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**Public Lands Council**



## **Capital Issues**

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## LEGISLATIVE UPDATE

### **Congress, Administration Duel on Interior and Environment Appropriations Measures**

As Congress prepares for the November 18<sup>th</sup> expiration of the current continuing resolution (CR) funding the federal government, the Obama Administration has sent a [letter](#) to Congress stating he will veto any bill that contains earmarks and opposes any cuts to the EPA's budget. At the same time, Rep. Mike Simpson (R-Idaho), chairman of the House appropriations subcommittee on Department of Interior and environment, has said that "there will be EPA riders, or there won't be a bill" and insists that certain limits on EPA funding must be made in order to provide stability for our nation's producers.

The Senate released its [draft Interior spending bill](#) this month, without any EPA-limiting riders. The bill is not likely to see action in committee or on the Senate floor. In the House bill, provisions have been included to limit the EPA and Corps of Engineers' ability to issue a "guidance" or rulemaking under the Clean Water Act (CWA) that would effectively remove the word "navigable" from the definition of waters that fall under federal jurisdiction. Also related to the CWA was a rider that would amend the CWA to prohibit EPA or the states from requiring an NPDES permit for discharges of stormwater runoff from roads associated with silvicultural activities (see [related story](#), below). Another House bill provision would bar the EPA from regulating dust in a way that would hurt farmers and ranchers.

The Senate bill did, however, include its own riders, such as Senator Jon Tester's (D-Mont.) proposal to designate some 700,000 acres of new wilderness in Montana. PLC opposes this provision.

Unlike the House draft, the Senate draft would maintain roughly level funding for land acquisition, the endangered species program, and wetlands preservation. The Senate version does contain a one-year continuation of a provision allowing for the renewal of grazing permits despite the NEPA backlog, while the House version allows for a 5-year continuation of the provision. This provision is key to public lands ranchers and one that has been passed by Congress each year for over 10 years. In other divergences from the House bill, the Senate did not include a provision barring groups from challenging the delisting of wolves in Wyoming. It also did not include the provision supported strongly by Chairman Simpson in the House, allowing sheep grazing to continue on public lands while research is underway to address the possibility of disease transfer to bighorn sheep populations. PLC recently sent letters requesting support for the bighorn language in the Senate (see our letters to [Sen. Dianne Feinstein](#) and [Sen. Jon Tester](#)).

Eventually, House and Senate leadership will have to go into conference with their separate bills to come up with a bill that can pass both chambers—or, per usual yet another CR may have to substitute a real budget for FY 2012. We will see what plays out as November 18<sup>th</sup> draws near.

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### **Congress Looks to Bring Oversight to Wildlife Refuge Creation**

A bill to make Congress the sole authority responsible for authorizing the creation of new wildlife refuges was the focus of a [hearing](#) of the House Natural Resource's Fisheries, Wildlife, Oceans and Insular Affairs Subcommittee this month. [H.R. 3009](#), known as the National Wildlife Refuge Review Act of 2011, was introduced by Rep. John Fleming (R-La.) and would close the "loophole" allowing the Department of Interior to designate new refuges without congressional overview, which has led to resource use restrictions, land acquisition and added management costs. Currently, the more than 550 wildlife refuges nationwide face a \$3.35 billion maintenance backlog. Rep. Fleming said the 150-million-acre system should not add more land until it can balance that backlog.

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## Hearing Scheduled to Address Proposed Forest Planning Rule

The House Natural Resources has scheduled a November 15<sup>th</sup> hearing for the U.S. Forest Service's (USFS) Proposed Forest Planning Rule ("[Proposed Rule](#)"). As reported [last month](#), PLC and other multiple use groups sent a [letter to House Natural Resources Committee](#) Chairman, Rep. Doc Hastings (R-Wash.) requesting a hearing on Proposed Rule. Issued by USFS under the National Forest Management Act (NFMA), the Proposed Rule contains requirements that would be difficult, if not impossible, for the agency to achieve without precluding grazing and other multiple uses. PLC is working with committee staff to provide a witness representing federal lands ranchers, especially on the issue of "species viability." As noted in [May 2011 Capital Issues](#), the Proposed Rule wrongly calls for "maintaining" "viable populations" of all plants and wildlife, including such things as moss and fungus. This requirement is unattainable, procedurally impossible, and currently one of the most frequent claims in forest plan and management litigation. The language is not found in the USFS' authorizing statute; thus this provision is beyond the agency's authority to enforce. Furthermore, there is no scientific consensus on what level of population is "viable" or how it is to be "maintained". Thus, using these words will perpetuate and likely increase the amount of lawsuits filed against the USFS. Species viability is the responsibility of the states, not the USFS.

