

Environmental Protection

on

Private and Public Lands

FREE to PROSPER

*A Pro-Growth Agenda for
the 115th Congress*



COMPETITIVE
ENTERPRISE
INSTITUTE



Environmental Protection on Private and Public Lands

5

Private property and secure property rights are essential conditions of freedom and prosperity. Contrary to claims by environmental advocacy groups, private landowners' environmental stewardship has proved to be far superior to that of public land managers. However, federal regulations increasingly undermine private conservation efforts.

The Endangered Species Act (ESA) and wetlands regulations provide no incentives for regulators to contain costs, because the costs of compliance are borne by land-owners. The solution is to enact meaningful compensation for regulatory takings that exceed 10 percent of a property's current-use value. The Supreme Court has acknowledged that regulatory takings can fall under the Constitution's Fifth Amendment provision: "nor shall private property be taken for public use without just compensation." Unfortunately, the Court has also made it extremely difficult to claim compensation unless the regulation takes all or nearly all the value of the property. Takings compensation legislation will reduce violations of property rights. Making taxpayers pay the costs of regulating should provide the push necessary to enact significant ESA and wetlands reforms.

Management of federal lands, which compose 27 percent of the surface area of the United States, continues to move away from active multiple-use management of resources toward non-management based on the destructive and false notion that anything humans do is bad for the natural world. For example, timber harvesting in

our National Forests has been replaced by management by catastrophic fires. The environmental degradation of federal lands goes hand in hand with declining resource production and impoverishment of rural people in those areas of the West where the majority of lands are federally owned. It is time to stop and reverse the locking up of federal land, restore multiple-use management, and increase resource production.

It is also time to stop the federal government from buying more private land and instead start privatizing federal land or transfer it to the states. Federal lands are, on average, in worse environmental condition than private lands and produce much less economic activity. Yet the four federal land agencies continue to buy private land under the Land and Water Conservation Fund, thereby taking it out of economic production and off the property tax rolls. Congress should prohibit further federal land acquisition, institute programs to transfer federal lands to states requesting it, and privatize federal lands in states that do not.

Finally, planning for the speculative impacts of potential climate change is now permeating federal land management policy and planning. Climate change is bad enough in itself, but planning for it has given federal land managers an excuse for planning “beyond boundaries”—that is, to include private property in their plans. In addition, calculating the speculative future “social cost of carbon”—an arbitrary figure based on the preferences of federal bureaucrats—is now being used in federal environmental permitting decisions. Congress should prohibit the use of that artificial metric in federal land management and environmental permitting.

REFORM ENVIRONMENTAL REGULATION OF PRIVATE LANDS

Private property and secure property rights are essential conditions of freedom and prosperity. Contrary to claims by environmental advocacy groups, the environmental stewardship of private landowners has proved to be far superior to that of public land managers. However, federal regulations increasingly undermine private conservation efforts. For example, the Endangered Species Act (has proved to be bad for wildlife because it is bad for people. The ESA has largely failed to protect endangered animals and plants because the threat of regulatory takings of private property creates perverse incentives for landowners to manage their land so that it does not provide habitat for listed species.

The first step in reducing regulatory takings is to enact regulatory takings compensation. An underlying problem with both the ESA and wetlands regulations is that regulators have no incentive to contain costs because the costs of compliance are borne by landowners. Supreme Court decisions have acknowledged that regulatory takings can fall under the Constitution's Fifth Amendment provision: "nor shall private property be taken for public use without just compensation." However, the Court has also made it almost impossible to claim compensation unless the regulation takes all or nearly all the value of the property.

The idea that private citizens should not be required to pay for public benefits enjoys widespread popular support. During the 104th Congress, the House of Representatives easily passed legislation to allow landowners who have lost more than half the value of their property because of ESA designations and wetlands and other land-use regulations to claim compensation. In 2004 and again in 2005, Oregon voters passed referendums by wide margins to provide compensation for property owners who have lost value in their property because of state land-use regulations. Yet government encroachment upon private lands continues.

