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**Public Lands Council**

## **Capital Issues**

~September 2011~

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## HIGHLIGHT

### **PLC Holds 2011 Annual Meeting, Approves Trust Agreement**

The 2011 Annual PLC Meeting took place September 6-9 in Park City Utah (see the [minutes](#) and the [PLC Annual Report](#)). Congressman Rob Bishop (R-Utah) and Utah Governor Gary Herbert gave substantial speeches on the value of public lands ranching, followed by good rainstorm that sent everyone running for cover. The Welcome Barbecue no worse for the wear; everyone was well fed with steaks and lamb chops. We thank the Utah Cattlemen's Association and Utah Wool Growers Association for their sponsorship.

The following morning, the PLC Board of Directors unanimously passed a historic Public Lands Endowed Trust with Ruby Pipeline an energy infrastructure company. The Trust is the result of more than a year of negotiations and is designed to “protect, enhance and preserve multiple use of public lands, including the livestock grazing industry's use of those lands.”

The ensuing general meeting addressed the ever-pressing need to defeat Secretary Salazar's Wild Lands Order; PLC's decision to refute the misleading [Economic Impact Report](#) recently released by DOI; PLC's options in dealing with the wild horse overpopulation problem; the importance of local government coordination with the federal agencies; and other matters—including the Forest Service's position on water improvements. Harv Forsgren, the Intermountain Regional Forester who addressed the group, asserted that, in states such as Utah and Nevada where federal agencies are prevented from holding stockwater rights, the Forest Service will not issue permits for water improvements, “at the expense of the resource.” Clearly, such a position, which will inevitably lead to the removal of livestock from allotments, is unacceptable to PLC. PLC is considering avenues to address this problematic policy, which calls for federal usurpation of privately held water rights and cannot be tolerated.

Members also passed policy opposing the removal of domestic sheep grazing due to bighorn management without sound science and policies supporting EAJA reform and wildfire prevention via grazing.

The BLM Stewardship Award was presented to Joe Stell, a Carlsbad, New Mexico, rancher who has improved rangeland conditions on his BLM grazing allotment. BLM Assistant Director Ed Roberson presented the award.

On Friday September 9<sup>th</sup>, we took a range tour. Bill Hopkin and other representatives of the Utah Grazing Improvement Project showed us how they and members are reorganizing to coordinate large-scale, rotational grazing across multiple allotments. The method is an emulation of what has been done on the Deseret Ranch, the east side of which the PLC group was also able to tour. A delicious lunch was provided by the Rich County Cattlemen's Association.

PLC would like to thank Utah Cattlemen's Association, Utah Wool Growers Association, Western AgCredit, Rich County Cattlemen's Association, and the Bureau of Land Management for their contributions to this year's meeting.

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## LEGISLATIVE UPDATE

### **Reps. Lummis, Bishop Release Pro-Grazing Editorials**

Congressman Rob Bishop (R-Utah) is a staunch supporter of public lands ranching. Not only did he come to the PLC Annual Meeting to speak about the importance of the industry (and of defeating the Wild Lands order and other threats); he also released an op-ed hailing our nation's public lands as “an important part of our American heritage” that “play an essential role in the livelihoods of many industries, including ranching.” This is especially true, he said, in the West, where over 90% of our nation's public lands are located. He went on to say that the relationship between ranching and public land management is often symbiotic and as stewards of

our public lands, ranchers are a cog in the wheel that helps manage the long-term health of our resources. [Read the entire Op-Ed.](#)

Congresswoman Cynthia Lummis (R-Wyo.) is another dedicated supporter of public lands ranching. Her recent Op-Ed, titled, “[Putting a Stop to Radical Environmentalists’ Best-Kept Secret](#)“, focuses on the importance of reforming the Equal Access to Justice Act (EAJA). “Correcting the problem of repeated lawsuits is a clear money-saver for the taxpayer – but it also frees federal land managers to do the work they are supposed to do,” Lummis wrote. “Rather than scurrying around to meet the never-ending demands of the perpetual lawsuit crowd, the Government Litigation Savings Act will free land managers to do the job they sign up to do — ushering through the regulatory process the types of activity on federal lands that will help our economy grow and get Americans back to work.” [Read the entire Op-Ed.](#)

