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# The Administrative Presidency and Public Lands Regulatory Change

**Abstract:** This research focuses on the efforts taken by recent Presidents to alter the direction of several federal land policies administered by Bureau of Land Management (BLM) and the Forest Service through rulemaking processes. Of particular concern here are three programs – the hardrock mining program under BLM’s jurisdiction, the grazing program managed by both agencies, and the Forest Service’s handling of the roadless area policy. An examination of these regulations reveals far reaching differences when compared with earlier versions of these rules developed under President Clinton. From a substantive policy perspective, all three regulations were designed to increase natural resource production under Bush while the rules initiated by Clinton and Obama placed greater emphasis on environmental conservation. Thus, Presidents will occasionally stretch the boundaries of statutory interpretation to maximize regulatory policy impact. However, this strategy is also accompanied by a degree of political risk since groups opposed to new rules may react by mounting legal challenges in the federal courts.

**Keywords:** administrative presidency; natural resources; public lands; regulation.

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## 1 Introduction

America’s federal lands covers over 700 million acres of mountains, prairies, rangelands, swamps, and deserts throughout the US. Much of the public land acreage is administered by two agencies, the Bureau of Land Management (BLM) located within the US Department of Interior and the Forest Service (USFS) located within the US Department of Agriculture. Each agency has adopted

a multiple-use management philosophy to balance programs that develop natural resources (mineral, timber, rangeland, and energy) with those aimed at conserving wildlife, recreation and aesthetic policy concerns (Dana and Fairfax 1980).

However, in examining resource management decisions for most of the 20th century, agency officials often sided with extractive industries, a critical source of jobs and income in the rural West. Pro-development policies were enacted within a closed system of policymaking commonly referred to as *subgovernments*; i.e., an institutional arrangement that limits participation in policy decisions to public agency administrators, legislators and interest group representatives with shared programmatic concerns, a low degree of visibility within the media and the general public and a high degree of stability over time (Clarke and McCool 1996; Skillen 2009). This resulted in a structural bias that favored the status quo for federal land programs providing access for energy, timber, rangeland, and mineral resources.

However, federal land policies and agencies have not been immune from larger social, economic, and political forces resulting in change. The environmental movement of the 1960s and 1970s pressured Congress to develop an array of new conservation policies that directed the BLM and the Forest Service to change land use decisions in ways that would address public concerns linked to wildlife, recreational opportunities, and the preservation of landscapes. Environmental groups attempted to change decisions favored by subgovernment participants by raising public awareness of environmental problems associated with existing policies (Hoberg 2001; Pralle 2007) and by pushing for the adoption of preferred policy decisions in alternative policymaking venues that were more receptive to environmental concerns such as courts or state ballot initiatives (Klyza and Sousa 2013).

However, an increasingly important source of policy direction within the public lands policy arena has been the growing importance of the President as a key policy actor (Vig 2013). In part, this has occurred because of factors such as increasing parity between environmental and industry groups and increasingly divergent partisan views on natural resource policy issues, trends that have resulted in substantial legislative gridlock within Congress (Kraft 2013). Consequently, most program changes for lands managed by the BLM or the Forest Service since the mid-1970s have resulted from administrative actions taken by presidents, often in the face of an uncooperative Congress controlled by the opposing political party.

Durant (1992) offers a detailed and useful account of the Reagan administration's efforts to redirect BLM decisions in New Mexico to encourage the accelerated production of rangeland, energy, and timber resources. Other presidents

since then have utilized agency appointments, budgetary authority, executive orders, and rulemaking to shape natural resource policy decisions (Vig 2013). Since many public land policies delegate considerable decision-making discretion to federal land managers, Presidents can make substantial and far reaching changes by using executive power to reshape these laws and to reallocate budgetary and personnel resources.

This article focuses on the efforts taken by Presidents Bill Clinton, George W. Bush, and Barack Obama to alter the direction of several federal land policies through use of administrative and rulemaking processes in three programs: 1) the hardrock mining program under BLM's jurisdiction; 2) the grazing program managed by both agencies; and 3) the roadless area regulations within the Forest Service. Our research goals include the analysis of (a) regulatory changes linked to these programs across Presidential Administrations in terms of constituency impacts and policy direction and (b) actions taken by policy actors to delay, halt, or amend these changes through administrative appeals and challenges within the federal courts.

## 2 An Overview of Public Lands Policies and the Presidents

Our analysis of Presidential involvement in public land policies begins with a number of initiatives undertaken by the Clinton Administration from 1993 through 2000. Working closely with Interior Secretary Bruce Babbitt and with Forest Service Chiefs Jack Ward Thomas and Michael Dombeck, Clinton sought to transform federal land programs by placing greater emphasis on ecological values in land use decisions than commodity production. The failure of his Administration to enact hardrock mining and livestock grazing policy reforms in the early 1990s coupled with the Republicans' successful efforts to gain control of Congress in the 1994 election contributed to the decision to make greater use of executive authority to achieve federal land use policy goals.

The election of George W. Bush to the presidency in 2000 produced a shift away from a more ecologically sensitive public lands policy agenda under Bill Clinton to one more sympathetic to the goals of energy companies, mining firms, and ranchers. A different tone from the pro-environment Clinton administration was established at the outset with the appointment of public officials such as Interior Secretary Gale Norton and Forest Service Chief Mark Rey from a pro-industry background (Vig 2013). Administration officials quickly took action to overturn or alter Clinton era regulations that were considered to be overly biased

in favor of environmental and conservation constituencies, resulting in a host of regulatory initiatives aimed at reducing or eliminating governmental restrictions on the production of rangeland, mineral, and timber resources.