The House of Representatives defeated federal land-use control legislation in the early 1970s. Since that time, several environmental laws—particularly the Endangered Species Act and wetlands regulation under Section 404 of the Clean Water Act—have increasingly been used by federal agencies to extend de facto land-use controls over

Congress should:

- ◆ Enact regulatory takings compensation under the following laws and programs:
 - Endangered Species Act;
 - Clean Water Act Section 404 wetlands regulation;
 - Permitting delays under the National Environmental Policy Act;
 - Coastal Zone Management Act;
 - Rails-to-Trails; and
 - Other federal land-use controls.
- ◆ Provide compensation when regulatory takings exceed 10 percent of a property's current-use value.
- ◆ Allow property owners to bypass administrative delays and file claims directly in federal court.
- ◆ Reform the Endangered Species Act by doing the following:
 - Require that all information used in the process of listing species meets the minimal requirements of the Federal Information Quality Act (IQIA);
 - Require that petitions for de-listing currently listed species be granted if the information supporting the listing does not meet the minimal requirements of the IQA;
 - Make it explicit in law that the IQA is justiciable in federal court;
 - Require that listing any species must be preceded by the online posting of the information supporting the petition within one month of receipt and a list of the data used to document the existence of each of the five factors used to justify the listing; and
 - Repeal the ESA's command-and-control regulatory regime and replace it with a conservation incentives program.
- ◆ Overturn the Environmental Protection Agency's Waters of the United States rule.
- ◆ Amend the Clean Water Act to restrict Section 404 jurisdiction to the constitutionally limited navigable waters of the United States.
- ◆ Overturn the Surface Mining Control and Reclamation Act's Stream Protection Rule.
- ◆ Prohibit funding for:
 - Any new studies, proposals, or designations of National Heritage Areas and Corridors, Wild and Scenic Rivers, or National Trails;
 - National Heritage Areas and Corridors after the initial funding has expired; and
 - The addition of any railroad rights-of-way into the Department of Transportation's rail banking inventory.

much of the United States. (The extent of federal regulatory control of private land can be seen at <http://naturalresources.house.gov/federalfootprint>.)

The federal footprint threatens to grow larger. As a result of the Obama administration's sue-and-settle agreements with environmental advocacy groups (primarily Wild Earth Guardians and the Center for Biological Diversity), the Fish and Wildlife Service is now in the early stages of a vast new endangered species power grab over large parts of the country. Thus, it is essential for Congress to move quickly to require that species must be listed on the basis of sound science and transparency. Takings compensation legislation will reduce violations of property rights. Making taxpayers pay for the costs of regulating should provide the push necessary to enact significant ESA reforms.

Congress should block implementation of the EPA's so-called Waters of the United States rule, which twists the language of the Clean Water Act out of all recognition. Through this rule, the Obama administration seeks to extend the Act's jurisdiction over the "navigable waters" of the United States to cover any piece of land that may at some time be occupied by water, such as drainage channels or seasonal pools. (The rule is currently being challenged in federal court.)

However, blocking that harmful rule is only the first step. Regulation of wetlands has expanded far beyond what Congress intended when it passed the Clean Water Act and what the Constitution allows. Therefore, Congress needs to amend Section 404 of the Clean Water Act to restrict regulation of wetlands to the constitutionally limited navigable waters of the United States.

Congress should place a moratorium on expanding several other federal programs that threaten private property rights, including National Heritage Areas and Corridors, Wild and Scenic Rivers, National Trails, and Rail-to-Trails. Although those programs are non-regulatory in a technical sense, they are often used to restrict the use of private property in local land-zoning decisions.

Experts: Myron Ebell, Marlo Lewis, William Yeatman, Robert J. Smith

For Further Reading

Myron Ebell, “An Update on Endangered Species Act Reform,” *ALEC Issue Analysis*, American Legislative Exchange Council, April 1995, <https://cei.org/op-eds-and-articles/update-endangered-species-act-reform>.

Bruce Yandle, “Bootleggers and Baptists in Retrospect,” *Regulation*, Vol. 22, No. 3 (1999), <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1999/10/bootleggers.pdf>.

Brian Seasholes, “End America’s 42-Year War on Wildlife,” Daily Caller, December 28, 2015, <http://dailycaller.com/2015/12/28/end-americas-42-year-war-on-wildlife/>.