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### **Western Caucus Release “Jobs Frontier” Report**

Senate Western Caucus Chairman John Barrasso (Wyo.), Congressional Western Caucus Chairman Steve Pearce (N.M.) and members of the Senate and House Western Caucuses have released a “[Jobs Frontier](#)” report that focuses on pro-growth legislation that will “protect and create jobs in the West and across America.” In the last two years, America has lost approximately 2.3 million jobs and the unemployment rate has increased from 7.8 percent to 9.1 percent. Americans in six western states have over 9 percent unemployment (Washington, Arizona, Idaho, Oregon, California and Nevada).

In the “Jobs Frontier” report, Western Caucus Members highlight over 40 legislative solutions have already been introduced and that would create jobs by, for example, promoting agriculture, ranching and forestry and reducing “junk lawsuits”. The report directly quotes PLC, citing a letter we sent to Sen. Crapo in support of the *National Monument Designation Transparency and Accountability Act* on February 18<sup>th</sup>. “The (Public Lands) Council highlights the negative effects of additional National Monument designations when they say, ‘[Such designations would be devastating to our nation’s federal lands ranchers and a burden to rural economies across the west,](#)’” quotes the report.

The report points to legislation, such as Congresswoman Kristi Noem’s (R-S.D.) [Farm Dust Regulation Prevention Act](#) and Senator John Barrasso’s [Grazing Improvement Act of 2011](#), that will help ranchers stay in business. It also includes some facts and statistics, provided in part by PLC, such as:

- States west of the Mississippi comprise over 74 percent of the nation’s 92.6 million [inventory of cattle and calves](#) and have nearly 92 percent of the nation’s 13.6 million [head of cattle on feed](#).
- Every [1000 domestic sheep create 18 U.S. jobs](#) and over 2.75 million sheep spend time on public lands – that equates to almost 50,000 jobs.
- Total meat production in the U.S. supports [6.2 million jobs](#).

The Jobs Frontier report is a follow-up to the Western Caucus’ September 2010, “War on Western Jobs” [report](#), which outlined the Administration’s policies and their negative impact on jobs and communities throughout the West.

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### **Closing Regulatory Loopholes Act of 2011**

Senator Mike Johanns (R-Neb.) has introduced [S. 1530](#), a bill that would close a loophole that allows agencies to establish power without full congressional review. Current law permits Congress to disapprove of agency rules; agencies have gotten around this by instead issuing guidance documents to expand their jurisdiction. A recent example is a guidance document issued by EPA that, in the agency’s own view, would significantly expand the waters of the United States subject to federal control and regulation ([see PLC’s comments on the guidance](#)). S. 1530 amends the Congressional Review Act to cover both agency rules and guidance documents.

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### **Senate Introduces Farm Dust Regulation Prevention Act**

Senator Mike Johanns (R-Neb.) has introduced the Senate companion bill to Rep. Kristi Noem's (R-S.D.) Farm Dust Regulation Prevention Act. PLC and NCBA jointly sent a [letter of support](#) to Sen. Johanns for [S. 1528](#), saying that his legislation "would protect livestock producers and rural America from one of the most detrimental regulations the Environmental Protection Agency (EPA) is currently considering: an effective doubling of the stringency for rural America of the coarse particulate matter National Ambient Air Quality Standard (PM<sub>10</sub> NAAQS), or the 'dust standard.'" Johanns' bill would halt for one year current plans to revise the dust standard. It would exempt agricultural dust from federal regulation if state and local authorities have already implemented dust control measures. In areas where there are no state or local dust control measures, EPA would be required to make two findings before regulating agricultural dust: A finding of substantial health effects caused by the dust, and a finding that any benefits of regulation outweigh economic costs.

