

Private *and* Public Lands

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the 116th Congress*



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Private and Public Lands

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Private property and secure property rights are essential conditions of freedom and prosperity. Contrary to propaganda from environmental advocacy groups, environmental stewardship by private landowners has proven to be far superior to that of public land managers. Private land ownership provides the right incentives to protect the value of land, including its environmental resources. However, federal regulations—primarily the Endangered Species Act (ESA) and Clean Water Act wetlands regulation—increasingly undermine private conservation by threatening property rights. This chapter makes several recommendations to reduce heavy-handed federal land-use regulation of private property and thereby increase freedom, promote prosperity, and better protect the environment.

Federal land ownership does massive environmental damage in the Western states, Alaska, and other states where the federal government owns or controls large areas of land. Mismanagement of the vast federal estate is the work of many decades, but the negative environmental and economic consequences have become obvious only in the past few years to people who do not live in rural areas with lots of federal land, as catastrophic fires over millions of acres have darkened the sky and fouled the air across the West. Those fires are the inevitable result of colossal fuel buildup, which is the direct result of severely reducing timber production in the National Forests. This chapter makes recommendations for improving federal land management, increasing resource production on federal lands, and radically reducing the amount of land the federal government controls.

Finally, planning for the speculative effects of potential climate change began to permeate federal land management policy and planning during the Obama administration. That is bad enough, but planning for climate change 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 policy preferences of federal bureaucrats, was starting to be used in federal environmental permitting decisions. Although the Trump administration is doing what it can administratively to eliminate climate planning and climate programs, including use of the SCC, legislation is needed in many areas. For example, Congress should prohibit the use of the SCC in federal land management and environmental permitting and abolish certain climate programs that were created by secretarial order in the previous administration.

REFORM AND REDUCE ENVIRONMENTAL REGULATION OF PRIVATE LANDS

The Endangered Species Act and wetlands regulations under Section 404 of the Clean Water Act provide no incentives for regulators to contain costs because the costs are borne by landowners. Those costs are not well documented, but as a report published by the Competitive Enterprise Institute in August 2018 shows, taxpayer costs for the ESA total in the tens of billions of dollars, and the economic costs to landowners are likely in the hundreds of billions of dollars.

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
 - Rail-to-Trails
 - 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 (IQA).
 - Require that petitions for delisting currently listed species be granted if the information supporting the listing does not meet the minimal requirements of the IQA.
 - Make explicit in the law that the IQA is actionable in federal court.
 - Require that listing any species must be preceded by the online posting, within one month of receipt of the petition, of (a) the information supporting the petition and (b) a list of the data used to document the existence of each of the factors used to justify the listing.
 - Repeal the ESA's command-and-control regulatory regime and replace it with a conservation incentives program.
- ◆ Amend the Clean Water Act to restrict Section 404 jurisdiction to the constitutionally limited navigable waters of the United States.
- ◆ Prohibit funding for the following:

- 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.
- Adding any railroad rights-of-way into the Department of Transportation's rail banking inventory.

The Trump administration is in the process of finalizing significant reforms to the rules implementing the ESA and Section 404, which, if successful, would shrink the jurisdictional reach of both statutes. This is welcome news for many landowners, but it does not solve the underlying problem. Only Congress can do that by addressing the issue of regulatory takings.

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, wetlands regulation under Section 404 of the Clean Water Act, and the Coastal Zone Management Act—have increasingly been used by federal agencies to extend de facto land-use controls over much of the United States. (The extent of federal regulatory control of private land can be seen at <http://naturalresources.house.gov/federalfootprint/>.) Land-use control rather than environmental protection is in fact, if not in stated intention, the main purpose of those statutes.

The Endangered Species Act has proven 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 taking of the use of private property creates perverse incentives for landowners to manage their land, therefore it does not provide habitat for listed species. Similarly, wetlands regulation has gone far beyond any environmental purpose and far beyond legitimate federal jurisdiction of navigable waters.

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 justify compensation, unless the regulation takes all or nearly all of the value of the property. Making regulators pay for the costs of regulating should also provide the push necessary to enact significant ESA and wetlands reforms.

