# TOP TEN WAYS TO IMPROVE FEDERAL LAND MANAGEMENT: AN OPEN LETTER TO THE U.S. PRESIDENTIAL CANDIDATES REGARDING FEDERAL LAND MANAGEMENT IN THE WEST

July 14, 2016

We write this *open letter* to you, as well as your respective party organizations, as a manifesto of sorts, to provide guidance as to the path forward for federal land[1] policy in the Western United States. This manifesto is not exhaustive, but provides what we contend to be the top ten position statements that would aid in mitigating the rhetoric and in advancing viable solutions associated with the working landscapes in the West should either of you be elected as President of the United States.

## (1) Retain federal ownership of most federal lands, but with significant changes.

The federal lands are a significant asset to the American people and should not be wholly divested. A predominant argument for divestiture is that a State, County or Local government can more efficiently manage such land. This argument ignores two realities, however. First, any form of government is *still* government. Experience reveals that a State, County or Local Government can be as rational or as irrational as the Federal Government. We really don't believe as much is gained by divesting this land to *another* government as would be gained by transferring the ownership into private hands. Second, assuming divestiture to States, there is a significant risk of irreconcilable management schemes between States which could directly impair common watersheds, common private inholdings, and common grazing allotments that straddle two or more States; this would be an unintended, adverse consequence to several of the intermountain states, like Idaho, Colorado, Nevada, Utah, and Wyoming.

With that said, isolated blocks of federal land should be forthwith sold and/or exchanged. There are significant federal land holdings in relatively small isolated blocks -- from less than 40-acre parcels to 640-acre parcels (sometimes even larger) of federal land, like in "checkerboard" areas, that are surrounded by private or State land. These federal acres for practical purposes are not managed and do not provide any real, cost-effective purpose for continued federal government retention. While we appreciate that our recommendation does not specify every detail,[2] the new President (and Congress) needs to immediately empower the federal land management agencies with a simplified, time-sensitive means to dispose of these parcels via sale and/or exchange based upon the fair market value of such federal lands. Similarly, the new President (and Congress) should establish a 4-year time period for the BLM to approve or deny numerous applications under the Carey Act and Desert Land Entry Act that have been outstanding for decades.

---

[1] The phrase "Federal land" has broad meaning for purposes of this letter. It is inclusive of "public lands" which are administered by the U.S. Department of the Interior, Bureau of Land Management ("BLM"), "national forest system lands" which are administered by the U.S. Department of Agriculture, U.S. Forest Service ("USFS"), and lands administered by the U.S. Department of the Interior, U.S. Fish & Wildlife Service ("FWS"), as well as other non-military lands, like Wilderness Study Areas, Wilderness Areas, National Conservation Areas, Monuments, and National Parks. This letter does not intend to speak to designated military bases.

[2] We acknowledge that some "details" need to be worked out, though we don't want these details to chill the need to accomplish this objective forthwith. The smaller isolated tracts should be sold and/or exchanged, with the adjacent land owner(s) being given the first right of refusal; whether such land owner is a private, local, county, or State entity. The larger isolated tracts, such as checkboard areas, should be sold and/or exchanged in the same manner, though we note the likely need to rely upon local, county, or State land use planning to speak to the disposition details due to the unique circumstances associated with each local, county, or State in the West.

**(2) Enhance the National Park System by converting some of the existing National Monuments to Park status with approval of the applicable State.**

The expansion of visitor demand on the National Park System has strained the system; requiring the need to turn-a-way visitors or expand park opportunities. We believe the latter is the prudent course. Given that many of the National Monuments have considerable recreation and tourism values, the new President (and Congress) should convert some of these Monuments to National Park status as determined on a case-by-case basis with coordination and approval from whichever State the National Monument is located. Ideally, the National Park Service could direct funding from the Land and Water Conservation Fund to different States to insure the proper administration of these jointly-designated areas.

**(3) Adopt and implement State sage grouse management plans, and withdraw BLM and USFS land use and forest planning as related to sage grouse**.

In September 2015 the federal government released a series of amendments to dozens of land use planning documents all across the Western U.S. which created an extensive new management regime that purports to protect sage grouse populations. It is hard to overstate the significance and impact of these amendments: they are the product of a nation-wide effort between federal agencies, State and Local governments, and regional stakeholders to balance sustainable resource use and wildlife protection from the Sierra Nevada to the High Plains. They have changed the face of federal land management in America.

