UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 03-4147

STATE OF UTAH *et al*.,

Appellees,

v.

GALE NORTON, Secretary of the Interior *et al*.,

Appellees,

and

SOUTHERN UTAH WILDERNESS ALLIANCE *et al*.,

Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

APPELLANTS' OPENING BRIEF

ORAL ARGUMENT REQUESTED

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April 5, 2004

CORPORATE DISCLOSURE STATEMENT

SOUTHERN UTAH WILDERNESS ALLIANCE, THE WILDERNESS SOCIETY, ARIZONA WILDERNESS ALLIANCE, FRIENDS OF NEVADA WILDERNESS, NATURAL RESOURCES DEFENSE COUNCIL, BIODIVERSITY CONSERVATION ALLIANCE, CALIFORNIA WILDERNESS COALITION, IDAHO CONSERVATION LEAGUE, NEW MEXICO WILDERNESS ALLIANCE, COLORADO ENVIRONMENTAL COALITION have no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States.

Respectfully submitted April 5, 2003.

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RULE 28.2(C)(1) STATEMENT REGARDING PRIOR OR RELATED APPEALS

A prior appeal was decided in this case in *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998). Appellants are not aware of any other prior appeals or related cases.

Respectfully submitted April 5, 2003.

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STATEMENT OF JURISDICTION

Southern Utah Wilderness Alliance *et al.* (collectively, "SUWA") appeal from the Order Approving Stipulation and Granting Joint Motion to Dismiss Third Amended and Supplemented Complaint filed by the District of Utah on April 14, 2003. Appellants' Appendix ("App.") 108-112. That order incorporated by reference Appellees' Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint. *Id*. 92-107 ("Consent Decree").

The district court had jurisdiction to hear this case pursuant to 28 U.S.C. § 1331. Pursuant to Fed. R. App. P. 4(a)(1)(B), SUWA filed a timely notice of appeal on June 13, 2003. App. 25. This Court, therefore, has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Whether a district court may enter a consent decree that:

1. lifts a mandatory injunction imposed by another court;

2. eliminates the Bureau of Land Management's (BLM's) discretion under the Federal Land Policy & Management Act (FLPMA) § 201, 43 U.S.C. § 1711, to conduct wilderness inventories;

3. eliminates BLM's discretion under FLPMA § 202, 43 U.S.C. § 1712, to designate and protect Wilderness Study Areas;

4. conflicts with FLPMA's land use plan amendment or revision processes, 43 C.F.R. §§ 1610.5-4 to –6;

5. limits the choice of reasonable alternatives for an action that is the subject of an ongoing National Environmental Policy Act (NEPA) review, 40 C.F.R. § 1506.1(a)(2);

6. resolves legal claims outside the general scope of the complaint or beyond the court's jurisdiction;

7. binds future administrations to a novel interpretation of FLPMA when no party is specifically authorized to bind a later administration and the court could not have arrived at the same legal interpretation in a final judgment; and

8. whether a district court may enter a consent decree without undertaking an independent analysis of its terms or allowing intervenors to raise objections when the decree affects third parties, there is evidence that the agreement is not "fair, reasonable, and adequate," that it was not the product of arm's-length negotiations, and where intervenors had no opportunity to conduct discovery into the negotiations.

STATEMENT OF THE CASE

Utah filed this lawsuit in 1996 to prevent BLM from conducting a wilderness re-inventory on select Utah BLM lands. This Court dismissed seven of Utah's eight claims in *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998), because

Utah lacked standing to challenge the re-inventory. On March 2003, Utah filed an amended complaint and less than two weeks later, Utah and BLM filed a proposed Consent Decree. The district court approved the Consent Decree and entered it as a court order the afternoon of the next business day. The court made no findings concerning the Decree and the conservation groups that had moved to intervene were denied any opportunity to voice their objections to the Decree prior to its approval.

This is an appeal of the District of Utah's entry of the Consent Decree. Among other things, the Decree lifts another court's injunction and binds BLM to a new and legally erroneous interpretation of §§ 201, 202, and 603 of FLPMA. As a result of the Consent Decree, hundreds of thousands of acres of BLM's most wild and pristine land will lose their existing protections and be open to potential development. In addition, millions of additional acres across the West will no longer be eligible for the level of protection that such areas have enjoyed in the past. In addition to suffering from a host of legal and constitutional infirmities, the Decree conflicts with every prior administration's interpretation of FLPMA, and reverses the position taken by BLM in the prior appeal to this Court in this case. For these reasons, and for the additional reasons set forth below, the district court's approval of the Consent Decree should be vacated.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND

The heart of this appeal is a purely legal dispute concerning the interpretation and interaction of FLPMA, §§ 201, 202, and 603. In order to understand these provisions, it is necessary to briefly review the Wilderness Act to which FLPMA's wilderness-related provisions are linked.

A. The Wilderness Act

Congress passed the Wilderness Act of 1964 by a bipartisan and near-unanimous vote. RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 226 (3rd ed. 1982). The Act established a "National Wilderness Preservation System" whose purpose is to "secure for the American people of present and future generations the benefits of an enduring resource of wilderness." 16 U.S.C. § 1131(a).

As a first step towards establishing such a system, the Wilderness Act directed the Secretaries of Agriculture and Interior to review specific federal lands under their jurisdiction and determine within ten years which lands qualified for wilderness designation by Congress, the sole body empowered to establish wilderness areas. 16 U.S.C. § 1132(a)-(c). In order to qualify for wilderness designation, an area must "appear[] to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable." 16 U.S.C.

§ 1131(c). Once designated as a wilderness area, new commercial development and other activities that mark the landscape are generally prohibited. 16 U.S.C. § 1133(c).