With the election of Barack Obama in 2008 and in 2012, environmentalists were optimistic that his administration would be receptive to their concerns, reversing course on many public lands policies pursued by the Bush administration. However, their hopes for a prompt, substantive change of course in public lands policies were tempered by the political realities of the recession, as well as Obama's evident preference for cooperation and compromise. His moderate approach to administrative policymaking was reflected in the appointments of Kenneth Salazar and later on, Sally Jewel, to head the Interior Department, as well as his selection of Thomas Tidwell as Forest Service Chief. In general, his policy preferences are consistent with Clinton-era initiatives in national forest rulemaking, but he has not confronted grazing and mining issues to the degree that Bush and Clinton did (Lubell and Segee 2013).

### 3 The Hardrock Mining Policy

The venerable Mining Law of 1872 allows exploration for and development of hardrock mineral resources (gold, silver, copper, molybdenum) on federal lands by individual or corporate miners for a very small fee. This statute was enacted by Congress to promote economic development and settlement in the West by removing legal barriers to mining activities on federally owned lands, a policy termed "economic liberalism" by Klyza (1996). Under this law, claims can be staked on BLM or Forest Service lands for the right to mine precious metals and the affected areas can be patented (i.e., purchased) for \$2.50 to \$5 per acre. Perhaps the most notable feature of this enduring policy is the absence of any sort of payment to the US government for the value of the mineral bounty taken from these lands. While public access to other natural resources like oil or coal also occurs on the public domain, energy companies pay the federal government royalties on the volume or amount of resources mined (Leshy 1987).

The law has remained quite resilient to change over the years although some restrictions on mining activities have occurred. The only major amendment to the original policy was adopted in 1920 and exempted energy resources from statutory coverage. Other laws have chipped away at mineral exploration by excluding mining on lands deemed worthy of protection such as national parks and wilderness areas. In addition, the Federal Land Policy and Management Act of 1976 (FLPMA) inserted a legal but ambiguous toehold for holding mining companies

accountable for compliance with existing environmental laws by preventing “unnecessary or undue degradation.” Finally, industry mining operations are constrained by the need to comply with federal environmental laws, notably the Clean Air and Water Acts, the National Environmental Policy Act, and the Endangered Species Act (Leshy 1987).

Mining program benefits have been retained over the years largely because of the actions taken by a protective subgovernment consisting of the BLM, the natural resource committees, mining companies, state and county officials representing lands with significant mineral deposits, industry leaders, and occasionally a supportive presidential administration. Consequently, would-be reformers are likely to face an uphill climb in their efforts to amend the Mining Law. Since the prospects for change are particularly daunting within the hallways of Congress, attention has been directed toward alternative decision-making venues like the federal courts or the administrative branch.

### 3.1 The Clinton Administration and Mining

Since the late 1990s, administrative reform has become a higher priority for Presidents Bill Clinton and George W. Bush. Clinton’s Interior Secretary Bruce Babbitt was a particularly staunch proponent of mining reform. After Congressional efforts to achieve mining reform stalled in 1994, he decided to seek change through the regulatory process, namely revision of the “section 3809 surface regulations” authorized under the Federal Land Policy and Management Act (FLPMA).

Working closely with Departmental Solicitor John Leshy, Secretary Babbitt attempted to limit impacts of environmentally damaging mining activities. A legal opinion issued by Leshy in 1997 had the practical effect of restricting each mining claim to a maximum of five acres per mill site. Since industry use of environmentally destructive technologies such as “heap leach” mining required the availability of considerable acreage for the disposal of large amounts of debris, this interpretation of the Mining Law would have effectively restricted mining operations. Interior officials denied charges that their ulterior motive was to halt hardrock mining on federal lands, pointing to the use of less ecologically damaging approaches to obtain minerals such as leases or land exchanges (Humphries 2007). Critics interpreted the new changes as a thinly veiled effort to appease environmental constituencies by dramatically increasing the financial costs of mining activities.

The Clinton administration also made changes in the performance standards affecting the 3809 surface management regulations in order to prevent

“unnecessary or undue degradation” of federal land resources under the authority of FLPMA. This rule offered another legal means by which federal officials could effectively veto mining activities that placed other resources in jeopardy. It also required companies to undertake restorative work that was backed by the posting of bonds equal to the total cost of reclamation (Humphries 2007). The net effect of DOI changes in statutory interpretation and rulemaking was to bring about greater balance between resource development and conservation values.

However, the changes drew fire from industry officials because of their belief that the new performance standards were overly prescriptive and because one of the key criteria dealing with “significant irreparable harm” (SIH) was inserted into the regulations in 2000 without any airing of the proposal at public meetings as required under NEPA (Struhsacker 2003). Another point of contention revolved around the compatibility of proposed changes with the conclusions reached in a National Research Council (NRC) study titled “Hardrock Mining on Public Lands.” Congress enacted policy riders affecting FY 2000 and FY 2001 to restrict the expenditure of money for changes sought by the Clinton Administration that were not compatible with the conclusions reached by the authors of the NRC study, including exemptions related to Leshy’s mill site opinion (Humphries 2007).