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### **Restoring Access to Our Public Lands: A Sacramento Field Hearing**

The House Natural Resources Subcommittee on National Parks, Forests and Public Lands held an [Oversight Field Hearing](#) in Sacramento, California on Monday, September 19, 2011 entitled "Restoring Public Access to the Public's Lands: Issues Impacting Multiple-use on Our National Forests." Witnesses included Subcommittee Chairman Rob Bishop (UT-01), Congressman Wally Herger (R-Calif.) and Congressman Tom McClintock (R-Calif.), as well as a host of multiple-use representatives. One of them was a rancher, Tom Leavell, who has a grazing permit in the Sierra Nevada mountains. His [testimony](#) spoke to the increasingly restrictive nature of agency decisions. He and his wife have recently been told that they may no longer be authorized to use the cabin their family has used since the 1930s. They have recently received a notice of noncompliance, with no prior warning, that their cattle have been grazing on private and UC Berkeley experimental grounds and that they are in violation of aspen utilization standards. At the time of the notice, they were informed that any further incident would be considered willful and grounds for cancellation of their permit. The hearing shed light on this and other problems arising with the land management agencies for multiple users.

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### **PLC, Multiple Use Groups Request Hearing on Proposed Forest Planning Rule**

On September 2<sup>nd</sup>, PLC and other multiple use groups sent a [letter to House Natural Resources Committee](#) Chairman, Rep. Doc Hastings (R-Wash.) requesting a hearing on the U.S. Forest Service's (USFS) Proposed Forest Planning Rule ("Proposed Rule"). Issued by the Forest Service (FS) 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.

USFS has denied many attempts by both multiple use groups and Congress to ask the administration to go back to the drawing board with its Proposed Rule. PLC and the livestock industry's [request](#) for a comment period extension was [denied](#), and their [submitted comments](#) appear to be falling on deaf ears with the agency. Congress made multiple efforts to encourage a better-crafted rule, including sending, with the urging of PLC and other multiple use groups, [this letter](#) to Secretary Vilsack. For now, however, indications are that the administration intends to proceed with its Proposed Rule, likely finalizing it before the close of 2011.

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### **Hearing Focuses on Need to Limit New National Monument Designations**

The President's authority to use the Antiquities Act to unilaterally designate new National Monuments was the subject of a [legislative hearing](#) this month. The Subcommittee on National Parks, Forests, and Public Lands discussed six bills that would require either state or congressional approval prior to a National Monument designation. [Subcommittee Chairman Rob Bishop](#) (R-Utah) said that the President's use of the Antiquities Act

allows the administration to circumvent the open congressional process, which helps ensure that the livelihoods of communities, residents, businesses and stakeholders are examined and thoughtfully considered before new public land designations are made. Bishop said the six bills reviewed at a subcommittee hearing have the support to pass.

The Obama administration and environmental groups have expressed unconditional opposition to the measures. Hundreds of wilderness advocates flew to Washington this month to lobby President Obama to designate new national monuments. Their goal is to convince the administration to make designations before November 2012, in states from Virginia to Washington.

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### **Appropriations: Continuing Resolutions Prolongs Budget Decisions**

To forestall a government shutdown, Congress will likely once again pass a continuing resolution (CR) to continue current spending levels, continuing (until November 18<sup>th</sup>) government operations at a rate of \$1.043 trillion - the total amount agreed to by Congress and the White House in the recent debt-ceiling legislation. The fact that a Fiscal Year 2012 budget has not yet been passed is not a surprise, for many it is a frustration: much effort, for example, went into the crafting of the Interior and Environment Appropriations bill. Now, Congress is expected to pass an omnibus spending bill by November 18<sup>th</sup>, which will require a revamping and combining of the 12 separate appropriation bills into one. PLC will continue working with appropriations legislators and staff to ensure that our priorities are included, priorities such as the rider allowing for the renewal of grazing permits despite NEPA backlogs; continued defunding of the Wild Lands secretarial order; a 5-year delay on any grazing decisions concerning bighorn sheep; and more (see our [list of priorities](#)).