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## Sen. Rand Paul Sheds Light on EPA Overreach in the Name of Wetlands

A hearing led by Senator Rand Paul of Kentucky this month allowed Mike and Chantell Sackett and other citizens suffering abuses under EPA wetlands regulations to tell their stories. As [reported last month](#), PLC has filed [an amicus brief](#) in the Sacketts' Supreme Court case, *Sackett v. EPA*. The young couple, attempting to build a home in Priest Lake, Idaho, did everything right—but still the EPA saw to it that they receive a compliance order stating that the Sacketts now owed \$43,500 per day until their lot was returned to its original state. The pending case will determine whether the EPA's compliance order should have undergone judicial review before enforcement, and, if not, whether the Sacketts' inability to seek pre-enforcement judicial review of the administrative compliance order violates their rights under the Due Process Clause.

There surely was not a dry eye in the place before the hearing was done, as families told their heart-wrenching accounts of their attempts to better their properties and their lives, only to be criminalized by the EPA (see Jackie Moreau's "[Victims of EPA's Wetland Exploitation Speak Out at Sen. Rand Paul's Roundtable](#)"). Sen. Paul also pointed out the agency's authoritarian behavior with respect to supposed "wetlands" both in a Washington Times [editorial](#) and in a [recent interview](#) with Lou Dobbs.

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## Wilderness Hearing Held by House Subcommittee

The House Subcommittee on National Parks, Forests and Public Lands held a [hearing](#) on 8 wilderness bills this month. Several of them were intended to alleviate problems in existing Wilderness Areas, while others proposed new Wilderness Areas, notably in California, New Mexico and Oregon. One bill, [H.R. 1126](#) proposed reductions in the federal estate through sale. In his opening statement, Rep. Rob Bishop (R-Utah), chairman of the subcommittee, emphasized the importance of addressing wilderness bills individually and moving them on their own merits, rather than as part of sweeping omnibus bills. Testimony was given by the bill sponsors; Mark Ward of the Utah Association of Counties; Utah State University's Dr. Brian Steed, who co-authored a recent [study](#) on the economic impacts of Wilderness (see [article](#) below); agency officials and others.

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## House Judiciary Subcommittee Holds EAJA Reform Hearing

This month, the House Judiciary's Subcommittee on Courts, Commercial and Administrative Law held a hearing on [H.R. 1966](#), the Government Savings Litigation Act. PLC, the [National Cattlemen's Beef Association](#)

(NCBA), the [American Sheep Industry Association](#) (ASI), the Association of National Grasslands and 35 organizations representing livestock producers [sent a letter](#) to Subcommittee Chairman Howard Coble (R-N.C.) and Ranking Member Steve Cohen (D-Tenn.), stating that the legislation will bring transparency and accountability to the Equal Access to Justice Act (EAJA). Idaho rancher Jennifer Ellis testified at the hearing, giving voice to the impacts of EAJA abuse to producers.

EAJA allows plaintiffs to recover attorney fees and other expenses from the federal government when they prevail in a case against the government. Environmental extremist groups have made a hobby of suing the federal government on minor process-related decisions. Often times, the government settles cases and pays the plaintiffs through EAJA instead of devoting time, staff and resources to a trial. According to Wyoming attorney Karen Budd Falen's estimates, over the past 10 years, 12 environmental groups alone have filed more than 3,300 lawsuits, recovering more than \$37 million in EAJA funds. Contrary to claims made by opponents of H.R. 1996, the legislation would remedy these abuses while leaving intact the original intent of EAJA: to enable individual citizens and small businesses to defend themselves against the federal government. Next steps will likely be a markup by the full committee, prior to going to the full House for a vote.