### **3.2 Restoring the “Right to Mine” under Bush**

Like other areas of natural resource production, the mining of gold, silver, and other hardrock minerals was given greater priority under Bush than Clinton. Perhaps the most clear cut example of policy differences was the question of mill sites and mining. Addressing this question was clearly important for Administration officials since the extension of hardrock mining could not forever depend upon Congressional exemptions enacted through annual appropriations bills. Ultimately, they decided to resolve the issue by relying upon a differing legal interpretation of mining requirements by Deputy Interior Department Solicitor Roderick Walston in 2003, concluding that multiple mill sites for a mine were legally acceptable (Humphries 2007).

However, this was only the beginning. In addressing other changes, Interior Secretary Gale Norton decided to combine the use of discretionary authority with rulemaking to achieve desired goals. She began by suspending former Interior Secretary Babbitt’s 2001 millsite rule (found at 43 CFR 3809). This meant that program changes could be considered while industry officials resumed mining under the more relaxed standard that was in place from 1980 to 1997. Administration officials then suggested that only “minor” modifications would be

undertaken to streamline the 2001 rule and make it more workable. In October 2001, a final rule was completed that retained some aspects of the Babbitt rule while changing others. For example, the bonding requirement for mining firms aimed at ensuring the reclamation of the site following the cessation of mining operations was left in place (BLM 2001).

Other recommended alterations put greater emphasis on industry costs and flexibility than environmental protection. Perhaps the most important modification from the industry perspective was the elimination of the significant irreparable harm provision of the Babbitt regulation that dealt with “unnecessary or undue degradation.” Company officials had complained vociferously about this section since it gave the DOI secretary the authority to deny a company’s plan of operations for mining at a particular site.

Another key change was linked to enforcement authority. Under the Babbitt rule, BLM administrators had the discretion to impose a \$5000 fine daily for company violations of reclamation standards along with the suspension of mining activities. This was replaced by a more vague provision from the 1980 regulation that simply stated that company violators would be subject to undefined enforcement actions. Finally, a set of performance standards designed to ensure that environmentally sound management practices were followed by mining firms was narrowed ostensibly to give BLM managers more discretion to tailor site specific solutions to deal with particular problems and to avoid an overly prescriptive “one size fits all” approach (Humphries 2007).

### 3.3 Hardrock Mining under Obama

Proponents of hardrock mining regulatory reform were hopeful that the Obama administration would move quickly to overturn or modify many Bush-era policies through executive actions, especially after a recent House mining reform bill had floundered in the Senate (Bontrager 2008). On the campaign trail, Obama had spoken in favor of reforming the 1872 Mining Law, and in July 2009, Secretary of the Interior Salazar promised that it would be a “top-tier” issue (Bontrager 2009).

However, the administration’s executive actions offered somewhat of a mixed bag to both environmentalists and industry. In a move that angered proponents of reform, the Obama administration opposed a lawsuit brought by environmental groups in April 2010 that challenged the Bush administration’s controversial 2003 and 2008 mill-site rules allowing waste disposal on public lands. While the move was supported by industry, critics argued that the administration’s defense of the Bush-era rules ran counter to its stated goals for reform (Kohler 2010). On the other hand, environmentalists were pleased by the Obama administration’s



decision to issue a 20-year moratorium on new hardrock mining claims on 1 million acres of public land near the Grand Canyon in 2012, a decision opposed by many western lawmakers and operators who supported uranium mining operations (Quinones 2012).

Another regulation dealt with mining reclamation issues. In response to lobbying from western tribes and Montana Senator Jon Tester, the Obama administration issued a rule in February, 2013 (after nearly a year of delay) that provided limited liability protection for tribes and states to use Abandoned Mine Land (AML) payments (a fund for coal-mine clean-up for certified states and tribes) for reclamation and remediation of hardrock mining lands. While helpful for ensuring more timely cleanup of many toxic sites, the rule may also undermine efforts for hardrock mining law reform by limiting the impetus for remediation efforts funded through a *tax* on hardrock mining (Quinones 2013).

## 4 The Federal Grazing Program

The federal grazing program for the US Department of Interior was authorized by the Taylor Grazing Act of 1934 (TGA). A primary objective of the TGA was to stabilize the western livestock industry after a vicious combination of drought and the Great Depression put many ranchers on the brink of financial ruin. The lack of precipitation over several years coupled with the tendency for many operators to place far more livestock in relation to the amount of available forage led to severe overgrazing on federal lands, a condition that also reduced the ability of grasslands to regenerate. The proposed policy solution was to identify the “carrying capacity” of the land through range surveys; i.e., the number of livestock that could be assigned to tracts with a given amount of forage. A program regulating livestock access to federal rangelands through a permit system based on sustainable levels of use was adopted and was financed in part by a fee system based on animal unit months or the number of cattle, sheep, or horses on a given parcel of federal land.

Who decided what represented a sustainable pattern of use for a permit and the number of livestock given access? The DOI’s Grazing Service (later renamed the BLM) was legally responsible for making these decisions. However, the agency was chronically understaffed and administrators were placed in the awkward position of enforcing a program with funds acquired in part from regulated parties in the form of grazing fees. Many felt uncomfortable placing restrictions on ranchers already operating on the margins of profitability. In addition, the TGA created grazing advisory boards allowing stockmen to “advise” Grazing

Service administrators on use allocation decisions. In practice, administrators often relied on board recommendations as the decisional path of least resistance.