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## **ADMINISTRATION UPDATE**

### **Black-Footed Ferrets Reintroduced in S.D.**

The endangered black-footed ferret has been reintroduced in South Dakota's Badlands. The ferrets are born and bred in captivity and are then released into the wild. To help the reintroduction process, some farmers have offered their land for prairie dog habitat, on which ferrets depend for food and shelter. This has caused conflict with neighboring ranches and farms when the dogs exceed their boundaries. PLC has policy that allows for the use of ferrets as a means of biologically controlling prairie dog population, provided the ferrets are classified as "experimental- non-essential". The policy also does not preclude any additional management that may be necessary to control prairie dog populations.

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### **Forest Service Issues Bighorn Directive**

PLC has acquired a [copy of a letter](#) sent to U.S. Forest Service Regional Foresters by Deputy Chief Joel Holtrop, dated August 19, 2011, directing them to use a specified "viability analysis outline" in instances of possible bighorn and domestic sheep interaction and disease transfer. To "provide for Forest-wide bighorn sheep viability" in instances where disease transfer from domestic sheep to bighorn sheep/goats is possible, the letter reads, "the goal of spatial and/or temporal separation" is "the most prudent action we can use." While data analysis is encouraged, the letter states "a qualitative approach to NEPA analysis for bighorn sheep viability is sufficient as long as clear and reasonable rationale for the decision is displayed."

Use of this approach on the Payette National Forest ended with a 70% reduction in domestic sheep grazing that will affect not just ranchers on the Payette, but the entire industry. Its duplication across forests will have wide-reaching, devastating implications for the U.S. sheep industry.

PLC has policy that, whereas sheep have pastured alongside bighorns for years without problems, and whereas environmental groups are in the process of transplanting bighorns across the west (thereby endangering sheep grazing on a large scale), we therefore support the development of sound science regarding the unfounded claims that disease transfer is threatening bighorns, and will continue to pursue grazing permit protection until such science is made available. PLC is categorically opposed to implementing the Payette decision across the west.

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### **Landrieu Supports Vitter's Hold on Wildlife and Parks Nominee**

*(Printed in part from E&E News)*

Sen. Mary Landrieu (D-La.) has said she supports fellow Louisiana Sen. David Vitter's (R-Louis.) pledge to block the confirmation of Rebecca Wodder as Interior Assistant Secretary for Fish, Wildlife and Parks. As previously reported in June's [Capital Issues](#), Wodder's selection is seen as a nod to environmental groups and has drawn criticism from others in the Senate, including Senator James Inhofe (R-Okla.), who expressed concern regarding Wodder's support of the proposal to expand the definition of waters subject to federal regulations under the Clean Water Act. Wodder worked for the Wilderness Society for over 10 years before becoming CEO of American Rivers, an organization whose positions on climate change, dam removal and other issues render it in opposition to PLC's policies.

Without Landrieu's support, Wodder's nomination would likely stall in the Senate Energy and Natural Resources Committee, where Democrats hold a slim 12-10 majority. Landrieu said yesterday she supports Vitter's pledge to block Wodder's advancement on the Senate floor until Interior issues a blanket extension of all shallow and deepwater oil and gas leases in the Gulf of Mexico that are due to expire at the end of the year. Sen. Joe Manchin (D-W.Va.), when asked whether he supported Wodder's confirmation, said only that "she's going to have a heavy lift." His vote would also be crucial for her nomination to pass the committee.

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### **New BLM Chief of Wild Horse and Burro Program**

Joan Guilfoyle has been selected as the new chief of the BLM's Wild Horse and Burro Division.