Although the Act declares broadly that wilderness areas shall be made up of "federally owned areas," 16 U.S.C. § 1131(a), its wilderness review provisions specifically mandated a review of only national parks, wildlife refuges, and a small portion of the national forests. 16 U.S.C. § 1132(b), (c). This disparity spawned a debate regarding whether BLM lands, which are not mentioned explicitly in the review provisions, were eligible for wilderness designation. App. 882 (Senate Report). Congress resolved the dispute by passing FLPMA, 43 U.S.C. §§ 1701-84.

B. FLPMA

Prior to FLPMA's passage in 1976, BLM lands were governed by a mélange of some 3,000 outdated and often-conflicting public lands laws, most of which were written when it was assumed that these "public domain" lands would be conveyed expeditiously to private hands. App. 880 (Senate Report). FLPMA cleared away many of these outmoded laws and, for the first time, provided BLM with a "comprehensive, statutory statement of purposes, goals, and authority for the use and management" of BLM lands. *Id*.

This appeal concerns BLM's reversal of position and adoption through a behind-closed-door agreement of a radically new interpretation of three of

FLPMA's most fundamental provisions: the continuing resource inventory requirement of § 201; the land use planning provisions in § 202; and the wilderness study deadline provisions in § 603(a).

1. Section 201

FLPMA mandates that BLM lands:

> [B]e managed in a manner that will protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, water resource, and archaeological values; that, where appropriate, will preserve and protect certain public lands in their natural condition; that will provide food and habitat for fish and wildlife and domestic animals; and that will provide for outdoor recreation and human occupancy and use

43 U.S.C. § 1701(a)(8). Congress recognized that BLM could meet this mandate only if the agency thoroughly understood the resources under its control. Therefore, FLPMA § 201 requires that BLM:

> [P]repare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values) .... This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.

43 U.S.C. § 1711(a). *See also* 43 U.S.C. § 1701(a)(2) ("the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried ....").

BLM conducts § 201 inventories for a variety of purposes. The agency carries out landscape-level inventories that, *e.g.*, map soils, assess rangeland

ecology, or, importantly for this case, determine the wilderness-eligibility of BLM lands. The agency also carries out more site-specific inventories that collect or update particular information such as the presence of endangered species or cultural artifacts. App. 27-29.

Section 201 does not set deadlines for completing any particular inventory. Given the magnitude and variety of lands overseen by BLM, it would have been both impossible and pointless to set meaningful deadlines for every conceivable inventory. Consequently, Congress required that BLM "maintain" the inventory "on a continuing basis." 43 U.S.C. § 1711(a). Doing so would enable the agency to meet FLPMA's mandatory requirement that § 201 inventories "be kept current so as to reflect changes in conditions and to identify new and emerging resources and other values." *Id*.

2. Section 202

Section 202 requires that BLM develop and maintain land use plans for each BLM area. 43 U.S.C. § 1712(a). BLM's land use plans provide an orderly, public process for striking a balance among competing demands such as commercial exploitation, recreation, and environmental protection. 43 U.S.C. § 1712; 43 C.F.R. § 1601.0-2. FLPMA does not dictate how land use plans must balance competing uses. Instead, Congress directed the agency to manage its lands under

the principles of "multiple use and sustained yield." 43 U.S.C. § 1732(a); 43 U.S.C. § 1712(c)(1). "Multiple use" is defined broadly as:

> [T]he management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people; ... the use of some lands for less than all of the resources; a combination of balanced and diverse resource uses that takes into account the long term needs of future generations for renewable and non-renewable resources, including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the lands and the quality of the environment with consideration being given to the relative values of the resources and not necessarily to the combination of uses that will give the greatest economic return or the greatest unit output.

43 U.S.C. § 1702(c); *see also* 43 C.F.R. § 1601.0-5(f).

While the multiple-use mandate leaves BLM tremendous discretion in its land use planning, FLPMA requires BLM to comply with certain procedures when adopting or altering plans and requires the agency to consider, *inter alia*, the long-term versus short-term benefits of potential uses, the relative scarcity of the values involved, and the present and potential uses of lands. 43 U.S.C. § 1712(c)(5)-(7); 43 C.F.R. §§ 1610.1-.8. In addition, Congress linked the land use planning decisions to the § 201 inventory requirement by mandating that BLM "rely, to the extent it is available, on the [§ 201] inventory of the public lands, their resources, and other values." 43 U.S.C. § 1712(c)(4). This link between FLPMA's "comprehensive inventorying and land use planning provisions ... ensure[s] that

the proper multiple use mix of retained lands be achieved." *Rocky Mountain Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 739 (10th Cir. 1982) (quotation omitted).

3. Section 603

While §§ 201 and 202 apply to inventories and planning on all BLM lands, FLPMA § 603, 43 U.S.C. § 1782, applies only to BLM's review and management of lands eligible for protection under the Wilderness Act. In relevant part, subsection (a) sets a fifteen-year deadline for determining – <u>on the basis of an inventory carried out under § 201</u> – which BLM lands are eligible for wilderness designation. This fifteen-year deadline – which parallels the ten-year review deadline provided for other federal lands in the Wilderness Act, 16 U.S.C. § 1132(b), (c) – was necessary because § 201 itself contains no deadlines.

In addition to setting the deadline for BLM's initial § 201 wilderness inventory, § 603(a) requires BLM to issue a formal recommendation to the President concerning the suitability of these areas for wilderness protection. Section 603(b), in turn, requires that, within two years the President tell Congress which lands he believes should be designated as wilderness. 43 U.S.C. § 1782(b).

To safeguard Congress's prerogative to designate the wilderness-eligible lands (known as "Wilderness Study Areas" or "WSAs") as wilderness, § 603(c) requires BLM to manage WSAs so that their wilderness suitability is not "impaired." 43 U.S.C. § 1782(c). Shortly after FLPMA's passage, BLM adopted

an Interim Management Policy for Lands Under Wilderness Review (IMP), in which it set out in detail how the agency would manage WSAs. 44 Fed. Reg. 72,014 (Dec. 12, 1979).