Further reinforcing a rather pro-industry perspective was the oversight exercised by the House and Senate Interior Committees. Membership on these committees was dominated by legislators from western states and most were committed to the belief that ranchers should not be overly burdened by regulatory restrictions or undue grazing costs. Consequently, the elements of a dominant subgovernment consisting of trade groups representing ranchers, an executive agency, and legislative committees were in place, resulting in program decisions that kept grazing fees low while minimizing agency oversight over ranching operations (Culhane 1981).

The federal grazing program benefitted from considerable political support from the 1940s through the 1960s. However, pressures for range policy reform began to surface from two sources. One was based on a strain of fiscal conservatism found among several members of Congress and the federal Office of Management and Budget (OMB). Under attack were grazing program subsidies paid to livestock permittees at rates that were considerably less than fees paid for access to private or even state owned pasturelands. The proposed solution was to move toward “fair market” pricing for natural resource commodities, including forage. Second, attention was directed to the environmental costs of using public rangelands primarily for grazing. Rangeland degenerative losses and streambed erosion were both linked to overgrazing. Other land uses such as wildlife conservation or recreation were either given short shrift or ignored in the development of resource management plans (Skillen 2009).

In 1976, Congress attempted to address some of these concerns by enacting the Federal Land Policy and Management Act (FLPMA). The new law provided legislative authorization for the BLM and for the agency’s multiple use mandate but did little to reform grazing subsidies or to alter the pro-industry bias of the grazing advisory boards. Efforts to achieve reforms in Congress nearly succeeded in the early 1990s but fell victim to the intense opposition of a few western senators. Legislation to increase grazing fees for ranchers holding BLM or Forest Service permits was initiated by the Clinton Administration in 1993 but failed in the U.S. Senate (Davis 2006).

## 4.1 The Grazing Program and the Clinton Administration

The primary impetus for change came from Interior Secretary Bruce Babbitt, some members of Congress, and environmental groups like the Natural Resources Defense Council and the National Wildlife Federation. A strategic effort was

made to fold range policy within the larger context of deficit politics. Reform proponents argued that reducing the size of grazing subsidies made sense for economic as well as ecological reasons. A move toward fair market value would not only eliminate unfair advantages enjoyed by public land ranchers over ranchers relying on privately owned pasturelands but would also generate additional fee revenue that could be reserved for rangeland improvement projects. If fewer subsidies meant less grazing on federal lands, this would also lessen the impact of environmental problems such as the loss of habitat for wildlife on public rangelands and damage to riparian areas (Davis 2006).

Supporters of the status quo included western legislators such as Senator Pete Domenici (R-NM) and Representative Ben Nighthorse Campbell (D-CO) as well as pro-grazing interest groups such as the National Cattlemen's Association. They denied the allegation that grazing fees were an unjustifiable public subsidy since the amount and quality of forage on public rangelands in parts of the arid west was not comparable to more lush pastures associated with privately owned ranches in the northern Rockies and the Midwest. Moreover, expensive private sector leases often included improvements for livestock operators not found on BLM or Forest Service lands such as fences and stock ponds.

Proponents of reform were disappointed when the Clinton Administration decided to drop the grazing fee proposal from the 1994 budget act following a threat from several western Democrats to oppose the larger bill unless it was deleted (Knickerbocker 1993). An effort to pass a watered down version of the reform bill met a similar fate. In November 1993, western senators led by Domenici waged a successful filibuster to defeat a compromise bill. Thus, subgovernmental influence remained strong but new political forces were beginning to emerge to challenge the programmatic status quo (Davis 2006).

Following the legislative rejection of grazing policy reforms, Secretary Babbitt turned his attention to regulatory initiatives. In 1995, several rangeland rules were proposed. One rule called for the creation of resource advisory councils consisting of wildlife biologists, environmentalists and planners as well as ranchers to advise BLM administrators on allotment management issues. This was designed to replace agency reliance on the industry dominated grazing advisory boards with a more balanced source of information. Other changes included language clarifying the right of BLM administrators to alter the terms of a permit or revoke it altogether to maintain rangeland quality goals and a provision that preserved federal ownership of any permanent range improvements made by permit holders.

These changes were ultimately challenged in the federal courts by the Public Lands Council (PLC), an industry trade group representing livestock operators. The controversy was resolved in the landmark case of *Public Lands Council v.*

*Babbitt*, 529 U.S. 728 (2000). The US Supreme Court sided with the PLC in part by deciding to invalidate the rule allowing substitution of conservation or non-use of range resources for livestock grazing. However, all remaining contested regulations were upheld. BLM was allowed to retain title to all range improvements and agency administrators were allowed to keep the discretionary authority to allocate forage on the basis of range management plans (Skillen 2009).

## 4.2 Revisiting Range Rules under Bush

Western ranchers and their allies were optimistic that the election of George W. Bush in 2000 would result in the appointment of pro-industry officials in BLM and the Forest Service as well as a more favorable reinterpretation of grazing policies. Their optimism was clearly warranted by subsequent actions. Shortly after taking office, DOI Secretary Gale Norton announced a new initiative titled “Sustainable Working Landscapes” that placed greater emphasis on the social and economic benefits of public lands ranching. This initiative was designed to address complaints voiced by livestock operators about the economic and legal costs of complying with Secretary Babbitt’s “rangeland reform” program (BLM 2006).