According to the BLM press release: In her current position in Washington, D.C., as Service First National Coordinator for the BLM, USDA Forest Service, National Park Service, and the U.S. Fish and Wildlife Service, Guilfoyle has provided leadership on streamlining and integrating agency processes to improve customer service, enhance natural and cultural resource management, and increase efficiency within and between agencies. Guilfoyle previously served in several key Federal positions, including Supervisory National Park Service Ranger for the Mississippi National River and Recreation Area in St. Paul and Minneapolis, Minnesota; Acting Executive Director of the Southern Nevada Agency Partnership, Service First offices in Las Vegas and Boulder City, Nevada; Information and Education Specialist/Outreach Coordinator and Deputy Assistant Regional Director for Public Affairs for the U.S. Fish and Wildlife Service in Twin Cities, Minnesota; and Deputy District Public Affairs Officer and Supervisory Park Ranger for the U.S. Army Corps of Engineers in St. Paul, Minnesota, and St. Louis, Missouri. She earned her Bachelor's degree in Zoology/Ecology from Southern Illinois University in 1979 and her Master's degree in Environmental Learning and Leadership from the University of Minnesota in 2002.

Guilfoyle said she took the new job to help educate an increasingly urbanized public about the challenges of managing wild horses. Federal law forces the BLM to gather 12,000 horses from the wild in order to protect the animals from starvation and preserve the range for other public lands users such as ranchers, she said. Guilfoyle arrives as the program embarks on a major overhaul that will ramp up the use of fertility drugs to reduce herd growth in hopes of reducing the need for roundups. BLM also plans to adjust the ratios of males and females in herds and, in some case, geld studs so that they can no longer reproduce.

Shortly after assuming her post, Guilfoyle traveled to Ely, Nev., to observe a gather at the Triple B herd management area, where more than 1,460 wild horses roamed an area BLM estimates can only support 250 to 518 of the animals. There, she witnessed “horse advocates” botch a helicopter gather by flying a fixed wing aircraft dangerously close to the government contracted helicopter, endangering lives. Guilfoyle said her hope is to convince skeptics that some wild horse gathers are necessary until BLM’s new fertility regime is given time to work. Many have unfairly criticized the techniques BLM uses to safely pen a wild, and sometimes unruly, horse, she said.

PLC president, John Falen has reported having had a productive conversation with Guilfoyle, after which he followed up with a letter, reiterating the points they had discussed. He is hopeful that the new chief will help institute some commonsense solutions to the program.

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### **Wolf Release in Mexico Spurs Questions in U.S.**

*Printed in part from the Associated Press:*

ALBUQUERQUE, N.M. (AP) – A plan by Mexican wildlife officials to reintroduce a rare species of gray wolf to its historic range in northern Mexico has prompted questions from wildlife managers and ranchers in the Southwest, where a similar, decade-long effort has been fraught with controversy. The U.S. Fish and Wildlife Service and officials with the Arizona Department of Game and Fish recently learned of the plan by the Mexican government to release five captive-bred Mexican gray wolves at an undisclosed ranch in northeastern Sonora.

The plan was first proposed in 2009 but has faced delays. Now, with the release imminent, Arizona wildlife managers are scrambling to determine what effects it could have on the effort in Arizona and New Mexico to reintroduce the endangered wolf. Wildlife managers and ranchers in the two states want to know whether the wolves will be protected under the federal Endangered Species Act. Or will they have the same “nonessential, experimental” designation as wolves released as part of the reintroduction effort in New Mexico and Arizona?

There are also questions about how the wolves will be detected and monitored if they cross the international border, and how nuisance and livestock depredation incidents in the U.S. will be investigated if they involve the wolves from Mexico. Ranchers in Sonora are concerned after having seen the challenges spurred by the U.S. reintroduction effort. In spite of population numbers well below recovery goals, the introduced wolves have wreaked havoc on livestock.

Officials said the wolves that will be released in Mexico will be fitted with radio collars so they can be monitored. If they cross the border, the Fish and Wildlife Service said they will have the full protection of the federal Endangered Species Act as long as they are outside the boundaries of the wolf recovery area that spans southeastern Arizona and southwestern New Mexico. If the wolves are found within the recovery area, they will be considered as part of the experimental population - a classification that gives wildlife officials greater flexibility in managing the animals.