II. THE CONTROVERSY OVER BLM'S UTAH WILDERNESS INVENTORIES

Although Utah contains some 23 million acres of BLM land, the agency completed its initial § 201 wilderness inventory in less than two years. Between 1978 and 1979, the agency determined that 14.5 million acres "clearly and obviously" lacked wilderness characteristics and dropped those lands from further wilderness review. *Utah*, 137 F.3d at 1198 (quotation omitted).[1] Within these same two years, BLM also was able to complete an intensive inventory of an additional 5.2 million acres and determine that only some 2.5 million acres would be eligible for wilderness designation and so should be managed as WSAs under § 603(c). *Id*.; Torrey, *supra* note 1, at 500-12 (describing Utah wilderness inventory process).

As BLM explained at the time, the Utah wilderness inventory was designed to "relieve[] as much land as possible from the restrictions of 603(c) in as short a time as possible." *Asarco, Inc.*, 64 I.B.L.A. 50, 54 (1982). Joyce Kelly, who

[1] BLM also performed an "accelerated inventory" of roughly 3 million acres that the agency had previously identified as "primitive" or "natural" areas. Rickey Shepherd Torrey, *The Wilderness Inventory of the Public Lands: Purity, Pressure, and Procedure*, 12 J. ENERGY, NAT. RES. ENVTL. L. 453, 453-54 n.2 (1992).

developed BLM's wilderness review and management standards in the early 1980's puts a somewhat finer point on it. According to Ms. Kelly, "political pressure on agency staff had caused inadequate inventories and sloppy work that resulted in millions of acres of wilderness-character lands being omitted from required consideration as" WSAs in Utah. App. 989. Moreover, "political appointees at the Department of Interior and the BLM planned numerous steps to undermine the protection of BLM wilderness-character lands. The plain message we were receiving from the political appointees was: 'We don't want any wilderness or WSAs.'" *Id.*[2]

BLM's initial § 201 wilderness inventories for many states were immediately challenged before the Interior Board of Land Appeals (I.B.L.A.) for ignoring or arbitrarily exempting from wilderness recommendation hundreds of thousands of acres of wilderness-quality lands. Torrey, *supra* note 1, at 515-20; 43 C.F.R. § 4.1(b)(3) (explaining role of I.B.L.A.). Several successful appeals were brought by Utah wilderness advocates. *See Utah Wilderness Ass'n*, 72 I.B.L.A. 125 (1983) (reversing BLM's inventory on 21 of 29 challenged inventory units); *Utah Wilderness Ass'n*, 86 I.B.L.A. 89 (1985) (reversing BLM determination

[2] Ms. Kelly's characterization of the Utah inventory process is consistent with the 1985 congressional testimony of a former BLM employee who warned that, "[w]e have lost well over 1½ million acres of these crown jewels of BLM lands in southern Utah through this corrupt wilderness review process." App. 859.

regarding 77,000 acres). As a result of these appeals, by 1985 over 3.2 million acres of Utah BLM lands were designated as WSAs.[3]

The debate over BLM's initial § 201 wilderness inventory in Utah, which has simmered over the years, has been recognized by BLM as its "most intractable controversy over any resource inventory." App. 872. In an effort to resolve the dispute, then-Interior Secretary Babbitt announced in 1996 that BLM would re-inventory roughly three million acres of non-WSA lands in Utah to determine their wilderness eligibility. *Utah*, 137 F.3d at 1199. This re-inventory proposal spawned this lawsuit.

III. THE PRIOR PROCEEDINGS

A. The Original District Court and Appellate Proceedings

The State of Utah *et al.* (collectively, "Utah") filed suit to stop the re-inventory in 1996. Shortly thereafter, Utah filed a motion for a TRO and preliminary injunction in which it argued that: (1) BLM violated FLPMA by failing to allow public involvement during the inventory; (2) BLM violated FLPMA and the Administrative Procedure Act by failing to allow public comment

[3] In 1991, Interior Secretary Manuel Lujan recommended that President Bush designate just 1.9 million acres of Utah BLM lands as wilderness. *Utah*, 137 F.3d at 1198-1199. Although President Bush forwarded this recommendation to Congress, no Utah wilderness bill has ever passed Congress.

before adopting the inventory procedures; and (3) BLM lacked authority to include Utah State trust lands in the inventory. *Id*. at 1200.

At oral argument, the district court *sua sponte* opined that BLM lacked statutory authority to undertake the re-inventory and, in a preliminary ruling from the bench, enjoined BLM from proceeding. App. 42-43. Because this dispositive issue was not addressed in the parties' pleadings, BLM sought leave after the hearing to file a supplemental memorandum demonstrating the agency's inventory authority. *Id*. at 43. Although the district court never responded to BLM's request, it did accept a post-hearing brief from Utah on this issue. *Id*. Shortly thereafter, the district court enjoined the re-inventory on the grounds that BLM lacked authority for the inventory and, if such authority existed, that BLM had failed to provide sufficient public participation. *Utah*, 137 F.3d at 1200-1201.