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### **Congress Questions Administration's Possible New Dust Regulations**

In a hearing hosted by Chairman Ed Whitfield (R-KY) of the House Subcommittee on Energy and Power (see our [letter](#) to the committee), past NCBA president Steve Foglesong said that ranchers are pleased that EPA has decided not to propose to lower the standard for coarse particulate matter (dust) this year, but that the issue is far from resolved. This month, the administration backed away from its consideration of a rulemaking to tighten the dust standard in a way that would have thrown many agricultural areas into nonattainment. PLC president John Falen spoke to the issue on a Texas farm broadcasting radio show earlier this month, saying that, had the tightened regulations been adopted, "Even Mother Nature would have been put in nonattainment status."

Despite producers' relief regarding EPA's decision, as noted by Foglesong in the hearing, EPA regularly goes against its word, regularly presenting final rules that are not reflective of their proposals. Producers still face the prospect of stricter standards in the future, even as many livestock operators, under the current dust standards, are spending more than \$1,000 per day on dust control. For these reasons, legislation must be passed to exempt agriculture from federal dust regulations, leaving those regulatory decisions to state and local governments instead. To that end, PLC and other livestock groups support Congresswoman Kristi Noem's (R-S.D.) [Farm Dust Regulation Prevention Act](#).

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### **House Science Committee Reviews ESA**

On October 13<sup>th</sup>, the House Science Committee held a [hearing](#) to consider changes to the Endangered Species Act (ESA), which has drawn criticism of late for its ineffectiveness and unintended consequences. A panel of witnesses from universities, state agencies and the George W. Bush administration criticized the 37-year-old act's use of science, its recovery record and its incentives for landowners.

The ESA continues to be funded year after year despite the fact that funding authorization expired almost 20 years ago. Given the dismal rate of species recovery (one percent of 2,000) and the shackling effect the act has had on ranchers and other industries, the ESA is clearly long overdue for review by its authorizing committee, the Natural Resources Committee (see Chairman Doc Hasting's [statement](#) addressing the need to reauthorize). A hearing in that committee may be forthcoming this fall. The Science Committee, in the meantime, addressed the area of its jurisdiction, primarily analyzing the Fish and Wildlife Service's use of science. Reportedly, many republican lawmakers believe states should have more responsibility in species management and recovery.

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## **Natural Resources Committee Passes Federal Lands Border Security Bill**

Representative Rob Bishop's (R-Utah) bill, [H.R. 1505](#), the National Security and Federal Lands Protection Act, passed through the Natural Resources Committee this month by a vote of 26-17. After a Full Committee [legislative markup](#), H.R. 1505 will go to the Full House with several amendments, offered by Rep. Bishop, Subcommittee Chairman of National Parks, Forests and Public Lands. The bill prohibits the Department of the Interior and the Department of Agriculture from using environmental regulations to hinder U.S. Border Patrol from securing our border on federal lands. Specifically, it stops the agencies from impeding, prohibiting or restricting the U.S. Border Patrol's efforts to gain full operational control within 100 miles of the U.S. border with Mexico and Canada. In an effort to make additional improvements to the legislation, a series of [amendments](#) were adopted during the markup. Including:

- A provision that removes the language that included "maritime" borders among the borders identified in the bill, therefore limiting the bill to the land borders with Mexico and Canada.
- A clarification that protects existing legal uses of public lands, such as leases for grazing.
- The addition of a five-year sunset from the date of enactment of the bill.

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## **Ag Groups Request Regulatory Moratorium from Ag Committees**

PLC and a wide range of agricultural groups sent a [letter](#) this month to leadership of both the Senate and House Agriculture Committees requesting they "include a two-year moratorium on all discretionary, non-essential regulatory actions that would increase the cost of food and agricultural production and processing" in their recommendations to the Joint Select Committee on Deficit Reduction. The letter explained that producers face an increasingly threatening regulatory climate in areas such as the environment, immigration and labor, food safety, forests and public lands, access to international markets, financial services, and tax policy. "Agriculture has been a bright spot in an otherwise dim economy over the past few years," the letter stated. "Agricultural production and processing can be one of the drivers of job growth and economic recovery, but to do that the U.S. must ensure that public policy does not hurt the economic viability of farm and ranch families across the country."