The idea that the government and not private citizens should 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 to claim compensation if they lost more than half the value of their property because of Endangered Species Act designations and wetlands and other land-use regulations. In 2004 and again in 2005, Oregon voters passed referenda by wide margins to provide compensation for landowners whose property has lost value because of state land-use regulations. Yet government encroachment on private lands continues.

Regulatory takings compensation legislation will reduce violations of property rights. Making regulators pay for the costs of regulating should provide the push necessary to enact significant reforms in the Endangered Species Act, Section 404 wetlands regulation, and other land-use statutes.

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

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

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SHRINK THE FEDERAL ESTATE

The environmental degradation of federal lands goes hand in hand with declining resource production and impoverishment of rural populations in areas of the West, where the majority of lands are federally owned. The Trump administration has undone most of the worst administrative obstacles to energy production on the federal estate, but Congress needs to do much more to reverse the locking up of federal land, restore multiple-use management, and increase resource production.

Congress should:

- ◆ Defund the Land and Water Conservation Fund of 1965 and not reauthorize it. Any reauthorization should continue to make all land acquisitions and other spending subject to congressional appropriation.
- ◆ Require all future federal land acquisitions to be funded by selling at least \$10 worth 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 into federal ownership, either through sale or donation.
- ◆ 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 into private ownership of Bureau of Land Management (BLM) 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 into private ownership.

The federal government owns far more land than it can care for properly. Federal stewardship varies widely, but on average, federal lands are in poorer environmental condition than are comparable private lands, and the quality of federal land management has declined. Beginning in the 1960s, management of federal lands has moved away in fits and starts from active multiple-use management of resources toward non-management, based on the 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 consequences of this disastrous policy have become as clear as the air has been darkened and fouled by smoke from fires across the West over the past several summers.

The four federal land agencies—the Department of the Interior’s Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, and the Department of Agriculture’s Forest Service—control about 610 million acres, or 27 percent of the American land mass. (An interactive map showing the types of federal land ownership and management can be seen at [http://naturalresources.house.gov/federalfootprint/.](http://naturalresources.house.gov/federalfootprint/))

The first thing Congress should do to improve federal environmental stewardship is to stop acquiring more private land. Since the Land and Water Conservation Fund was enacted in 1965, the federal government has appropriated more than \$11 billion (not adjusted for inflation) to acquire more than 5 million acres 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 second thing Congress should do is transfer federal lands to the states and into private ownership. The State of Utah in 2012 enacted the Transfer of Public Lands Act, which provides a well-thought-out path for transferring most lands controlled by federal land agencies (excluding National Parks and Wilderness Areas). The American Lands Council has developed concepts for how states could request federal lands to be transferred and how the transfer process could work.

Experts: Myron Ebell, Robert J. Smith

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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 has 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.

Congress should:

- ◆ Amend the Antiquities Act of 1906 to require all existing National Monument designations of more than 640 acres to be approved within four years by the legislature and governor of the state in which the National Monument is located.
- ◆ Prohibit future National Monument designations larger than 5,760 acres, and require that Congress and the legislature and governor of the state in which the National Monument is located must 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 rights of way decisions be subject to state laws and decided in state courts.

During the Obama administration, those withdrawals reached outrageous levels. The Trump administration has taken several small steps to undo or limit some of those unlegislated federal land lockups. For example, President Trump signed executive orders to reduce the size of two National Monuments in Utah—the Grand Staircase-Escalante, designated by President Clinton in 1996, and the Bears Ears, designated by President Obama in 2016.

Although congressional oversight is needed on all these preservation categories, three methods for locking up federal lands deserve immediate attention by Congress:

- ◆ The misuse by recent presidents of the Antiquities Act of 1906 to designate huge federal areas as National Monuments;
- ◆ Administrative designations of federal lands as Wilderness Study Areas and Roadless Areas; and

- ◆ Closure of public rights of way that are long established and that in many cases were created under Revised Statute 2477 and grandfathered into the Federal Land Policy and Management Act of 1976.

The Antiquities Act of 1906 was intended primarily to allow the executive branch to take immediate action to protect Native American ruins and artifacts that are discovered on federal lands from being looted. It was understood that presidents would use that authority to protect areas of 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 roughly 36 million acres as de facto wilderness. Lands that have been classified as Wilderness Study Areas or Roadless Areas for more than 10 years without action by Congress to designate them officially as such should be released from those administrative preservation categories. The Protect Public Use of Public Lands Act (H.R. 5198, S. 2206, 115th Congress) was introduced in Congress in 2017 to release National Forest Lands in Montana from Wilderness Study Area status and return them to multiple uses.