This Court vacated the injunction on the grounds that Utah lacked standing to challenge the re-inventory and instructed the district court to dismiss every one of Utah's seven inventory-related claims. *Id*. at 1205-1215. The Court then considered Utah's sole non-inventory-related cause of action, which alleged that BLM was illegally imposing "de facto wilderness management" on non-§ 603 and

non-§ 202 WSA lands.[4] Although it found Utah's lone standing declaration inadequate to demonstrate injury, this Court allowed the claim to survive because the State's "general allegations of injury based on a legally cognizable right" sufficed to carry Utah over the standing hurdle at the pleading stage. *Id*. at 1215. The Court was careful to stress, however, that its decision did not address the merits and that Utah would need to provide additional standing evidence to survive even a motion for summary judgment. *Id*. at 1216.[5]

B. The Consent Decree

This case languished for nearly five years on remand until March 31, 2003, when Utah filed a third amended and supplemented complaint ("amended complaint"). In that complaint, the State offered a fresh spate of statutory and constitutional challenges to BLM's management of the wilderness-eligible lands identified in the re-inventory. App. 65-91. In support of its motion to amend its complaint, the State declared that "[w]hile the parties have attempted to settle this case, the discussions have failed to bear fruit." App. 64. This sworn statement is difficult to square with an e-mail sent <u>the very next day</u> from Utah's counsel to

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[4] In stark contrast to the Consent Decree challenged here, Utah acknowledged during this initial appeal that BLM could create WSAs pursuant to FLPMA § 202 and protect them under the IMP. *Utah*, 137 F.3d at 1211 ("Plaintiffs assert that only those lands designated as WSAs pursuant to FLPMA § 603 or FLPMA § 202 may be managed under an IMP standard.").

[5] Freed from the district court's injunction, BLM concluded the re-inventory in 1999. The results confirmed that BLM's original § 201 wilderness inventory had grossly underestimated the amount of wilderness-eligible BLM land in Utah. BLM found that nearly 84% of the re-inventoried land qualified for wilderness designation. App. 821-25.

Bob Comer, attorney for BLM, in which she refers to the two remaining "outstanding issues" concerning settlement and to which she attached the "latest draft" settlement agreement. App. 340.

On Friday, April 11, 2003 – just nine business days after Utah filed its revamped complaint – Utah and BLM filed a proposed Consent Decree for court approval. App. 92-107. The Decree fundamentally re-interprets FLPMA's wilderness-related provisions in several important respects:

- BLM agreed that its "authority ... to conduct wilderness reviews, including the establishment of new WSAs, expired no later than October 21, 1993," the deadline for the President's wilderness recommendations to Congress (43 U.S.C. § 1782(b)), and that the agency was therefore "without authority to establish Post-603 WSAs." App. 103-104.

- BLM agreed not to "establish, manage or otherwise treat public lands … as WSAs or as wilderness pursuant to the Section 202 process absent congressional authorization." App. 105.

- BLM agreed to expunge any mention of WSA designation from certain management plans in process. *Id*.

- BLM agreed to withdraw the 2001 Wilderness Inventory Handbook and related guidance under which non-WSA wilderness-eligible lands identified during the re-inventory and elsewhere were being temporarily protected while BLM was deciding whether to impose more lasting protection through its § 202 planning process. App. 104.[6]

[6] BLM's Wilderness Inventory Handbook was originally adopted in 1978 to standardize the wilderness inventory process. *Utah*, 137 F.3d at 1198. The Handbook was later revised to detail how the agency should consider, among other things, wilderness values in later-acquired lands and new and supplemental information regarding the changed wilderness values of previously inventoried lands. App. 515-567. The provision to which Utah objected provided that BLM would not allow development to impair wilderness-eligible lands until BLM had decided whether to protect the areas through the land use planning process. App. 527.

As is plain from its terms, the Consent Decree marks a complete victory for Utah. Indeed, the Decree hands Utah victories on claims that were not presented in the amended complaint and over which the district court unquestionably lacked jurisdiction. *See Utah*, 137 F.3d at 1205-1215 (holding that court lacked jurisdiction to consider Utah's inventory-related claims).

The extraordinary rapidity with which BLM agreed to settle this case suggests that BLM's interest in settling the suit had little if anything to do with the strength of Utah's case or representation. Documents wrested from BLM through a still-pending FOIA lawsuit, *The Wilderness Society v. Norton*, No. 03-CV-01801 (D.D.C.), indicate that the Bush administration had long been considering reinterpreting FLPMA along these same lines. For example, in October 2002 and February 2003, draft directives withdrawing the Wilderness Inventory Handbook were circulating within the Interior Secretary's Office. App. 329, 336. Other documents that BLM was forced to disclose indicate that in November 2002 BLM's attorneys were mulling changes to the "Management of Public Lands with Potential Wilderness Characteristics" and the agency's view of its authority to conduct wilderness inventories. App. 330-31, 337. And in February 2003, more than a month <u>before</u> Utah filed its amended complaint, a "Wilderness Options White Paper" circulating within the Secretary's office demonstrates that the Secretary was considering revisiting the legality of designating "Section 201 and

202 Wilderness characteristics in BLM's land use plans and amendments." App. 332-35. These documents, along with the extraordinarily compressed sequence of events indicate that the Consent Decree was not the usual product of arm's-length negotiations driven by the parties' frank assessment of their chances of success, but rather BLM's using settlement as a vehicle for making a significant policy shift favored by the administration.

Although the Consent Decree would bind this and future administrations to an entirely new interpretation of FLPMA and eliminate protections for hundreds of thousands of acres of undeveloped BLM land, the district court held no proceedings to consider the agreement's legitimacy. Nor did the district court allow SUWA an opportunity to object to the Consent Decree. Instead, just five business hours after the decree was filed, the district court approved the agreement *in toto* and entered its terms as a court order. App. 108-112.

Since the Consent Decree was approved, Utah BLM has forged ahead with development proposals on wilderness-eligible land. For example, between November 2003 and February 2004, the agency sold 26 oil and gas leases in wilderness-eligible areas. App. 921-985, 992-997. Several more such leases are likely to be offered this upcoming June. In addition, on March 19, 2004, Utah BLM approved an oil and gas seismic exploration project that will involve cross-

country vehicle travel and subsurface explosive charges being detonated in two wilderness-eligible areas identified in the re-inventory. App. 986-987, 1001-1002.