The grazing program authorized under the Taylor Grazing Act (TGA) and FLPMA offers considerable leeway for alternative interpretations of program management requirements. Like her predecessor, Secretary Norton chose to put the Administration stamp on a new set of policies. One new rule (43 CFR Part 4100) eliminated the issuance of conservation use grazing permits to environmentalists hoping to promote range restoration and wildlife conservation. This was a direct effort to eliminate bidding strategies favored by market oriented environmental groups; i.e., offering more money for grazing permits than ranchers with the expectation that all livestock would subsequently be removed from BLM or Forest Service parcels.

Other changes produced more tangible gains for public land ranchers. One regulatory initiative provided ranchers with greater leniency time-wise in complying with permit requirements by doubling (from 12 months to 24 months) the amount of time they had to correct environmental or other problems. Conversely, BLM administrators were instructed to acquire more monitoring data before taking action against permittees in violation of range management standards (Environmental News Service 2006).

Another change essentially reversed a Babbitt-era rule; i.e., the DOI claim to ownership of any improvements made by ranchers on federal lands. While some forms of preference sought by livestock operators were not tenable (such as the

argument that holding a permit represents a property right), Norton and BLM Director Kathleen Clark put emphasis on the distinction between portable and permanent changes such as fences, wells or stock ponds. Under the new regulation, ranchers could share title to subsequent improvements with BLM in proportion to investments made in labor or materials (BLM 2006).

Perhaps the most controversial rule was procedural in nature. Changes in public participation were made that reduced opportunities for public input on decisions affecting grazing use including appeals of BLM's resource management plans. This was achieved by altering the definition of "interested public" to include only those individuals and groups that have a direct stake in the process, thereby excluding potentially critical views espoused by taxpayer and environmental groups. Once again, the primary justification for the move was an expected gain in operational efficiency through participatory restrictions on non-rancher groups while regulatory opponents complained that the change amounted to a more restricted form of access designed to maintain program benefits for the livestock industry (Environmental News Service 2006).

### 4.3 Rangeland Reform under Obama

With the election of Barack Obama, and a new democratic majority in Congress, proponents of range reform focused their attention on raising grazing fees. Pointing to recent reports from the GAO that showed federal agencies were losing \$123 million per year administering the grazing program, environmental advocacy groups sought to portray the low fee as an expensive "handout" in tough fiscal times. They noted that the fee had remained far below market value for many years; while the fee per AUM was \$1.35 in 2008, the average fee on equivalent private lands in 2007 was \$15.90. Ranching interests countered that raising the fee would imperil rural economies and livelihoods, and that the low price was necessary to offset the costs of improvements borne by leaseholders (Luccioli 2009).

Fees remained steady through Obama's first 2 years in office, and legislative efforts for reform went nowhere. Consequently, a coalition of environmental groups led by Western Watersheds and the Center for Biological Diversity pressed forward with a lawsuit aimed at forcing the Administration to raise fees. They alleged that the federal agencies violated NEPA by failing to annually assess the environmental impacts resulting from grazing (noting that agencies had not prepared a supplemental environmental review regarding the fee since 1988), and they also sought to compel a response to a 2005 rulemaking petition for a fee raise that remained unanswered (Taylor 2011a).

In response, the Obama administration reached a “tentative” settlement with the groups. The following week the coalition received responses to the petition from both the BLM and the Forest Service stating that they would be unable to enter into a new rulemaking process due to personnel and resource constraints. Shortly thereafter the Obama administration announced that fees would remain at the legal minimum (Taylor 2011a). The next year, the administration again decreed that fees would remain the same but Obama’s 2013 budget called for increases of roughly 75%. However, this proposal was strongly opposed by industry groups as well as several Western lawmakers and was subsequently dropped (Taylor 2012a).

## 5 National Forest Roadless Areas

Wilderness policy within US national forests combines a strong Congressional role with a historic tendency by the Forest Service to utilize agency discretion to preserve some forest lands (Allin 1982). Organizational support for federal wilderness legislation was originally pushed by the Wilderness Society in the mid-1950s with the help of prominent legislators like Senators John Saylor (R-PA) and Hubert Humphrey (D-MN). After a series of compromises with powerful western representatives to protect hardrock mining interests, the Wilderness Act was enacted in 1964. The policy called for Congress to take responsibility for creating a list of criteria for wilderness designation and for recommending and adopting new areas for inclusion in the newly established National Wilderness Preservation System (NWPS). It also created public participation opportunities for commentary on proposed wilderness areas and gave statutory recognition to the nine million acres already receiving administrative protection by the Forest Service (Allin 1982).

### 5.1 Roadless Areas in the National Forests and the Clinton Years

Perhaps the most dramatic example of executive action affecting public lands policymaking occurred when President Bill Clinton decided to make the preservation of roadless areas within national forests a defining action for his second term. By the mid-1990s, the NWPS had grown considerably to encompass more than 100 million acres, thanks, in large part, to the enactment of the Alaska Lands Act of 1980 that resulted in the creation of an additional 60 million acres. However, the

number of state wilderness bills slowed considerably because of factors such as the belief that most deserving sites had already been designated, the rejection of some proposed areas because of their proximity to natural resource riches such as prime timberlands, minerals or energy resources, concerns linked to state water rights and an increase in anti-environmental positions adopted by many of the newly elected Republican members of Congress following the midterm elections of 1994. For many, wilderness proposals were incompatible with property rights or with traditional preferences for multiple-use management over preservation.