Richard L. Stroup, *Free-Market Environmentalism: The Concise Encyclopedia of Economics* (Indianapolis: Liberty Fund, 2008), <http://www.econlib.org/library/Enc/FreeMarketEnvironmentalism.html>.

Daren Bakst and Katie Tubb, “Lawmakers Need to Kill EPA’s and Corps’ Water Rule: Property Rights Are at Stake,” Daily Signal, November 3, 2015, <http://dailysignal.com/2015/11/03/lawmakers-need-to-kill-epa-and-corps-water-rule-property-rights-are-at-stake/>.

SHRINK THE FEDERAL ESTATE

The federal government owns far more land than it can take care of properly. Federal stewardship varies widely, but on average federal lands are in poorer environmental condition than comparable private lands. The four federal land agencies—the Department of the Interior’s Bureau of Land Management (BLM), the National Park Service, the U.S. Fish and Wildlife Service, and the Department of Agriculture’s Forest Service—control about 609 million acres, or 27 percent of the surface area of the United States.

The first action Congress should take to improve federal environmental stewardship is to stop acquiring more private land.

The second action Congress should take is to transfer federal lands to the states or to private ownership. Although these actions will be more difficult to achieve, Congress can take some practical steps to begin the process.

Since the Land and Water Conservation Fund (LWCF) was enacted in 1965, the federal government has appropriated over \$15.5 billion to acquire over 5 million acres

Congress should:

- ◆ Defund the Land and Water Conservation Fund of 1965, and let it expire when it comes up for reauthorization in 2018.
- ◆ Require all future federal land acquisitions to be funded by selling at least \$10 of existing federal land for every \$1 of private land purchased.
- ◆ Forbid the use of eminent domain in acquiring private land for the four federal land agencies.
- ◆ Prohibit the establishment or expansion of National Wildlife Refuges without express congressional approval.
- ◆ Make all sources of revenue for the Fish and Wildlife Service subject to congressional appropriation.
- ◆ Require federal agencies to prepare a comprehensive report for Congress on all current eminent domain authority in existing statutes.
- ◆ Require agencies to report to Congress all instances of threats of condemnation made to private property owners.
- ◆ Ban all secret agreements between federal land agencies and land trusts or other entities to acquire private land and transfer it to federal ownership, through either sale or donation.

Congress should:

- ◆ Enact legislation to comply with Utah's Transfer of Public Lands Act.
- ◆ Enact legislation to comply with future requests from other states for the transfer of their federal lands.
- ◆ Require the orderly sale to private ownership of Bureau of Land Management and Forest Service lands in states that have not applied for transfer of their public lands within five years.
- ◆ Ensure that all valid existing rights—including water rights, rights-of-way, grazing permits, and traditional recreational uses—are fully protected after the transfer of federal lands to the states or to private ownership.

of private land, according to the Congressional Research Service. Federal taxpayers must pay the annual costs for managing and protecting those lands, which have been removed from economic production and property tax rolls. The LWCF's current authorization expires at the end of FY 2018. Congress should let it expire and then reform federal land acquisition to prohibit the use of eminent domain and to require the sale of \$10 of federal land to private hands for every \$1 spent on buying more land.

De-federalizing parts of the rural West becomes more and more important as the BLM and U.S. Forest Service (USFS) work with environmental pressure groups to turn vast areas into nature museums. The Utah Transfer of Public Lands Act is a notable step in the right direction. Congress should comply with its provisions.

Experts: Myron Ebell, Robert J. Smith

For Further Reading

“CEI Opposes Senate’s Energy Policy Modernization Act,” news release, Competitive Enterprise Institute, February 1, 2016, <https://cei.org/content/cei-opposes-senate%20%99s-energy-policy-modernization-act>.

Robert J. Smith, “The War in the West: Time to Stop Federal Land Acquisition,” Daily Caller, January 1, 2016, <http://dailycaller.com/2016/01/15/the-war-in-the-west-time-to-stop-federal-land-acquisition/>.