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## Submit Comments to the Wild Horse and Burro Advisory Board

The BLM's National Wild Horse and Burro Advisory Board will meet on October 13-14, 2011, in Arlington, Virginia, to discuss issues relating to the management, protection, and control of wild horses and burros on Western public rangelands. [We encourage members to submit comments \(CLICK HERE for suggestions\) on the Wild Horse and Burro Program BY COB OCTOBER 5<sup>th</sup> \(this will give the advisory committee time to review comments. At the very latest, comments must be submitted by COB OCTOBER 13<sup>th</sup>\).](#)

Please submit your written statement to:

Bureau of Land Management, National Wild Horse and Burro Program  
WO-260, Attention: Ramona DeLorme  
1340 Financial Boulevard  
Reno, Nevada, 89502-7147

Comments may also be e-mailed to the BLM through the Wild Horse and Burro Website (at <http://on.doi.gov/qHv09E> ). For additional information regarding the meeting, please contact Ramona DeLorme, Wild Horse and Burro Administrative Assistant, at 775-861-6583.

The two-day meeting will take place on Thursday, October 13, from 8 a.m. to 5 p.m. and on Friday, October 14, from 8 a.m. to 12 p.m. The agenda of the meeting can be found in the September 6, 2011, **Federal Register** (at <http://www.gpo.gov/fdsys/pkg/FR-2011-09-06/pdf/2011-22626.pdf>). PLC's president, John Falen, and several other PLC representatives will be present to address the Advisory Board on Thursday October 13.

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## JUDICIARY UPDATE

### PLC Files Amicus Briefs in Two Clean Water Act Cases

PLC has joined other groups to file amicus briefs in two cases slated for the Supreme Court, *PPL Montana, LLC v. Montana* and *Sackett v. EPA*. Both cases touch on different aspects of Clean Water Act (CWA) jurisdiction.

#### *PPL Montana, LLC v. Montana*

In *PPL Montana, LLC v. Montana*, a hydroelectric power company that owns hydroelectric facilities, or dams, along the Missouri, Madison and Clark Fork rivers, is (ostensibly) being sued by Montana school children, who are seeking compensation for PPL's use of state-owned riverbeds. The plaintiffs argued that the riverbeds occupied by PPL's dams were part of the school trust lands and that PPL was obligated to compensate the state for their use. Despite the fact the state had never asserted ownership of the riverbeds, Montana State decided to join the federal litigation. The district court and the Montana Supreme Court sided with the plaintiffs, finding that the title to the riverbeds passed to Montana when it became a state in 1889.

The issue for the Supreme Court: in determining whether a river is "navigable," does a court look at whether the river is navigable now, or instead whether it was navigable when the state joined the Union. "Navigable waters" are the crux of the federal government's authority under the CWA. The issue of "navigable waters" has been litigated before, but has never received a clear delineation by Congress or the Supreme Court. A subset of this argument is a category of waters called "traditionally navigable waters," the primary question being whether "recreational use" solely qualifies a water as a "traditionally navigable water." A ruling in this case may include a larger discussion of "what does 'navigable' mean under the CWA," including the "recreational use" question. If the Supreme Court takes up these questions, it is imperative that NCBA and PLC be involved.

## *Sackett v. EPA*

The other case, *Sackett v. EPA*, being argued by Pacific Legal Foundation out of Sacramento, Calif., involves a couple, Chantell and Michael Sackett, who own an undeveloped lot (less than an acre) in Idaho. In 2007 they filled in half the lot with dirt and gravel in preparation for building a house. Later that year, the EPA issued the Sacketts a “compliance order.” It alleged the parcel of land is a “wetland” subject to CWA jurisdiction and that the Sacketts had violated the CWA when they filled the “wetland” without receiving a CWA permit. The compliance order required the Sacketts to remove the dirt and gravel and restore the land to its original condition. If they did not, there would be an enforcement action issued against them with a fine of \$32,500 per day of violation in civil penalties and up to \$11,000 per day of violation in administrative penalties.