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 to 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

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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' 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.

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 Protection Act's Environmental Impact Statement and Environmental Review, as with responses to other types of natural disasters.
- ◆ Enact legislation to mandate incremental increases in timber sales on National Forests over five years from the current level of 2 to 3 billion board feet to 12 billion board feet per year (USFS, "Forest Products Cut and Sold from the National Forests and Grasslands," <https://www.fs.fed.us/forestmanagement/products/cut-sold/index.shtml>).
- ◆ Enact legislation to prohibit future federal coal leasing moratoriums.
- ◆ Shorten delays in issuing drilling permits by enacting legislation to put states in charge of applications for permits to drill in oil and gas leases on federal land.
- ◆ Enact legislation to share royalties from federal offshore production with all coastal states.

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 Forest Service 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, most withdrawals from multiple use were made by Congress, such as, for example, designating federal lands as Wilderness Areas. In recent decades, most withdrawals have been made administratively by the BLM and 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. In many cases, various types of recreational access have been banned or limited.

Massive federal land ownership means that BLM and USFS control the economies of many rural areas in the West. Closing off federal lands to resource production has had 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 caused scores of mill towns to disappear. Sustained-yield management of National Forests has been replaced by “management” through catastrophic forest fires. Subsurface energy and mineral production also declined as a result of decisions made by the Obama administration.

In the first two years of the Trump administration, the Department of the Interior has made progress in increasing oil, gas, and coal production on federal lands and offshore areas. Congress made a major contribution in 2017 when it allowed oil and gas exploration of the coastal plain of the Arctic National Wildlife Refuge. Also in the past two years, the U.S. Forest Service has taken steps that could eventually lead to increased timber production in the National Forests. However, much remains to be done to maintain and increase resource production on federal multiple-use lands.

Experts: Myron Ebell, Ben Lieberman, Marlo Lewis

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REMOVE CLIMATE PLANNING FROM FEDERAL LANDS POLICY

Planning for the effects of potential climate change pervaded federal land management policy and planning during the Obama administration.

Congress should:

- ◆ Defund and abolish the 22 Landscape Conservation Cooperatives (LCCs) and the associated National Climate Adaptation Science Center and eight regional Climate Adaptation Science Centers.

The Trump administration has made progress in dismantling Obama-era climate offices, programs, and policies. President Trump's Executive Order 13783 directed the Council on Environmental Quality (CEQ) to withdraw the 2016 Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews. CEQ withdrew the guidance document on April 5, 2017.

The Department of the Interior rescinded a number of climate policies that were inconsistent with the Executive Order, and Interior's Energy and Climate Change Council seems to have stopped functioning. The U.S. Department of Agriculture's Forest Service seems to no longer have a climate adviser or a functioning Office of Sustainability and Climate Change.

Attempts to insert climate change planning into federal land management are misconceived 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." 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 subregional climate changes occur constantly around the planet even during periods like the past two decades, when the GMT is more or less steady. Moreover, the current scientific understanding of the potential ecological

impacts from climate change is highly speculative at best. For those reasons, adding climate to land planning is an expensive and cumbersome waste of time.

However, Congress still has work to do. In particular, the administration has yet to shut down the 22 Landscape Conservation Cooperatives and eight affiliated Climate Science Centers, which were established in 2010 by Department of the Interior Secretarial Order 3289 (https://lccnetwork.org/sites/default/files/Resources/DOI_SecretarialOrder_3289A1.pdf). Congress should do so.

Congress has never authorized the Landscape Conservation Cooperatives, which were designed to expand the regulatory reach of the Endangered Species Act. The Obama administration's reasoning was that, because 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.

Moreover, the LCCs are not confined to planning on federal lands. All privately owned lands are included in the 22 LCCs, which cover the entire country plus large parts of Canada and Mexico and large tracts in the Gulf of Mexico and the Pacific Ocean. Indeed, the LCCs' motto, "Beyond Boundaries," is proudly displayed on the landing page of LCC Network's website (<https://lccnetwork.org/>).

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