Carol Hardy Vincent, Laura A. Hanson, and Jerome P. Bjelopera, “Federal Land Ownership: Overview and Data,” Congressional Research Service Report 7-5700, December 29, 2014, <http://www.fas.org/sgp/crs/misc/R42346.pdf>.

For information on the Utah Transfer of Public Lands Act, consult the American Lands Council website, <http://www.americanlands council.org/>.

UNLOCK FEDERAL LANDS

Congress has often exercised its authority to designate federal lands under special categories of protection and preservation. For example, under the Wilderness Act of 1964, Congress designated 110 million acres of land managed by the four federal land agencies as officially protected Wilderness Areas.

In recent decades, presidents and land agency officials have decided that they can lock up federal lands in various administrative categories without legislation by Congress. During the Obama administration, such withdrawals have reached outrageous levels. Although congressional oversight is needed for all preservation categories, three methods for locking up federal lands deserve special and immediate attention by Congress:

- ◆ The increasingly outrageous misuse by recent presidents of the Antiquities Act of 1906 to designate huge federal areas as National Monuments;
- ◆ Administrative designations of federal lands as Bureau of Land Management Wilderness Study Areas and U.S. Forest Service Roadless Areas in perpetuity; and
- ◆ Closure of public rights-of-way that are long established, and that in many cases were created under Revised Statute 2477 and grandfathered in the Federal Land Policy and Management Act of 1976.

Congress should:

- ◆ Amend the Antiquities Act of 1906 to require that all existing National Monument designations of more than 640 acres be approved by the legislature and governor of the state wherein the National Monument is located within four years.
- ◆ Prohibit future National Monument designations of more than 5,760 acres, and require Congress and the legislature and governor of the state wherein the National Monument is located to approve the designation within two years.
- ◆ Enact hard-release language for all federal lands that have been administratively designated as Wilderness Study Areas or Roadless Areas for more than 10 years.
- ◆ Enact legislation that recognizes and guarantees R.S. 2477 rights-of-way.
- ◆ Require that federal right-of-way decisions be subject to state laws and decided in state courts.

The Antiquities Act of 1906 was primarily intended to allow the executive branch to take immediate action to protect Indian ruins and artifacts discovered on federal lands from looting. It was understood that presidents would use this authority to protect areas of a few hundred acres, or a few thousand acres at most. Under recent presidents, the Antiquities Act has been misused to lock up millions of acres of land and hundreds of millions of acres of ocean.

The Bureau of Land Management manages roughly 6 million acres, and the U.S. Forest Service manages roughly 36 million acres as de facto wilderness. Lands that have been classified as BLM Wilderness Study Areas or USFS Roadless Areas for more than 10 years without Congress's officially designating them as Wilderness Areas should be released from these administrative preservation categories.

Revised Statute 2477 was enacted in 1866 to allow local governments and private individuals to establish and maintain rights-of-way across public lands. Those rights-of-way could range from trails and dirt roads to highways. The Federal Land Policy and Management Act of 1976 repealed R.S. 2477 but recognized and protected all R.S. 2477 rights-of-way already in existence.

Experts: Myron Ebell, Robert J. Smith

For Further Reading

Robert J. Smith, "Time to Repeal the Antiquities Act of 1906," National Policy Analysis No. 677, National Center for Public Policy Research, September 2016, <http://www.nationalcenter.org/NPA677.html>.

Marjorie Haun, "R. S. 2477 and Western Lands," American Thinker, March 31, 2016, http://www.americanthinker.com/blog/2016/03/rs_2477_and_western_lands.html.

RESTORE RESOURCE PRODUCTION ON FEDERAL LANDS

More than half the land in the 11 Western states and Alaska is federally owned. The Bureau of Land Management controls roughly 245 million acres in the West and Alaska, and the U.S. Forest Service controls roughly 165 million acres. At one time, most of that land was managed for multiple uses under the BLM's Federal Land Policy and Management Act of 1976 and the USFS's Multiple Use and Sustained Yield Act of 1960. Multiple uses include:

- ◆ Recreation, including hunting and fishing;
- ◆ Wildlife and water conservation;
- ◆ Livestock grazing; and
- ◆ Timber production.