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## **ADMINISTRATION UPDATE**

### **President Proposes Ocean Zoning**

This month, the House Natural Resources Committee held two full committee oversight hearing on "[The President's New National Ocean Policy - A Plan for Further Restrictions on Ocean, Coastal and Inland Activities](#)." PLC circulated a [letter](#) amongst industry groups for submission to the record, opposing President Obama's Executive Order (EO) 13547 which, according to the Natural Resources Committee, "creates a new, top-down bureaucracy that could significantly impact the way we use and manage our oceans and imposes mandatory ocean zoning." Not only does the EO impact oceans, it also gives authority to a new "National Ocean Council" to regulate "upstream watersheds and airsheds," as well as any activities that might have a connection to ocean resources and coastal waters. Similar attempts have been made legislatively in the past—and none of the bills made it out of committee. True to form, the administration is attempting to legislate by administrative fiat, and the potential for new regulations on our members and other industries up stream is too high to risk.

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## **FWS Releases Candidate Species Review**

The U.S. Fish and Wildlife Service (FWS) has announced its Candidate Notice of Review ([CNOR](#)), a yearly appraisal of the current status of plants and animals considered candidates for protection under the Endangered Species Act (see their [press release](#)). According to the National Endangered Species Act Reform Coalition (NESARC), there are now 244 species recognized by FWS as candidate species. Three species have been removed from candidate status, three have been added, and seven have a change in priority from the last review conducted in November of 2010. The seven changes in priority announced in the federal register notice are based on new information in the updated assessments of continuing candidates. These changes include two species that increased in priority and five that lowered in priority.

As reported [last month](#), a federal court has approved a settlement binding FWS to deadlines for decisions on over 1,000 species for which activist groups have petitioned for listing under the Endangered Species Act. FWS is now beginning its work to “systematically, over a period of six years, review and address the needs of candidate species to determine if they require ESA protection” (read the FWS [press release](#)). A list of these species is available at [http://www.fws.gov/endangered/improving\\_ESA/listing\\_workplan.html](http://www.fws.gov/endangered/improving_ESA/listing_workplan.html).

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## **BLM Announces Fall-Winter Wild Horse Gather Schedule**

The BLM has announced its tentative fall-winter schedule for wild horse and burro gathers, “required by Federal law and approved by land-use plans,” according to their [press release](#). All helicopter-driven wild horse gathers will be completed by Feb. 28. The tentative dates of the fall-winter gathers can be accessed [here](#). In its press release, the BLM invited “the public and media” to observe the gathers. “Observation points will be determined by the BLM in a manner that recognizes the need for good viewing sites, along with the need to ensure viewer and animal safety,” the release stated. In past gathers such as the Triple B herd management area, activists have botched gathers and created a dangerous environment for the horses, BLM personnel, and themselves (see [last month’s story](#)).

Along with removals, the fall-winter gathers will be used to implement population growth-suppression techniques to about 2,000 wild horses. They will use methods such as applying fertility- control vaccine, porcine zona pellucida (PZP), incorporating sex ratio adjustments, and gelding. While PLC supports implementing fertility control, we oppose the continued use of the marginally effective PZP, which requires that mares be retreated every two years and is supplied to the agency by extremist anti-livestock group, the Humane Society of the United States (HSUS). PLC encourages BLM to consider using the newly developed vaccine, SpayVac ®, which has the support of groups such as the Wildlife Society and has shown to be more effective over a longer duration than PZP.

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## **JUDICIARY UPDATE**

### **Will the Supreme Court Hear Logging Roads Nonpoint Source Permitting Case?**

\*Correction to September 2011 Capital Issues: the ruling requiring NPDES permits for formerly excluded activities was on a case titled [Northwest Environmental Defense Center v. Brown](#), not *Northwest Environmental Defense Center v. Oregon Forest Industry Council*, as written.

Western Resources Legal Center has filed [amicus brief](#) on behalf of PLC, NCBA and various forestry groups in support of Georgia-Pacific’s writ of certiorari, who hope to see the Supreme Court accept the case and overturn a decision of the Ninth Circuit Court in [Northwest Environmental Defense Center v. Brown](#). As reported [last month](#), the decision threatens to require National Pollutant Discharge Elimination System (NPDES) permitting on hundreds of thousands of miles of once-exempt (under the Silvicultural Rule) logging roads and other, non-

logging-road related ditches and culverts. It also calls into questions all categorical exclusions under the Clean Water Act.