The Sacketts requested a hearing to challenge EPA’s finding that the parcel was subject to the CWA, but EPA refused to give them a hearing. Based on the denial of the hearing request, the Sacketts filed suit in federal court. The district court granted EPA’s motion to dismiss the case because of lack of subject matter jurisdiction. Basically, the court threw it out because it determined that the CWA prevented judicial review of compliance orders until the enforcement actions have actually been issued by the federal agencies. Thus, the Sacketts could not challenge the compliance order until they refused to do what it said and then were fined. The 9<sup>th</sup> Circuit upheld the ruling.

The Supreme Court will look at two questions in this case: (1) Whether petitioners may seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 §704; and (2) whether, if not, petitioners’ inability to seek pre-enforcement judicial review of the administrative compliance order violates their rights under the Due Process Clause.

PLC believes it is important to accurately portray the effects the CWA can have on farmers and ranchers across the country. The amicus brief will push for a decision in this case that affirms a landowner’s right to challenge a “jurisdictional determination” before his is required to either go through the permitting process (just to determine he did not actually need a permit), or forgo the process and are fined thousands of dollars per day.

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## **PLC, NCBA and ICA Granted Intervenor Status in Sage Grouse Case**

Federal Judge Lynn Winmill of the U.S. District Court, District of Idaho has granted PLC, NCBA, and the Idaho Cattle Association (ICA) intervenor status in the Western Watershed Project’s (WWP) challenge of the BLM’s grazing permit decisions. Without offering scientific evidence, WWP had challenged grazing permits based on accusations that BLM did not account for preservation of sage grouse habitat. Having intervenor status will allow PLC, NCBA and ICA to fully participate in the legal proceedings. Without the January 2011 Ninth Circuit Court of Appeals landmark decision to abandon the Federal Defendant Only rule, PLC, ICA and NCBA may not have been allowed to defend ranchers in this case. Now, industry representatives will be able to provide evidence that livestock grazing can be beneficial to sage grouse habitat. The non-profit Western Resource Legal Center (WRLC) is representing intervenors in the sage grouse case.

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## **Groups File Appeals over BLM’s Upper Missouri Breaks Management Plan**

Radical environmental activist group, Western Watersheds Project (WWP), is appealing a federal court ruling that cleared the BLM to implement a new management plan for the Upper Missouri River Breaks National Monument in north-central Montana. U.S. District Judge Sam Haddon’s Aug. 9 [opinion](#) that grazing and other multiple uses would continue drew the ire of the radical group, which filed its appeal notice in the San Francisco-based 9th U.S. Circuit Court of Appeals. The appeal’s outcome could significantly affect how the

federal government manages Upper Missouri River Breaks and 15 other national monuments in eight Western states overseen by BLM.

WWP has asked the appeals court to issue an injunction blocking the new resource management plan (RMP) for Upper Missouri Breaks until BLM has addressed the group's grazing concerns. In addition to the grazing motion, appeals are expected in the next two weeks from groups challenging other aspects of Haddon's decision, including the RMP's authorization of six small airplane landing strips. Oil drilling activities are likely to be challenged as leases in the monument become active. Roads that activists claim to be "unauthorized" are also likely to be challenged.

WWP and six other groups had filed lawsuits in 2009 challenging the RMP on numerous grounds. While WWP wants a court-ordered injunction in the short term, the other appellants plan to ask the 9th Circuit Court to remand the plan to BLM for wholesale revisions.

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### **Judge Approves Settlement Agreement over Species Listings**

On September 9, 2011, Judge Emmet Sullivan in Washington, D.C., approved two settlement agreements that will bind the U.S. Fish and Wildlife Service (FWS) to deadlines for decisions on over 1,000 species for which activist groups have petitioned for listing under the Endangered Species Act.