Subsurface production of hard-rock minerals, oil, natural gas, coal, and geothermal energy has also been permitted on most multiple-use lands. More recently, wind and solar energy production has been encouraged on multiple-use lands.

However, BLM and USFS lands have been removed from multiple use and put under various categories of preservation management at an increasing rate over the past 50 years. In the earlier decades of this trend, Congress made most withdrawals from multiple use, such as designating federal lands as Wilderness Areas. In recent decades, most withdrawals have been made administratively by the BLM and the USFS or by presidential decree in the case of National Monument designations. For the most part, those withdrawals have been used to ban or severely limit resource production. And in many cases, types of recreational access have also been banned or limited.

Massive federal landownership means that the BLM and the USFS control the economies of many rural areas in the West. Closing off federal lands to resource production has had several devastating environmental and economic impacts. For example, reducing timber production by more than 80 percent since 1990 has destroyed hundreds of thousands of jobs and has caused scores of mill towns to disappear. Sustained-yield management of National Forests has been replaced by "management" through cat-

Congress should:

- ◆ Enact comprehensive reform of the National Environmental Policy Act (NEPA) to:
 - Streamline the NEPA Environmental Impact Statement process;
 - Set time limits for agency decisions; and
 - Severely restrict opportunities for endless litigation by environmental advocacy groups.
- ◆ Enact legislation to protect the valid existing rights of grazing permittees, including beneficial water rights allocated under state law.
- ◆ Enact legislation to expedite the permitting of production on mining claims under the General Mining Law of 1872.
- ◆ Exempt timber salvage sales from the National Environmental Policy Act's Environmental Impact Statement and Environmental Assessment, as is the case with responses to natural disasters.
- ◆ Enact legislation to mandate incremental increases in timber sales on National Forests over five years from the current level of 2 billion board feet to 12 billion board feet per year (USFS Forest Products Cut and Sold from the National Forests and Grasslands website, <http://www.fs.fed.us/forestmanagement/products/cut-sold/index.shtml#collapseThree>).
- ◆ End the moratorium on federal coal leasing.
- ◆ Overturn the Bureau of Land Management's hydraulic fracturing rule and methane venting and flaring rule.
- ◆ Shorten the outlandish delays in issuing drilling permits by enacting legislation to put states in charge of applications for permits to drill for oil and gas on federal land.
- ◆ Enact legislation that shares royalties from federal offshore production with all coastal states.
- ◆ Overturn the offshore well control rule, offshore air quality rule, and the Arctic rule.

astrophic forest fires. Subsurface energy and mineral production has also started to decline as a result of administrative decisions.

Experts: Myron Ebell, Marlo Lewis, William Yeatman

For Further Reading

Robert H. Nelson, Testimony on “Restoring Forest Health and Avoiding Catastrophic Fire on Federal Lands,” before the Task Force on Natural Resources and the Environment, House Budget Committee, September 13, 2000, <https://cei.org/outreach-reg>

ulatory-comments-and-testimony/restoring-forest-health-and-avoiding-catastrophic-fire-fe.

Kevin D. Dayaratna, David W. Kreutzer, and Nicolas Loris, “Time to Unlock America’s Vast Oil and Gas Resources,” *Backgrounder* No. 3148, Heritage Foundation, September 1, 2016, <http://www.heritage.org/research/reports/2016/09/time-to-unlock-americas-vast-oil-and-gas-resources>.

Institute for Energy Research, “Oil Production on Federal Lands Lags behind Private and State Lands,” April 13, 2016, <http://instituteforenergyresearch.org/analysis/oil-production-federal-lands-still-not-regained-fy-2010-high/>.

REMOVE BOGUS CLIMATE PLANNING FROM FEDERAL LAND POLICY

Planning for the impacts of potential climate change is now permeating federal land management policy and planning. That is unfortunate because, as the United Nations Intergovernmental Panel on Climate Change stated in its Third Assessment Report, “The climate system is a coupled non-linear chaotic system, and therefore the long-term prediction of future climate states is not possible.”