In July, 2011, Senator Mike Crapo (R-Idaho) introduced a bill, [S.1369](#), that would codify the Silvicultural Rule as an amendment to the Clean Water Act, with the clarification that no NPDES permit is required for “road use, construction and maintenance.” Rep. Jamie Herrera Beutler (R-Wash.) introduced similar legislation in the House, [H.R. 2541](#). A similar provision was also added to the House Interior appropriations bill, [as noted above](#).

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### **PLC Granted Motion to File as Amicus in Wild Lands Case**

PLC and seven other organizations, represented by Pacific Legal Foundation (PLF), recently filed an [amicus brief](#) in *Uintah County v. Salazar*, the lawsuit brought by the state of Utah and several Utah county groups challenging the Department of Interior’s (DOI) [“wild lands” policy](#). The amicus brief supports the plaintiffs’ argument that, when DOI Secretary Ken Salazar signed Secretarial Order 3310, he created an avenue for the BLM to administratively designate *de facto* wilderness areas—an act reserved solely for Congress under law. It also argues that the “wild lands” policy should be struck down because it was put into place without giving affected individuals the opportunity to comment on the policy before it took effect.

Groups who joined as friends of the court include PLC, NCBA, Washington Cattlemen’s Association, Wyoming Stock Growers Association, Guardians of the Range, Petroleum Association of Wyoming, Wyoming Association of Conservation Districts, and Wyoming County Commissioners Association.

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### **Grazing Regulations Case Ends in a Loss**

On October 3, the Supreme Court denied PLC’s petition for [writ of certiorari](#), requesting that the Supreme Court review the [Ninth Circuit decision](#) in *Western Water Project v. Department of the Interior, et al* (learn more about the points PLC raised in the [May 2011 Capital Issues edition](#)). At question were regulations, approved under the Bush administration in 2006, that would have given ranchers more time to correct violations of grazing restrictions; phased in eminent grazing curtailments more gradually; allowed ranchers to share ownership of structures on public land with BLM; and other provisions.

When environmentalists filed a lawsuit opposing the new rules, they won an injunction. The Ninth Circuit held that regulations adopted by the BLM in 2006 were invalid because they failed to comply only with the procedural requirements—not substantive requirements—of the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). PLC and the American Farm Bureau Federation intervened with BLM to support the regulations. While the BLM later dropped its appeal, the Ninth Circuit did allow PLC to pursue our appeal, rejecting Western Watersheds Project’s argument that PLC could not appeal because the BLM had not appealed.

PLC’s legal counsel posits that the Supreme Court’s denial of PLC’s petition does not indicate that the Court necessarily agreed with the Ninth Circuit’s decision. On the contrary, the Court typically denies all but about 1% of the petitions seeking review, and the Court generally reviews decisions only if they raise significant national issues that must be decided at the highest judicial level.

Although PLC is disappointed that the Supreme Court denied review of our petition, and understands that the Court routinely reviews only a fraction of the petitions seeking review, PLC continues to believe that the Ninth Circuit decision was wrongly decided, and that the BLM regulations did not violate the procedural requirements of NEPA and the ESA. In any event, PLC believes that the BLM should re-adopt the same regulations that it adopted in 2006, and that it should comply with the procedural requirements of NEPA and the ESA in re-adopting the regulations. If the regulations promoted sound rangeland management in 2006, as the BLM

believed at that time, the regulations presumably promote sound rangeland management at this time, since nothing has changed since 2006 indicating that the regulations fail to adequately protect the public range.

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### **PLC, NCBA and ICA File Briefs in Sage Grouse Case**

As reported [last month](#), PLC, NCBA, and the Idaho Cattle Association (ICA) have been granted full intervenor status in the Western Watershed Project's (WWP) challenge of BLM grazing permit decisions in Idaho. This month, the groups, with representation by the non-profit Western Resource Legal Center (WRLC), filed their joint "[Memorandum in response to plaintiff's motion for summary judgment](#)", opposing WWP's claims. Concurrently, the groups filed a cross-motion for summary judgment.

The briefs argue that BLM did in fact comply with the National Environmental Policy Act (NEPA), the Federal Land Management Policy Act (FLPMA), and the Fundamentals of Rangeland Health (FRH) in renewing the grazing permits in question, located in the Battle Creek, East Castle Creek, Rockville, Diamond Basin, and Silver City allotments. PLC awaits Judge Winmill's response to the joint motions.