As reported in May Capital Issues, the first [settlement agreement](#), between FWS and WildEarth Guardians, will require FWS to make initial petition findings for over 600 species and issue proposed listing rules or not warranted findings for at least 251 species by September 2016. It would also require the agency to make critical habitat determinations by specific deadlines for the Mexican wolf, the New Mexico meadow jumping mouse, the greater sage-grouse and others. The [ruling](#) comes in light of a dozen [lawsuits](#) in which WildEarth Guardians challenged the Interior Department's failure to make listing decisions in a timely manner. As part of the agreement, WildEarth Guardians has agreed not to sue the government over missed listing deadlines for the next six years.

The [second settlement agreement](#) was released on July 12<sup>th</sup> and was designed to appease the Center for Biological Diversity (CBD), who had claimed that first settlement was "too weak, too vague," and not enforceable. The agreement between WildEarth Guardians and FWS had been put on hold by Sullivan, who in May ordered the parties to revise the agreement to meet terms amenable to CBD. The resulting separate settlement, according to CBD, requires agency action within the next 10 years on 1,000 of species, including the walrus, wolverine, Mexican grey wolf, fisher, New England cottontail rabbit, three species of sage grouse, scarlet Hawaiian honeycreeper, California golden trout, Miami blue butterfly, Rio Grande cutthroat trout, 403 southeastern river-dependent species, 42 Great Basin springsnails and 32 Pacific Northwest mollusks.

Just how FWS will be capable of holding up its end of the deal by handling such a workload (clearly the agency is already strained to meet ESA deadlines) is yet to be seen. Cases such as this are evidence of the need for ESA reform. According to Rep. Mike Simpson (R-Idaho), funding authorization for ESA programs expired nearly two decades ago, but because the Appropriations Committee continues to fund them, the authorizing committee (the Natural Resources Committee) has not been compelled to modify the act to meet today's needs.

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### **Court Ruling Threatens Logging Roads, Ditches and Culverts**

A recent ruling in [Northwest Environmental Defense Center v. Oregon Forest Industry Council](#) threatens to upend 35 years of settled law by making logging roads subject to National Pollutant Discharge Elimination System (NPDES) permitting under the Clean Water Act (CWA). The Ninth Circuit has held that these roads—roughly 385,000 miles of them on national forests alone—no longer qualify for categorical exemption from

regulation as point sources of sedimentation into waterways. For more than three decades, silvicultural activities, road construction, and road restoration have been exempt from NPDES permit requirements under the EPA's silvicultural rule. These same roads on federal lands are used for access to grazing allotments and to move cattle between pastures.

The implications of this ruling are several: First, these roads will fall under CWA regulation for the first time; second, it calls into question all categorical exclusions under CWA; and finally, it could have implications for other non-logging-road related ditches and culverts. Given the potentially harmful effects to our members, PLC will be filing an amicus brief, along with other groups, in support of the petitioners, asking the Supreme Court to overturn the Ninth Circuit ruling.

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### **Winmill Rules against Grazing in Sage Grouse Case**

U.S. District Judge Lynn Winmill of the Ninth Circuit Court of Appeals [ruled](#) on September 28<sup>th</sup> that the Interior Department failed to include enough data or alternatives for grazing in an Idaho national monument and failed to analyze the cumulative impacts of oil and gas development on sage grouse in southwest Wyoming. Western Watersheds Project (WWP) had filed a case challenging 18 land management plans covering 34 million acres in six Western states: Idaho, Nevada, California, Utah, Wyoming and Montana. WWP brought the case at the end of the George W. Bush administration, before the sage grouse was granted "candidate" status for federal protection in March 2010. BLM has since announced that it will amend six management plans in Wyoming. However, Judge Winmill's ruling said those amendments could take too long to complete.

The impacts of the ruling remain unclear. Mary Wilson, a spokeswoman for BLM in Wyoming, said the agency was working with the Justice Department to understand the implications of the judge's ruling. A status conference with the court is scheduled for Oct. 27.

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