Moreover, even assuming that the global mean temperature (GMT) will increase over the next century as a result of increasing atmospheric concentrations of greenhouse gases, regional climate changes cannot be predicted on the basis of the GMT. Major regional and sub-regional climate changes occur constantly around the planet even during periods like the past two decades, when the GMT is more or less steady. Finally, the current scientific understanding of the potential ecological impacts from climate change is highly speculative at best. For these reasons, adding climate to land planning is an expensive and cumbersome waste of time.

The addition of “direct, indirect, and cumulative” impacts of climate change in the preparation of Environmental Impact Statements, as required by a NEPA guidance document, threatens to make that process even more of an ordeal than it already is, thanks to the endless litigation it will engender.

Landscape Conservation Cooperatives (LCCs) are designed to expand the regulatory reach of the Endangered Species Act. The Obama administration’s reasoning is that, since changes in the climate could cause species habitats to change over time, planning for projected changes could require huge expansions in critical habitat designations under the ESA. Congress has never authorized the LCCs, and they should be eliminated. The LCCs are not confined to planning for federal lands. All privately owned lands are included in the 22 LCCs, which cover the entire country plus large areas of Canada and Mexico and large tracts in the Gulf of Mexico and the Pacific Ocean. Indeed, the motto of the LCCs is “Beyond Boundaries,” which is proudly displayed on the homepage of the LCC Network’s website (<https://lccnetwork.org/>).

Experts: Myron Ebell, Robert J. Smith, Marlo Lewis

Congress should:

- ◆ In the preparation or analysis of, or in litigation regarding Environmental Impact Statements, prohibit the use of:
 - The National Environmental Policy Act guidance document on climate impacts (Executive Office of the President, "CEQ Releases Final Guidance on Greenhouse Gases and Climate Change," August 1, 2016, <https://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance>);
 - The Office of Management and Budget (OMB) guidance document on the social cost of carbon (see separate item in this Agenda); or
 - Any other speculative climate impact considerations.
- ◆ In the preparation of management plans by the four federal land agencies, prohibit the use of:
 - The NEPA guidance document on climate impacts;
 - The OMB guidance document on the Social Cost of Carbon;
 - Department of the Interior Climate Change Planning Requirements; or
 - Any other speculative climate impact considerations.
- ◆ Defund and abolish:
 - The Department of the Interior's Energy and Climate Change Council;
 - The U. S. Forest Service's Offices of the Climate Adviser and of Sustainability and Climate Change;
 - Subordinate offices, councils, programs, and projects in all four federal land agencies; and
 - The 22 Landscape Conservation Cooperatives (LCCs) and associated eight Climate Science Centers established in 2010 by Department of the Interior Secretarial Order No. 3289 (Secretary of the Interior, Order No. 3289, Amendment No. 1, February 22, 2010, https://lccnetwork.org/sites/default/files/Resources/D0I_SecretarialOrder_3289A1.pdf).

For Further Reading

Myron Ebell, "CEQ Releases New Guidance on Including Climate Impacts in Environmental Impact Statements," GlobalWarming.org, December 23, 2014, <http://www.globalwarming.org/2014/12/23/ceq-releases-new-guidance-on-including-climate-in-environmental-impact-statements/>.

Marlo Lewis, "Menace to Society: Commentary on the Social Cost of Carbon," GlobalWarming.org, February 27, 2014, <http://www.globalwarming.org/2014/02/27/menace-to-society-commentary-on-the-social-cost-of-carbon/>.

Thomas J. Pyle et al., “CEI Joins Coalition Supporting Halt to ‘Social Cost of Carbon,’” Competitive Enterprise Institute, July 19, 2016, <https://cei.org/content/cei-joins-coalition-supporting-halt-social-cost-carbon>.

United Nations Intergovernmental Panel on Climate Change, Third Assessment Report Executive Summary, <https://www.ipcc.ch/ipccreports/tar/wg1/501.htm>.



COMPETITIVE
ENTERPRISE
INSTITUTE

The Competitive Enterprise Institute promotes the institutions of liberty and works to remove government-created barriers to economic freedom, innovation, and prosperity through timely analysis, effective advocacy, inclusive coalition-building, and strategic litigation.

COMPETITIVE ENTERPRISE INSTITUTE

1310 L Street NW, 7th Floor
Washington, DC 20005
202-331-1010

cei.org