SUMMARY OF ARGUMENT

The district court's entry of the consent decree must be overturned for numerous reasons. First, the Decree impermissibly relieves BLM of the injunction imposed in *Sierra Club v. Watt*, 608 F. Supp. 305 (E.D. Cal. 1985).

Second, the Consent Decree enshrines an interpretation of FLPMA §§ 201, 202, and 603 that is contrary to FLPMA's plain language. Section 603 did not, as the Consent Decree suggests, supercede or limit BLM's authority under § 201 to undertake wilderness inventories, but rather relies explicitly on BLM having exactly that authority under § 201. Nor does § 603 in any way limit BLM's discretion under § 202 to manage its lands as it sees fit, including managing areas as WSAs. Every prior administration has created WSAs under § 202 and they plainly had authority to do so.

Third, the Consent Decree violates FLPMA's land use plan amendment regulations by declaring that BLM will not accord existing § 202 WSAs the protection that they now receive under the governing land use plans.

Fourth, by committing BLM to deleting any mention of potential § 202 WSA designation from a number of ongoing NEPA analyses, the Decree conflicts

with NEPA's requirement that an agency take no action that limits its choice of reasonable alternatives.

Fifth, the district court was without authority to enter the Consent Decree because it lacked jurisdiction over the issues resolved in the Consent Decree and because the Decree contains numerous provisions that were beyond the scope of the amended complaint.

Sixth, the Decree unconstitutionally limits the discretion of future administrations to re-interpret FLPMA's wilderness-related provisions – or even return to the interpretation held by every prior administration. FLPMA does not authorize BLM to bind later administrations, and the court in this case could not have afforded Utah the sweeping relief provided in the Consent Decree because it lacked jurisdiction and because Utah failed to present substantial federal claims.

Seventh, the district court failed to make the required findings or undertake the required analysis to approve the Decree. The need for such careful analysis is particularly acute when, as here, the consent decree impacts the interests of third parties and where there is evidence suggesting that the agreement was collusive. In light of these concerns, this Court must, at the very least, vacate the entry of the Consent Decree and remand to the district court for further proceedings.

ARGUMENT

I. STANDARD OF REVIEW

A "federal court is more than a recorder of contracts from whom parties can purchase injunctions." *Local Number 93 v. City of Cleveland*, 478 U.S. 501, 525 (1986) (quotation omitted). When a consent decree implicates a statutory directive, "it is the statute – and only incidentally the parties – to which the courts owe their allegiance." *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1169 (10th Cir. 2004) (quotation omitted). Therefore, a court must carefully review a proposed consent decree to determine whether it comports with law. *United States v. Colorado*, 937 F.2d 505, 509 (10th Cir. 1991); *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (*en banc*) (a "judge must not give [a consent decree] perfunctory approval").

In reviewing a district court's approval of a consent decree, this Court applies an abuse of discretion standard. *Heuser v. Kephart*, 215 F.3d 1186, 1190 (10th Cir. 2000). The Consent Decree at issue here purports to bind BLM to a particular interpretation of FLPMA and, as such, its approval by the district court raises several purely legal issues. When a consent decree addresses legal questions, a district court abuses its discretion when it bases its approval of the decree on "an erroneous conclusion of law." *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187 (10th Cir. 2002) (quotation omitted). Whether the court

made such an error of law is reviewed *de novo*. *Feerer v. Amoco Prod. Co.*, 242 F.3d 1259, 1262 (10th Cir. 2001).

Even if the Consent Decree implicated factual issues, no deference would be due the district court's adoption of the agreement. A key rationale for deferring to a district court's approval of a consent decree is its presumed familiarity with the litigants' strategies, positions, and evidence. *See, e.g., Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1148 (8th Cir. 1999); *Moore v. Nat'l Ass'n of Sec. Dealers*, 762 F.2d 1093, 1106 (D.C. Cir. 1985) (deference accorded district court turns on, *inter alia*, court's familiarity with issues, stage of the proceeding, and type of issues involved). The district court here could not have been familiar with any of these. The Decree resolves an amended complaint filed just days earlier. No proceedings were held concerning the claims in the amended complaint and no briefing regarding the claims was ever submitted. Given the extreme rapidity with which the Consent Decree was approved and adopted, the district court could not possibly have researched the legitimacy of the new interpretation of FLPMA embodied in the far-reaching, legally complex, and constitutionally suspect agreement. In such circumstances, where the "trial court ha[s] heard no evidence at the time the consent decree was presented for his approval," "the desirability of careful review at the appellate level is manifest" because there is "no reason to defer to the trial court's greater exposure to and familiarity with" the case. *United States v. City of*

Alexandria, 614 F.2d 1358, 1362 (5th Cir. 1980); *see also Stovall v. City of Cocoa*, 117 F.3d 1238, 1243 (11th Cir. 1997) (remanding consent decree that implicated constitutional issues); *In re Masters Mates & Pilots Pension Plan & IRAP Litig.*, 957 F.2d 1020, 1026 (2d Cir. 1992) (*de novo* review where "novel issues" of law are presented by a consent decree).

De novo review is particularly appropriate here because the consent decree significantly impacts third parties and the public interest in wildlands protection more generally. *See Bass v. FSLIC*, 698 F.2d 328, 330 (7th Cir. 1983) ("usual deference to consent decrees simply does not apply" when interests of non-litigants affected).

II. THE CONSENT DECREE CONFLICTS WITH THE MANDATORY INJUNCTION ENTERED IN *SIERRA CLUB v. WATT*.

A "district court is without jurisdiction to afford relief from a mandatory injunction issued from a federal district court in another circuit." *Carter v. Attorney Gen.*, 782 F.2d 138, 142 (10th Cir. 1986) (quotation omitted). The district court's approval of the Consent Decree in this case violates this bedrock principle and so must be vacated.