Unfortunately, in adopting the current plans, the federal government neglected to utilize the fruits of years of collaboration between federal, State, and Local stakeholders. As part of its interim guidance in the years prior to the adoption of the final land use plan amendments, the U.S. Department of the Interior made clear in Instructional Memorandum 2012-043[3] that it would adopt plans developed by individual States in concurrence with the federal Fish and Wildlife Service. However, despite the development and apparent approval of State plans such as in Idaho and Southwest Montana, the federal government did not adopt the State plans as it claimed it would, but simply reduced the State plans to an "alternative" that was allegedly considered but rejected in favor of a different, federally-based standard that ignored the years of collaborative effort that went into making the State plans. Not surprisingly, this has already prompted a series of lawsuits on behalf of the State governments and related interests; more lawsuits can only be expected in the years to come. Accordingly, the most efficient, rational, and equitable solution is for the new President (and Congress) to simply adopt the State plans as originally promised.

**(4) Manage wild horses and burros to achieve "appropriate management levels" (AML) within 4 years with priority timing on sage grouse breeding, late-brood rearing, and winter habitat areas**.

The *Wild Free-Roaming Horse and Burro Act*, 16 U.S.C. § 1331 *et seq.*, obligates the federal government to maintain wild horse and burro populations at federally-determined appropriate management levels (AML). However, in many areas of the West, wild horse and burro populations are

[3] IM 2012-043 stated: "The BLM field offices do not need to apply the conservation policies and procedures described in this IM in areas in which (1) a state and/or local regulatory mechanism has been developed for the conservation of the Greater Sage-Grouse in coordination and concurrence with the FWS (including the Wyoming Governor's Executive Order 2011-5, Greater Sage-Grouse Core Area Protection); and (2) the state sage-grouse plan has subsequently been adopted by the BLM through the issuance of a state-level BLM IM." Available from: http://www.blm.gov/wo/st/en/info/regulations/Instruction_Memos_and_Bulletins/national_instruction/2012/IM_2012-043.html

far in excess of AML and have been for many years. The result is devastating on the animals themselves (who suffer malnutrition and frequently starve or die of thirst) as well as the rangeland ecosystem, including severe impacts such as the displacement of wildlife due to horses and burros denying access to limited water sources. This adversely impacts these landscapes in the West, including those dependent upon such working landscapes like livestock operators, recreationalist, and others. This situation is obviously in no one's best interests, especially the animals themselves. The new President (and Congress) must use all applicable tools in the "toolbox" to meet AMLs within 4-years, with priority timing on sage grouse breeding, late-brood rearing, and winter habitat areas.

**(5) Repeal (or amend) the *Antiquities Act* of 1906, to negate the ability of the President to unilaterally establish National Monuments without the approval of Congress**.

While perhaps well-intentioned originally, the Antiquities Act of 1906, as amended, is "un-American" to say the very least. With the stroke of a pen, the President can lock up enormous swaths of public lands without any regard to the wishes of Congress, State and Local governments, or -- most importantly -- the people who live, work, and recreate on the land. We acknowledge that this executive power has been used by both Democratic and Republican presidents, though we also note that President Obama has already designated 22 areas as monuments, which is more than any President in history. In any event, utilization of the *Antiquities Act* in recent years has been extremely controversial and counter-productive, both for purposes of local and regional economic sustainability as well as environmental protection/preservation. This demonstrates a need for the new President (and Congress) to repeal (or amend) the Act so that the creation of National Monuments would be subject to the approval of Congress and not simply a unilateral executive prerogative, particularly given the increased burden on taxpayers and threats to multiple-use each monument imposes.

**(6) Release Wilderness Study Areas (WSAs) within 4 years unless Congress approves to establish the same (in whole or in part) to Wilderness status**.

The *Wilderness Act* of 1964, 16 U.S.C. § 1131 *et seq.*, places restrictions on designated areas to protect their perceived "natural" characteristics. These restrictions apply equally to federal lands that have been formally designated by Congress as "wilderness" areas as well as those which are simply declared to be "wilderness study areas" ("WSAs") by agencies. This is problematic because many WSAs have never been formally declared to be wilderness areas by Congress, yet have been managed as such for decades. The new President (and Congress) should establish a four-year deadline to designate the WSAs as wilderness or not (in whole or in part) so that after such time period the WSAs are released from consideration.