However, in President Clinton's second term, his team laid the groundwork for significant policy changes by placing greater emphasis on environmental values within the context of national forest land use decisions. Working with Forest Service Chief Michael Dombeck, Clinton initiated the "roadless rule," a decision that effectively banned developmental activities on 58 million acres of national forests. This was undertaken in conjunction with a related decision to withdraw funding for any new road construction activities designed to essentially end or seriously curtail timber harvesting in affected national forests. Recognizing that such actions were likely to create controversy, the Forest Service attempted to politically immunize the new rule by expanding public participation in a big way. Altogether, over 900 public hearings were held between 1997 and 1999, and more than 1.6 million comments were received. The overwhelming majority of comments expressed support for the roadless rule (Baldwin 2006).

Congressional Republicans were stunned by the geographic scope of the new rule and were clearly unhappy with Clinton's decision to bypass Congress on a major policy shift with an administrative end run. Administration officials argued that the regulation did not violate key provisions of the Wilderness Act requiring all designation decisions to be made by Congress since it was authorized by the Multiple Use and Sustained Yield Act of 1960 (MUSY), a statute that confers considerable discretion to the executive branch. But critics in Congress and elsewhere felt this was a political ruse. In their view, a policy that looked, acted and felt like a wilderness policy should be subjected to the procedural requirements of the Wilderness Act. This perspective would soon gain important allies in the White House following the 2000 Presidential election.

## 5.2 The Roadless Rule under Bush

Like the preceding policy issues, the election of George W. Bush in 2000 led to expectations among his supporters that changes in policy direction were forthcoming. This was clearly true for the "roadless rule." At the onset of the new Administration, President Bush's Chief of Staff, Andrew Card, placed a 60-day moratorium

on carryover rules from the Clinton Administration to determine whether these rules should be retained, altered, or dropped (Klyza and Sousa 2013). The roadless rule was held up for review by USDA Secretary Ann Veneman, the departmental overseer for the Forest Service, and she ultimately decided that it should be retained but modified. After seeking and obtaining public input on a number of questions, Forest Service officials proposed a new regulation in July, 2004.

The roadless rule proposed by the Bush Administration differed greatly from the previous version both philosophically and procedurally. The most fundamental point of departure was reconsidering the assumption that roadless areas should be considered from a national perspective; i.e., the belief that larger concerns linked to environmental sustainability should guide the management of federal forests writ large. In this sense, the roadless rule was closely intertwined with the Clinton-based planning rule that altered national forest planning to place more emphasis on land uses contributing to the preservation of forest ecosystems. However, the Bush administration's alteration of both rules was designed to recapture the prior emphasis on multiple-use management favored by extractive user groups seeking greater access to timber, mineral, and rangeland resources (Nie 2004).

A key component of the new rule was the creation of a new review process to aid USDA in determining which roadless areas should continue to be effectively managed as wilderness and which areas should be placed under multiple-use management. The focus of decision shifted, in part, to the states. A new petition process called for the governor to solicit input from state groups to determine appropriate management goals for national forests located within state borders. Governors in some states like Colorado opted for a major effort to tap public sentiment in a series of hearings held throughout the state while others tended to rely on the advice of staff or agency officials to determine what the state's position should be (Nie 2008).

Gubernatorial recommendations would then be reviewed by a federal technical advisory committee (TAC) that was established to provide policy advice to USDA officials. The TAC consisted of a dozen individuals representing different constituencies such as forest products industries or environmentalists. A decision would then be made to accept the Governor's recommendations or to pursue a different managerial path. The final rule retained the same changes as the proposed regulation and was published in the Federal Register in May, 2005 (Baldwin 2006).

Proponents of the new rule argued that it represented a corrective step by placing more emphasis upon the inclusion of state-related management concerns instead of a national "one size fits all" approach. Governors were given a stronger advisory role in terms of procedural input. They also pointed out that the



voluminous outpouring of public support for the Clinton rule was misleading and the result of a carefully orchestrated postcard campaign rather than any attempt to spend more time conversing with local constituencies about their policy concerns (Nie 2004). Left unsaid was the assumption that the process would lead to land use decisions resembling multiple use management more closely than the previous rule.

Critics of the reformulated regulation were quick to point out that it failed to contain an environmental impact statement assessing the likely consequences of the procedural shift. This was viewed as a means of signaling greater access to land use decisions for extractive user groups who were largely shut out from the previous iteration of the roadless rule. The rule was also depicted as overly complex procedurally since governors were asked to put forward forest management recommendations with no guarantee that the TAC committee advising USDA officials would accept them. Finally, critics read the public input differently, arguing that the previous regulation was clearly a mandate for change since well over 90% of the 1.6 million comments received expressed support (Klyza and Sousa 2013).

Implementation of the Bush rule was to begin shortly after the November, 2006 deadline for gubernatorial positions to the TAC. However, due to legal uncertainty over procedural issues, USDA undersecretary Mark Rey announced that the roadless rule would be administered on a state by state basis using the Administrative Procedures Act (Berman 2006b). Consequently, only Colorado and Idaho decided to continue with the petition process, ensuring contentious battles at the state level between those who favored strong protections – such as environmentalists and representatives from the recreation and tourism sectors – and groups who favored a more “flexible” approach that allowed greater opportunities for extractive industries.