Sierra Club v. Watt, 608 F. Supp. 305 (E.D. Cal. 1985), arose when then-Secretary of Interior Watt issued an order that, *inter alia*, withdrew WSA status from 158 areas that were smaller than the 5,000-acre minimum set out in FLPMA § 603(a). *Id*. at 312. The order also declared that because these so-called "Watt-

drop" areas – which covered more than 340,000 acres in ten states – no longer enjoyed WSA status under § 603, they would be opened up to the full range of potential development allowed under FLPMA's multiple-use mandate. *Id*. at 312 & n.9, 338-339 & n.67.

The district court upheld Secretary Watt's decision to withdraw § 603 WSA status from these areas because they were not eligible for WSA designation under § 603, the sole authority cited by former Secretary Andrus's 1980 order formally creating the WSAs. *Id*. at 340. However, the court rejected Secretary Watt's assumption that the withdrawal of the areas' § 603 WSA status necessarily left the areas open to development. Because Secretary Andrus had determined that less-than-5,000-acre areas could be studied for potential WSA designation under FLPMA § 202, the nullification of the flawed 1980 order returned the areas to their status as areas being studied for potential designation as § 202 WSAs, under which status the areas were protected by the IMP. *Id*. at 341.

The *Watt* court accordingly entered the following injunction:

> The Secretary of Interior shall manage all less than 5,000 acre lands previously included by Secretary Andrus in his November 14, 1980, order and deleted by Secretary Watt in his December 30, 1982, order, pursuant to the nonimpairment mandate protocol specified in the W[ilderness] I[nventory] H[andbook] and IMP for potential inclusion as WSA's unless and until the Secretary exercises his discretion in a manner permitted by law to change that status ... .

Id. at 344. Because there was no appeal, this injunction remains in force today.

Although the court ordered BLM to manage the Watt-drop areas "pursuant to the nonimpairment mandate protocol specified in the ... IMP," the Consent Decree here orders BLM to "refrain from applying the IMP ... to BLM lands other than Section 603 WSAs." App. 106. Because binding Tenth Circuit precedent prohibits the District of Utah from lifting a mandatory injunction entered by another district court, the district court's entry of the Consent Decree must be vacated.[7]

III. THE CONSENT DECREE IS ILLEGAL.

A court may not approve a consent decree unless the decree "further[s] the objectives of the law upon which the complaint was based." *Local 93*, 478 U.S. at 525; *see also System Fed'n No. 91 v. Wright*, 364 U.S. 642, 651 (1961) ("it was the ... Act, and only incidentally the parties, that the District Court served in entering the consent decree"). Therefore, a court may not approve a consent decree that is inconsistent with the law at issue. *Local 93*, 478 U.S. at 526 ("parties may [not] agree to take action that conflicts with or violates the statute upon which the complaint was based"); *Colorado*, 937 F.2d at 509. Nor, of course, may a court approve an agreement that is inconsistent with other federal law.

[7] Although the *Watt* injunction conflicts with only a portion of the Consent Decree, this Court must vacate the entire Decree rather than deleting only the offending portions. *See Colorado*, 937 F.2d at 509-510.

In carrying out its *de novo* review of the Decree's legality, this Court should not defer to the new interpretation of FLPMA agreed to by BLM. *See FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) ("The court, rather than blindly following the agency's lead, must make its own inquiry into the issue of reasonableness before entering judgment."). Instead, "the true measure of the deference due depends on the persuasive power of the agency's proposal and rationale, given whatever practical considerations may impinge and the full panoply of the attendant circumstances." *Id*. (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 84 (1st Cir. 1990). Because the interpretation of FLPMA agreed to by BLM in the Consent Decree conflicts with the statute's plain terms, is contrary to the agency's historic interpretation, violates NEPA, and was arrived at through a closed-door settlement, no deference is due. *See Barnhart v. Walton*, 535 U.S. 212, 219-222 (2002); *Skidmore*, 323 U.S. at 140.

A. The Consent Decree Is Contrary To FLPMA.

1. The Consent Decree Is Inconsistent With § 201.

The Consent Decree declares that FLPMA § 603 provides the sole authority for BLM "to conduct a wilderness review for the purpose of identifying and preserving public lands ... recommended to Congress for wilderness." App. 100-101; *see also id*. at 103 (declaring that BLM's authority "to conduct wilderness

reviews ... expired no later than October 21, 1993, with submission of the wilderness suitability recommendations to Congress pursuant to Section 603"). This view of the statute ignores the broad inventory power conferred in § 201, fundamentally misreads § 603, conflicts with BLM's decades-long interpretation of FLPMA, and is contrary to the interpretation by every other relevant federal agency of the Wilderness Act's analogous wilderness review provision.[8]

a. The Consent Decree Conflicts With The Plain Language Of §§ 201 And 603.

Section 201 requires that BLM:

> Prepare and maintain on a continuing basis an inventory of all public lands and their resource and other values (including, but not limited to, outdoor recreation and scenic values) .... This inventory shall be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values.

43 U.S.C. § 1711(a) (emphases added). This provision sets no limit on what resources BLM may inventory or the purpose that an inventory may serve. To the contrary, Congress required BLM to inventory "all" of the public lands and consider their "resource and other values." Congress could not have chosen

[8] The Decree also conflicts with the principle that the mere presence of a statutory deadline does not necessarily eliminate an agency's power to act after the deadline. *See Brock v. Pierce County*, 476 U.S. 253, 258-265 (1986); *Gallagher v. NTSB*, 953 F.2d 1214, 1220-24 (10th Cir. 1992); *Twin Pines Coal Co. v. United States Dep't of Labor*, 854 F.2d 1212, 1216-17 (10th Cir. 1988).

broader terms.[9] Furthermore, rather than setting inventory deadlines, Congress directed BLM to "maintain" the inventories "on a continuing basis." Only by doing so could BLM satisfy FLPMA's mandate that the agency keep abreast of "changes in condition" and be able to "identify new and emerging resource and other values."