**(7) Retain, but amend, the *Equal Access to Justice Act*, and similar fee-shifting statutes.**

The *Equal Access to Justice Act* authorizes the recovery of legal expenses incurred in suits against the government at both the administrative and federal judicial level. *See* 5 U.S.C. § 504 (administrative cases) *and* 28 U.S.C. § 2412(d)(1)(A) (federal court cases). However, administrative case law within the Department of the Interior precludes an award of fees under EAJA in cases involving appeals of grazing permit renewal decisions. *See Western Watersheds Project v. Interior Bd. of Land Appeals*, 624 F.3d 983 (9th Cir. 2010). As a result, BLM frequently couches all manner of decisions as "permit renewal" decisions even when the renewal of the permit itself is not at the heart of a given issue, solely to avoid the prospect of EAJA liability. This circumvents the purposes of EAJA, and the new President (and Congress) should motivate Congress to rectify that EAJA has *not* been effectively repealed in the context of grazing permit renewals or other type of permit renewals that may be subject to EAJA.

In addition, the new President (and Congress) should also eliminate or enlarge the upper limit of net worth for a party to be awarded fees. *See* 5 U.S.C. § 504(b)(1)(B); 28 U.S.C. § 2412(d)(2)(B). This is necessary to establish some equity between so-called non-profit organizations and so-called commercial individuals/organizations. In addition, the new President (and Congress) should clarify that any awards under either the administrative or federal court versions of EAJA are limited to a specific hourly rate. Congress has already done this in the administrative-EAJA. *See* 5 U.S.C. § 504(b)(1)(A). This same subsection should be applied to similar type of fee-shifting statutes so as to avoid abuses by some that rationalize high hourly rates. The new President (and Congress) should intervene to determine a standard across-the-board hourly rate to avoid the abuse of EAJA and other fee-shifting statutes.[4]

**(8) Amend the *Endangered Species Act* to more precisely defining the terms "species", "endangered species", and "threatened species".**

The *Endangered Species Act* of 1973 defines "species" in broad terms: "The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). This overly-broad definition has proved to be highly problematic overtime; given that with the advent of genetic science, our understanding of a "species" is fundamentally different today than when the ESA was passed in 1973; and given that the current definition has been applied to provide ESA protection when the "species" as a whole is not imperiled. Wildlife biologists often rationally disagree about what degree of variation should be sufficient to differentiate a "species". This "splitting" or "lumping", as it is commonly referred to, needs to be resolved by Congress so that Congress decides what constitutes a "species" to be protected under ESA, not some *unelected* Wildlife biologist in an agency. The new President (and Congress) should spearhead the effort to provide a *genetic-based* definition of "species" that encompasses "all organisms that are capable of interbreeding when mature to produce offspring that are routinely fertile" (such a definition would include subspecies and distinct population segments as subsets of the parent species rather than as separate species), with input from Wildlife biologists and geneticist, so as to reflect the considerable advancement in scientific understanding of genetics since 1973. The recent litigation over the subspecies of sage-grouse is an example of why this reform is needed.

Similarly, the ESA also defines "endangered species" and "threatened species" in broad terms. The ESA defines an "endangered species" as "any species which is in danger of extinction throughout all or a significant portion of its range...". 16 U.S.C. § 1532(6). Because the ESA did not define what Congress intended by the term "a significant portion of its range", the ESA has been applied to extend regulatory protections when a species is imperiled in only a small fraction of its range, including portions of marginal habitat on the extreme fringes of the species range that are inconsequential to the species survival across its entire range. The new President (and Congress) should spearhead the effort to remedy this situation by striking the phrase "or a significant portion of its range" from the definitions for an "endangered species" and a "threatened species" under the ESA. The newly clarified definitions would protect a species when it is imperiled across its entire range.

Similarly, the ESA defines a "threatened species" as "any species which is likely to become an endangered species within the foreseeable future…". 16 U.S.C. § 1532(20). Because the ESA did not define what Congress meant by the term "the foreseeable future", the ESA has been applied to extend regulatory protections when a species is at possible risk to become endangered so far into the future that such risk is speculative. For example, given the current population status and rate of decline for the Greater Sage Grouse, existing management practices would not reduce grouse numbers to the point that the species is at risk of becoming endangered for at least another 300 years. Yet, the FWS found that the

[4] The abuse of EAJA by purported non-profit environmental organizations has been the subject of controversy for several years. *See e.g.* http://buddfalen.com/practice-areas/eaja-attorney-fee-payments/.

Greater Sage Grouse was warranted for listing as "threatened" under the ESA. The new President (and Congress) should spearhead the effort to remedy this situation by defining the term "the foreseeable future" under the ESA to include a period of no less than 20 years and no more than 50 years depending on the quality of available data. In situations where little or no high quality data is available, the "foreseeable future" should be limited to a 20-year time frame. In situations where high quality data is abundant, the "foreseeable future" should be limited to a 50-year time frame because even with the best available data, we only fool ourselves if we claim to be able to forecast things beyond a 50-year time frame with any degree of accuracy. The newly clarified definition would protect a species as "threatened" if it is likely to become endangered (face the risk of extinction across its entire range) within the next 20 to 50 years.