PLC has reconvened its sage grouse committee to address the various issues surrounding the species, including the above case. The committee has discussed the need to gather scientific information, habitat improvement projects, and other efforts on behalf of ranchers across the western states, and compile it in a way that is accessible and useful.

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### **Clinton's Roadless Rule Upheld**

A federal appeals court judge in Denver has upheld the Clinton administration's "roadless rule" that prevents logging and roadbuilding and maintenance on nearly 50 million acres of national forests. This decision comes after a decade of litigation over the rule. According to E&E News, the 120-page [ruling](#) by the 10th U.S. Circuit Court of Appeals reversed a Wyoming district court's finding that the rule had illegally created *de facto* wilderness and violated the National Environmental Policy Act. The decision means nearly one-third of the nation's forests will be managed primarily for their "primitive qualities." The Colorado Roadless rule is still expected to be carried forward; PLC will keep members abreast of possible appeals.

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### **Gray Wolf Update**

This month, the 9th U.S. Circuit Court of Appeals denied the emergency injunction sought by three wolf advocacy groups saying it would consider the request during oral arguments scheduled for next month. The groups, Alliance for the Wild Rockies, Friends of the Clearwater and WildEarth Guardians, are challenging an August decision by a federal district court in Missoula, Mont., that the Interior Department legally removed federal protections for the animals last spring after ordered to do so by Congress.

Of course, federal protection of the wolf under ESA still applies in the eastern parts of Washington and Oregon, where the Northern Rocky Mountain distinct population segment (DPS) delisting, because of arbitrary agency DPS boundary lines, does not apply. Washington Cattlemen's Association (WCA) supports making the entire populations of Oregon and Washington part of the Northern Rocky Mountain DPS so that the legislative delisting rider applies to their entire states. WCA is also petitioning to take the wolf off the Washington State endangered list, and opposes the Washington Department of Fish and Wildlife's proposed recovery plan, which gives no limit to indicate how many wolves is "enough," among other problems.

Also in Washington State this month, the federal district court for the [Eastern District of Washington](#) entered an order approving a settlement agreement in [Washington Cattlemen's Association v. Salazar](#). Pacific Legal Foundation (PLF) represented WCA in challenging the U.S. Fish and Wildlife Service's failure to conduct a statutorily mandated status review for the gray wolf. Now, FWS must complete its review by February 2012. According to PLF, "status reviews must be conducted every five years because, without current science, the Service cannot determine whether a species should remain listed as endangered, be reclassified as threatened, or removed from the endangered species list altogether. Making sure the Service conducts status reviews is very important to people who are impacted by the gray wolf's status as an endangered species, and who count on the Service's species listings to be scientifically justifiable."

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## MORE NEWS

### **Study Reveals Wilderness Designations' Damage to Rural Economies**

Environmental activists regularly hail the economic benefits that Wilderness areas bring to the communities near them. However, a [recent study](#) conducted by Utah State University (USU) Jon M. Huntsman School of Business professors shows that while some Wilderness Areas can have beneficial impacts, they usually have a significant negative impact on county total payrolls, county tax receipts, and county average household incomes. There are 759 Wilderness Areas in the U.S., located primarily in the rural West and totaling 109,663,992 acres. According to the study, "Grazing is expressly allowed in Wilderness Areas, but administrators may make 'reasonable regulations' including the reduction of grazing to improve range conditions." Ranchers who operate in Wilderness Areas know best the impact the designation actually has on AUMs, although to date no analysis has been done to determine the cumulative impacts on AUMs across the West.

The same USU professors and a Southern Utah University professor produced a [separate study](#) based on the potential impacts of the leaked BLM "Treasured Landscapes" memo, which cited possible national monument areas for designation by President Obama. While grazing and other uses were mentioned, the focus was primarily on energy development across the 15 different sites, and indicated that monument designations on these lands would highly restrict not just traditional energy development, but renewable energy projects, as well.

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### **NEW Link to IBLA Decisions**

To find the decisions of the Interior Board of Land Appeals over the last three months, [click here](#).

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### **American Sheep Industry Association News**

Go to [www.sheepindustrynews.org](http://www.sheepindustrynews.org)

### **Environmental Steaks**

See NCBA's monthly newsletter, [Environmental Steaks!](#)

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