Because § 201 sets no limit on the subject of inventories, and because it requires that inventories be conducted on a "continuing" basis, the Consent Decree's declaration that BLM's power to conduct wilderness inventories expired in 1993 can be upheld only if § 603 severely limits or supplants the § 201 inventory power. Section 603 does neither.

Contrary to the Consent Decree, § 603 does not authorize a distinct, one-time-only, wilderness inventory that expired fifteen years after FLPMA's creation. The plain language of the statute sets a fifteen-year deadline for the Secretary to review the lands "identified during the inventory required by section 1711(a) of this title [*i.e.*, § 201] as having wilderness characteristics described in the Wilderness Act ...." 43 U.S.C. § 1782(a) (emphasis added). Thus, § 603 simply sets a deadline for BLM's review of the results of an inventory carried out under

[9] The broad scope of § 201 comports with the statutorily-required use of the inventory information during the § 202 land use planning process in which BLM chooses amongst the full range of multiple uses. *See* text *supra* at 7-9.

§ 201.[10] *See Christensen v. Harris County*, 529 U.S. 576, 582-585 (2000) (interpreting analogous provision as establishing a "minimal guarantee" for implementation of the statute, rather than limiting the powers conferred under the statute). Rather than the two distinct inventory provisions in §§ 201 and 603 that the Consent Decree imagines, there is only the single inventory provision in § 201 and a deadline in § 603 for the review of a wilderness inventory carried out under § 201.

It is clear, therefore, that rather than eliminating BLM's ability to carry out wilderness reviews under § 201, § 603 explicitly relies upon BLM's having just that power. If BLM could not carry out wilderness inventories under § 201, then there would have been nothing upon which the agency could have based the wilderness review and recommendations to the President required by § 603(a).

b. The Consent Decree Conflicts With BLM's Historic Interpretation Of FLPMA.

Further undermining the Consent Decree's restrictive interpretation of § 201 is the fact that it is contrary to BLM's long-held view – adopted immediately after FLPMA's passage in 1976 – that the agency may conduct wilderness inventories under § 201. By the late-1970's, BLM had adopted a Wilderness Inventory

[10] The fifteen-year deadline was necessary because Congress believed that there was an "[u]rgent need" for the "inclusion of BLM lands in the Wilderness System." App. 884 (House Report). Absent a hard deadline, there was no guarantee that this "urgent need" would be satisfied because, as noted above, § 201 sets no deadlines.

Handbook to guide the initial § 201wilderness inventory process and an IMP to guide WSA management. Both documents recognized BLM's authority under § 201 to inventory less-than-5,000-acre areas – areas that would not have been eligible for WSA designation under § 603. *See Watt*, 608 F. Supp. at 310-311; App. 343, 346 (1978 Wilderness Inventory Handbook's description of BLM's inventory policy for less-than-5,000-acre areas); 44 Fed. Reg. 72,014, 72,015 n.1, 72,018 (Dec. 12, 1979) (IMP's description of the same). These contemporaneous and formal interpretations, rather than BLM's reinterpretation in the Consent Decree, deserve deference. *See Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Rosette, Inc. v. United States*, 277 F.3d 1222, 1230 (10th Cir. 2002).

BLM's continued belief during the Reagan administration that § 201 authorized wilderness inventories is evident in a series of I.B.L.A. decisions. *See, e.g., Michael Huddleston*, 76 I.B.L.A. 116, 120 (1983) (characterizing § 201 as "requir[ing]" BLM "to identify, during the inventory process, areas of the public lands which exhibit wilderness characteristics"); *Tri-County Cattleman's Ass'n*, 60 I.B.L.A. 305, 311 (1981) ("we believe BLM was entirely correct in adopting the 'less than 5,000 acre' policy for identification of wilderness areas during the inventory phase"). This position was reiterated in a Department of Interior Solicitor's Memorandum entitled: Wilderness Review of Lands Placed Under Bureau of Land Management Administration After October 21, 1976, which

concludes that BLM has discretion under § 202 to review land acquired after the enactment of FLPMA for wilderness preservation, even though § 603 does not mandate such review. App. 424-428. As the opinion explains, "the fact that wilderness review [of after-acquired areas] is not mandated by section 603(a) does not preclude the Secretary from choosing to do so." App. 427.

Furthermore, the government has advanced this position repeatedly in litigation. In *Marathon Oil Co. v. Babbitt*, 966 F. Supp. 1024 (D. Colo. 1997), *aff'd* 166 F.3d 1221 (10th Cir. 1998), for example, BLM argued that § 201 "requires the Secretary on an ongoing basis continually to reinventory ... public lands for wilderness ... values." App. 259. In doing so, BLM pointed out that FLPMA's definition of "multiple use" and its preamble "declare a congressional intent that public lands be continuously reinventoried for their wilderness values." App. 259-260. Most tellingly, BLM argued in support of its historic reading of § 201 in its earlier briefing in this Court in this case. App. 47 (arguing that Utah's claim that BLM lacked authority to carry out wilderness inventories "ignore[es] the plain language of Section 201").

c. The Consent Decree Conflicts With Other Agencies' Interpretation Of The Wilderness Act's Analogous Review Provision.

The Consent Decree also conflicts with the interpretation by the Forest Service, Fish and Wildlife Service, and National Park Service of the Wilderness

Act's precisely analogous wilderness review deadline. Like FLPMA, the Wilderness Act sets a deadline – in that case ten years – for federal agencies to conduct a wilderness inventory. 16 U.S.C. § 1132(b), (c). Although the deadlines in the Wilderness Act are functionally identical to the deadline in § 603, all three agencies have always understood that that they have continuing authority to undertake wilderness review.