Finally, the ESA listing and de-listing process needs to be revised. Presently, the FWS determines if a species should be listed as "endangered" or "threatened" and when (if ever) that species should subsequently be de-listed. In practice, this has meant that the FWS may continually "move the goal posts" by never de-listing a species and increasing regulatory burdens regardless of however much real-world progress is made in recovering the species and its critical habitat. This is unworkable and unfair. Consequently, the new President (and Congress) should identify a more uniform standard / process for de-listing species rather than affording such unchecked discretion to the agency.

### (9) Amend the *Administrative Procedure Act* to provide litigants a meaningful opportunity for participation and for judicial review.

As decades of case law have developed, it has become clear that the two sections of the *Administrative Procedure Act* ("APA") that provide for judicial review of agency (in)action, 5 U.S.C. §§ 706(1) and 706(2), are in need of serious reform.

First, concerning relief for unreasonable delay under Section 706(1) of the APA, the last decade of federal case law has almost rendered this section nearly meaningless. In the wake of the U.S. Supreme Court's holding in *Norton v. Southern Utah Wilderness Association*, 542 U.S. 55 (2004), many federal Circuit Courts have interpreted Section 706(1) of the APA in a manner that is so strict that it is effectively impossible to obtain relief from agency action that has been unreasonably delayed. The end result is disastrous because it essentially allows an agency to commit itself to any number of things on paper but then do (or not do) anything it pleases free of legal consequence. Since the *Norton* case did not actually abrogate Section 706(1) of the APA, the new President (and Congress) needs to amend the statute in order to clarify that plaintiffs can indeed seek judicial review for an agency's unreasonable delay.

Second, concerning relief for "arbitrary and capricious" agency actions under 706(2) of the APA, the new President (and Congress) needs to amend the statute in order to no longer give deference to agency discretion. The APA intentionally provides agencies with considerable discretion based upon the assumption that agencies possess expertise in the particular field over which Congress grants them management authority. In the context of natural resource management, while this assumption may have been warranted a century ago in the time of Gifford Pinchot, it is no longer warranted today. In many cases, individuals in the private sector are armed with more education, more experience, and more information. This change will re-empower the agencies to rely upon the best information, and will allow the court system to substantively rely upon such information in its decision-making.

///

///

**(10) Consolidate administration of the public lands and national forest system lands into <u>one</u> federal land management agency**.

BLM and USFS must be consolidated into one federal land management agency.[5] The historical antagonism between the Department of the Interior and the Department of Agriculture that led to the division of land management between BLM and USFS is not relevant today. In fact, not much is said about the similar missions and the practical realities of management of public lands versus national forest system lands. For example, typically, you think that BLM manages range resources and USFS manages forest resources, though this is not true. Nevada's *national forests* are generally managed for range resources, not timber resources. Southwestern Oregon's *public lands* are generally managed for timber resources, not range resources. Moreover, it is common in the West to find that the BLM and USFS are sharing the *same* office space. The consolidation of these two agencies would allow greater efficiency in management and better allow "one-stop-shopping" for the interested public and permittees.

* * *

In conclusion, based on the cumulative sum of years of experience in natural resource management / litigation, the signatories[6] below hope that these ten suggestions provide guidance to the new President (and to Congress) as to some of the more pressing concerns in federal land management. As we are sure you are well aware, your stance on many of these issues will be key to securing the vote in any of the Western States. *Thank you* for your consideration.

Very truly yours,

*Schroeder & Lezamiz Law Offices, LLP*

By _____
W. Alan Schroeder

*Schroeder & Lezamiz Law Offices, LLP*

By _____
Brian G. Sheldon

///

///

[5] Arguably, even more federal agencies should be combined to create a uniform Department of Natural Resources. In addition to BLM and Forest Service, the Bureau of Reclamation, Fish and Wildlife Service, Natural Resource Conservation Service, United States Geological Survey, and National Park Service could all be combined for greater efficiency and administrative direction.

[6] The positions expressed in this letter are those of the individual signatory and do not intend to express the positions of the firm/business or its clients/customers to which the signatory is associated/employed.

*Schroeder Law Offices, P.C.*

By _____
Therese A. Ure

*Western Range Service*

By _____
Al Steninger

*Western Range Service*

By _____
Quinton Barr

*Synergy Resource Solutions, Inc.*

By _____
Jack Alexander