In Idaho, the Bush administration moved quickly to work with the state on developing a roadless rule in collaboration with representatives from several stakeholder groups. When an initial plan was released early in 2008, the Wilderness Society and other advocacy groups alleged that the language in Idaho’s rule offered significantly less protection for Idaho’s inventoried roadless lands than the Clinton rule, leaving the door open for commercial timber harvesting, geothermal energy development and extensive phosphate mining on 5.2 million acres (Berman 2008). However, Idaho’s rule also received the support of several conservation groups, such as Trout Unlimited and the Idaho Conservation League, who felt that the plan provided sufficient protections, and that collaborative process would help to prevent future litigation (Taylor 2011b).

In Colorado the rulemaking process was much more protracted and contentious. A petition submitted by Republican Governor Bill Owens late in 2006

was retracted by his successor, Democratic Governor Bill Ritter, in order to more adequately address public concerns (Lipsher 2007). In particular, sportsmen, conservation, and recreation industry groups argued that the initial rule allowed for excessive coal mining and energy development on 300,000 acres nominally protected under the Clinton rule. At the same time, affected industrial interests in Western Colorado enlisted members of Colorado's statehouse and congressional delegation to vigorously lobby for discretion and flexibility in inventoried roadless areas where their interests were at stake (Finley 2010).

### 5.3 The Roadless Rule under Obama

Despite legal uncertainty, proponents of a “one-size fits all” national roadless rule were cheered by the election of Barack Obama. On the campaign trail, Obama had offered his support for the Clinton rule, and in January of 2009, a coalition of congressional representatives and conservation groups called upon Obama to use his administrative powers to uphold the tenets of the Clinton-era rule as various legal appeals worked their way through the courts (Greenwire 2008). In May, their calls were heeded. Agriculture Secretary Tom Vilsack signed a directive ensuring that no road-building or timber related projects would proceed on inventoried roadless areas without his approval (Straub and Bontrager 2009).

Following a US District case decision in Wyoming that ruled against reinstating the Clinton-era rule, the Obama Justice Department finally weighed in by appealing the decision to the 10th Circuit Court of Appeals in Denver. In *Wyoming v. USDA* (No. 11-1378), the 10th Circuit opted to reverse the lower court, effectively upholding the original roadless rule. While the Obama Administration consistently acted to support the earlier rule, some environmentalists were less satisfied by later decisions that again reflected his preference for moderation and compromise. For example, groups such as Earthjustice were angered by Secretary Vilsack's move to allow limited logging in an inventoried roadless area in Alaska's Tongass National Forest while others objected to decisions to defend Idaho's rule in court and to uphold Colorado's rule in 2012.

## 6 The Limits of Regulatory Change

Recent presidents have made ample use of executive powers to pursue policy goals outside the legislative arena. Rulemaking has become a particularly useful tool in an era of divided partisan control and legislative gridlock. While regula-

tory coverage can be far reaching and comprehensive like a statute, the obvious limitation is the question of continuity beyond the incumbent's tenure in office (Harris and Milkis 1996). However, rulemaking is also limited in the sense that regulations must be clearly linked to existing statutory authority. Whenever new administration officials seek to test the limits of statutory content with an ambitious regulatory proposal, they are likely to be sued on the grounds of not following proper procedures or for attempting to "legislate" on matters that go beyond Congressional intent.

All three regulations discussed in this article were challenged in the federal courts by environmental organizations. The hardrock mining law was least affected by the judicial process. In October, 2001, the Bush administration put forward a rule that was designed to restore the historic "right to mine" by forbidding BLM administrators the authority to veto a company's mining plans because of negative environmental impacts. This rule effectively negated the Clinton Administration's efforts to prevent "unnecessary or undue degradation" of federal lands and in 2003 it was challenged in the Washington, D.C. district court by the Mineral Policy Center. In *Mineral Policy Center v. Norton* (292 F. Supp 2d 30), Judge Henry Kennedy issued a ruling in November 2003, that was interpreted positively by both parties. Bush administration and industry officials were pleased by his decision that the rule did not violate the law. On the other hand, environmentalists were relieved that the undue degradation provision of FLPMA was not overturned, thus suggesting the possibility of litigation in the future (Public Lands News 2003).

The remaining regulations were litigated on the basis of NEPA-related issues. The grazing regulations, finalized in July 2006, gave more leeway and time to ranchers to fix range management problems, made it harder for federal managers to cite ranchers for permit violations, allowed livestock operators to share title to improvements made on the land, and required BLM and Forest Service administrators to consider social and cultural aspects of grazing when making land use decisions (BLM 2006). Two changes of particular concern to environmentalists included provisions restricting public input on grazing decisions to those immediately affected and restrictions on the appeal of biological assessments prepared by BLM scientists (Environmental News Service 2006). Lawsuits were filed shortly after publication of the regulation by the Western Watershed Project and the National Wildlife Federation in Idaho, stating that the rule was inconsistent with FLPMA, NEPA, and the Endangered Species Act (ESA). US District Court Judge Lynn Winmill agreed and in an August, 2006 court decision, *Western Watersheds Project v. Kraayenbrink*, Civ. No. 05-297-E-BLW (D. Idaho), an injunction was issued effectively halting implementation of the new rule (Bontrager 2006).

While the use of a NEPA based litigation strategy proved to be successful in addressing “executive overreach,” there are limits to its use in prompting *new* executive actions if existing regulations have legally fulfilled procedural requirements. This is particularly evident when moving from the realm of legal interpretation to the more politically charged realm of actually compelling the *agency promulgation* of rules. A prominent example is the failure of the BLM and the Forest Service to increase grazing fees, arguing that they lacked the resources to initiate rules for that purpose.

