In addition, Interior officials said, the bureau has identified 7,000 more acres of federal land with wilderness characteristics — about 4,500 acres in Northern California's Headwaters Forest near Eureka, and the rest in Oregon.

In Utah, only the Price BLM staff has issued a land-use plan since the settlement. The plan covers 483,000 acres found to have wilderness characteristics in BLM surveys completed in 1999 and 2002.

One of the most scenic areas surveyed is Upper Desolation Canyon along the Green River. In its 1999 inventory, the bureau called Desolation Canyon "a special place ... where the visitor will experience the natural world on its own terms, where opportunities for primitive and unconfined recreation are diverse and outstanding."

But a draft of the bureau's latest plan does not recommend special protection for the area, or for any of the 483,000 acres previously protected.

Tom Gnojek, a recreation and wilderness specialist in the Price BLM office, said agency personnel had been cautioned to avoid proposing protection for land previously found to have wilderness characteristics. Those places, Gnojek said, are now akin to "the forbidden fruit that can't be picked."

His colleague, Dennis Willis, added sardonically: "We can protect any landscape that no one wants to use for anything else. If it's not wanted by the oil and gas industry or the ORV [off-road-vehicle] industry, then we can protect it."

'Primeval character'

The current controversy has its roots in the 1964 Wilderness Act. Passed overwhelmingly by both

houses of Congress and signed into law by President Johnson, the law defined wilderness as land that retained its "primeval character and influence, without permanent improvements or human habitation."

The law initially set aside 9 million acres and declared that those lands and later acquisitions should be administered in a manner that would "leave them unimpaired for future use and enjoyment as wilderness."

Road building, oil and gas drilling, logging, and off-road vehicles were banned, along with new mining claims, new reservoirs, power lines and pipelines. Congress allowed some long-standing mining operations and livestock grazing to continue.

Over the last 40 years, the national wilderness system has grown to 105 million acres. More than half of it is in Alaska. Much of the rest is scattered through some of the nation's most dramatic mountain country: California's Sierra Nevada; Washington's North Cascades; and along the spine of the Rockies in Montana, Idaho, Wyoming and Colorado.

Until now, every president since Johnson, except Richard Nixon, has added at least 3 million acres to the nation's store of wilderness.

However, resistance to that trend has steadily hardened. Known initially as the Sagebrush Rebellion, the antiwilderness movement is a potent mix of rural, populist protest and corporate money from industries that benefit most from unrestricted access to federal land.

Nowhere has the opposition been more formidable than in Utah, where less wilderness has been created than in any other Western state except Hawaii.

The Clinton administration inflamed the antiwilderness sentiment in 1996 by protecting 1.7 million acres as part of a new Grand Staircase-Escalante National Monument.

The same year, Bruce Babbitt, Interior secretary under Clinton, renewed surveys of Utah lands with wilderness potential after numerous complaints that earlier surveys were faulty.

In the late 1970s and early '80s, the BLM had recommended 1.9 million acres for wilderness protection, but members of environmental groups and several former bureau employees testified in Congress that the agency had ignored or arbitrarily exempted millions of acres of eligible lands.

The new surveys ordered by Babbitt added 2.6 million more acres to the rolls of potential wilderness and were given interim protection pending congressional action.

In 1996, Utah sued the Clinton administration to block the surveys, contending that the legal deadline for completing the work had passed. Utah initially prevailed in its lawsuit before U.S. District Court Judge Dee Benson. But the ruling was reversed unanimously by a three-judge panel of the U.S. 10th Circuit Court of Appeals.

Five years later, with the Bush administration in office, state officials revived their case in an amended complaint in Judge Benson's court in Salt Lake City.

Less than two weeks after the state filed suit, the Interior Department signed a settlement acquiescing

to Utah's arguments on all the major issues.

With the agreement, Interior relinquished protection of the 2.6 million acres of Utah land and said the federal government had exceeded its authority when it earmarked those and other lands for protection.

Environmentalists cried foul.

"The Interior Department not only gave Utah every single thing they asked for in the lawsuit, Interior even gave them things they hadn't asked for and couldn't possibly have won because of the prior appeals court ruling in the case," said Earthjustice attorney Jim Angell, co-counsel for several environmental groups challenging the settlement.

The groups contend that Utah and the Bush administration were in cahoots and that the lawsuit was nothing more than a formality to get court approval of a prearranged deal.

Not so, said Connie Brooks, Utah's attorney. She said there was a genuine disagreement between Utah and the Interior Department, and that Utah refiled its lawsuit only after "glacial" negotiations spanning two years "failed to bear fruit."

When the dust settled

Angell and other critics point to a series of e-mails as evidence that federal and state officials had the same goal and wanted a formal settlement before anyone of a different mind could intervene — such as the Southern Utah Wilderness Alliance, or SUWA, which had picked up rumors of a deal.

On March 24, one week before Utah filed its amended complaint, Interior attorney Wendy Dorman e-mailed Bob Comer, the department's chief attorney in Denver, saying: "If we want to settle this case, we need to act now. SUWA called Gary Randall at Justice last Friday and said it wants to intervene."

One day after Utah had filed its amended complaint, Brooks e-mailed Comer saying a settlement was almost concluded. And four days later, on April 5, Interior's associate deputy secretary, James E. Cason, sent a fax to Norton, who was staying at the Caneel Bay Resort in the U.S. Virgin Islands on a business trip, conveying a similar message: "We are currently in a polishing process."

Settlement papers were filed late Friday, April 11, at the federal courthouse in Salt Lake City. The judge approved the settlement the following Monday afternoon without a hearing.

Lawyers for the Bush administration acknowledge they are taking a position diametrically opposite from the one advanced by the Clinton administration when the case first came before the 10th Circuit Court in 1998.

"The settlement is not invalid merely because it represents a change from BLM's prior interpretations," Justice Department attorneys Thomas L. Sansonetti and Todd S. Aagard said in a brief. "Agencies have the inherent authority to change their position to conform to applicable law."

The government lawyers also said that "by resolving a long-standing and contentious dispute with Utah, the settlement promoted a more cooperative relationship with the state, an outcome with considerable value to the BLM."

Former Clinton administration officials contend that the policy changes reflect more than a difference of opinion over land-management law.

"This settlement reeks of hostility to wilderness, to the whole idea of taking any steps to protect wild land in its natural condition," said John Leshy, the chief lawyer for the Interior Department under Clinton.

Martha Marks, president of REP America, a Republican environmental organization, has also spoken out against the administration's wilderness policies, including the Utah settlement.

"If conservatives don't conserve, who will?"

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