Both versions of the roadless rule were also challenged in the federal courts. The Clinton rule was targeted by timber firms and by the state of Idaho for attempting to create “de facto” wilderness in national forests through executive action. This allegedly violated provisions of the Wilderness Act that gave Congress the legal authority to make designation decisions. US District Judge Clarence Brimmer in Wyoming agreed in a 2003 ruling. In 2005, the decision was appealed to the 10th Circuit Court of Appeals and, in *Wyoming v. U.S. Dept. of Agriculture*, 414 F.3d 1207 (10th Cir.), it was rendered moot since the Bush Administration had formulated an alternative rule in 2004 that eliminated aspects of the original regulation that industry officials had objected to (Baldwin 2006).

The much revised roadless rule was released in 2004 and was immediately criticized by environmentalists and a number of (mostly Democratic) state officials wishing to preserve the roadless area characteristics of national forests within their borders. A 2005 lawsuit against the roadless rule was filed by 20 environmental groups and the attorneys general from California, New Mexico, Oregon, and Washington. At issue was the failure of the Bush administration to conduct an EIS for the repeal of the Clinton era rule. And in September 2006, U.S. District Judge Elizabeth Laporte agreed. In *California v. United States Department of Agriculture*, 459 F. Supp.2d 874, 908–09 (N.D. Cal.), she ruled that failure to conduct an EIS on the rule violated both NEPA and the ESA and ordered that the Clinton rule be reinstated (Berman 2006a).

However, Laporte’s ruling only created more confusion. In throwing out the Bush Rule, Laporte did not render an opinion on the merits of its predecessor. In response, the state of Wyoming once again asked District Court Judge Brimmer to reject the Clinton rule and issue an injunction, which he quickly did, resulting in two contradictory nationwide injunctions – one supporting the Clinton Rule and the other supporting the Bush rule. Noting that the Forest Service faced a “Hobbesian choice” in choosing which injunction to comply with, the Bush administration found itself in the peculiar position of asking the Wyoming court to limit its injunction on the Clinton rule to the state of Wyoming (Judge Brimmer, clearly incensed by the California ruling, refused to do so for some time) (Straub 2009).

In August 2009, the 9th Circuit affirmed Laporte's decision, and the Obama administration quickly moved to appeal Brimmer's to the 10th Circuit. In *Wyoming v. USDA* (No. 11-1378), the 10th Circuit subsequently reversed the lower court's decision. It found that the Forest Service did not abrogate the authority of Congress in its designation of roadless areas, nor did it neglect procedures required by NEPA. A last ditch effort was made by the State of Wyoming and the Colorado Mining Association to persuade the U.S. Supreme Court to overturn the Circuit Court ruling. However, in October, 2012, the Supreme Court refused to hear the case, effectively upholding the Clinton rule (Taylor 2012b). In short, both the roadless and grazing regulations offer useful examples of how opponents of regulatory policymaking can succeed by using the courts to halt the implementation of rules found to be procedurally deficient.

## 7 Conclusions

This research shows the importance of rulemaking as an alternative means for Presidents to shape public policy decisions. It has historically been useful for chief executives attempting to overcome divided partisan control between Congress and the Presidency but, as the preceding discussion indicates, regulatory initiatives can provide an opportunity for a major alteration of policy direction without the procedural hurdles associated with legislative proposals. An examination of hardrock mining, grazing, and national forest regulations reveals major differences between Democratic Presidents William Clinton and Barack Obama with Republican President George W. Bush.

From a substantive policy perspective, all three regulations were designed to increase natural resource production under Bush while the Clintonian rules placed greater emphasis on environmental conservation. Under Bush, firms were given more flexibility to achieve conservation goals while the ability of land managers to restrict activities or impose fines on permittees was reduced. Change was also facilitated in general by the rather vague construction of federal land policies including the delegation of substantial discretion to BLM and Forest Service officials.

A notable feature of the Bush Administration regulations was the focus on procedural changes aimed at promoting public participation opportunities for extractive resource industries while excluding environmentalists. This was achieved in part by the expanded use of categorical exclusions to increase the number of agency projects that could be completed without EIS requirements such as thinning national forests to reduce wildfire risks. A related change was

the decision to eliminate interagency consultation with the US Fish and Wildlife Service, thereby decreasing the likelihood that projects would be delayed or altered to accommodate wildlife-related concerns. Other EIS and ESA requirements were reduced or eliminated for both the grazing and roadless rules. The short-term result was greater policy change than would have been possible had administration officials focused on pushing legislation through Congress.

In contrast, the Obama administration has displayed an obvious preference for collaboration and compromise in public lands regulation – a clear shift from the top-down managerial style of the Bush administration. However, this approach has had mixed results for both affected industries and environmentalists. In Colorado, for example, neither the mining industry nor environmentalists were completely happy with the outcome of the roadless rule. Obama's aversion to conflict and his desire to preserve political capital for higher priority policy issues may also explain his decision to defend Bush era mining rules, and his unwillingness to engage in substantive grazing reform measures. Indeed, compared to both Clinton and Bush, Obama has been reluctant to use his rulemaking powers in a forceful way.

While presidents will occasionally stretch the boundaries of statutory interpretation to maximize regulatory policy impact, this strategy is also accompanied by a degree of political risk. Groups opposed to the promulgation of new rules may well achieve success in the next round by mounting a challenge in the federal courts. This research demonstrates both the opportunities presented by the use of executive authority to achieve public land policy goals as well as the limits of trying to go too far too fast.

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