For example, the National Park Service's (NPS's) formal Management Policies declare that "[a]ll lands administered by [NPS], including new units or additions to existing units since 1964, will be evaluated for their suitability for inclusion within the national wilderness preservation system." App. 575. For new areas or additions, the "assessment must be completed no later than one year after the establishment of the park or the acquisition of new lands." *Id*. And "[f]or existing parks in which wilderness suitability determinations have never been undertaken, the superintendent must complete the suitability assessment within one year of the effective date" of the 2001 management policy book. *Id.*[11] NPS also has committed to reviewing "lands that were originally assessed as non-suitable for

[11] NPS has also committed to restudying existing parks that already have had surveys completed because of the possibility of changed conditions. *See* App. 575, 588 (NPS statement that "[b]ecause of past lapses, expansion of the National Park System, and changed circumstances, wilderness review is an ongoing affirmative NPS obligation"), 600-601 (listing parks "where changed conditions may warrant a review").

wilderness because of a non-conforming or incompatible use[] ... if the non-conforming uses have been terminated or removed." *Id.*[12]

The Fish and Wildlife Service (FWS) adopted a similarly broad view of its wilderness inventory authority on the National Wildlife Refuge System. FWS's Refuge Planning Policy requires that refuges create and review comprehensive conservation plans (CCPs) every fifteen years. 65 Fed. Reg. 33,892, 33,895, 33,910 at § 3.2 (May 25, 2000). "Concurrent with the CCP process," the Policy declares, "we will conduct a wilderness review and incorporate a summary of the review into the CCP.... If a Wilderness Study Area is identified, proceed with the study and recommendation phases of the review." *Id*. at 33911 at § 3.4(C)(1)(c).[13]

In order to guide these wilderness reviews, FWS developed a draft wilderness review and management policy whose stated purpose is "to implement the Wilderness Act of 1964 within the [National Wildlife Refuge] System." 66 Fed. Reg. 3708 (Jan. 16, 2001). The draft declares that:

> At a minimum, we will conduct wilderness reviews every 15 years through the CCP process. We generally conduct wilderness reviews within 2 years of acquiring acreage ... that may qualify as wilderness. A review would be appropriate when we have restored significant acreage to its natural conditions sufficiently that it meets the definition of wilderness.

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[12] NPS has applied these policies to numerous areas over the last fifteen years. *See* App. 743-756.

[13] FWS has applied this wilderness review approach repeatedly. *See* App. 801-820.

Id. at 3725. Furthermore, in order to keep current with changing conditions, the policy declares that "if additional information becomes available, if we have acquired additional lands, or if restoration activities have significantly modified System lands, we may conduct a wilderness review." *Id*.

Like its sister agencies, the Forest Service has interpreted the Wilderness Act's review deadline as allowing for expanded and continuing wilderness reviews. Although the Wilderness Act only required the Forest Service to review designated primitive areas, 16 U.S.C. § 1132(c), the Forest Service decided to study the wilderness potential of all previously unclassified roadless areas larger than 5,000 acres. App. 860-870 (Forest Service history of its wilderness management). As the agency has since explained, "[i]t has been the judgment of the Forest Service that nothing in the [Wilderness] Act prohibits the administrative review of land for possible wilderness classification by Congress," even where those lands are not specifically described in the Wilderness Act. App. 870; *see also* App. 861-862.

In addition to broadening the scope of its wilderness reviews, the Forest Service has continued to review its lands for potential wilderness designation and recommend wilderness designation, notwithstanding the ten-year deadline in the Wilderness Act. For example, the Service carried out a second roadless area review in the late 1970's, which was the basis for numerous wilderness areas

designated by Congress. Charles F. Wilkinson and H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 1, 349-351 (1985). Such Forest Service action, like the wilderness review actions of the NPS and FWS described above, would be illegal if the Consent Decree's interpretation of FLPMA were applied to the Wilderness Act's analogous deadline provision.

2. The Consent Decree Misinterprets FLPMA § 202.

The Consent Decree declares that BLM "will not establish, manage or otherwise treat public lands, other than Section 603 WSAs … as WSAs … pursuant to the Section 202 process." App. 105; *see also* App. 104 (Consent Decree declaration that BLM lacks "authority to establish Post-603 WSAs"). This restrictive reading of § 202 contradicts FLPMA's plain language and is contrary to decades of interpretation from every prior administration.

a. The Consent Decree Conflicts With The Plain Language Of § 202

Section 202, FLPMA's land use plan provision, requires that BLM manage its lands under the principles of "multiple use and sustained yield." 43 U.S.C. § 1712(c)(1); 43 U.S.C. § 1732(a); *supra* at 7-8. As this Court has recognized, this multiple-use mandate leaves BLM with near-unbounded management latitude. *See, e.g.*, *Pub. Lands Council v. Babbitt*, 167 F.3d 1287, 1305 (10th Cir. 1999) (FLPMA's multiple-use mandate leaves BLM with "considerable administrative flexibility"), *aff'd* 529 U.S. 728 (2000); *Rocky Mountain*, 696 F.2d at 738. Other

courts have reached the same conclusion. *See Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1182-83 (9th Cir. 1990); *Natural Resources Defense Council v. Hodel*, 624 F. Supp. 1045, 1058 (D. Nev. 1985), *aff'd*, 819 F.2d 927 (9th Cir. 1987) (FLPMA's multiple-use mandate "breathes discretion at every pore") (quoting *Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979)). This discretion has proved so great that no court at any level has held that BLM violated FLPMA's multiple-use mandate.

Absolutely nothing in § 202 or in the multiple-use requirement limits BLM's discretion to manage areas to preserve them for potential wilderness designation by Congress. To the contrary, FLPMA requires that the agency's planning weigh the long-term versus short-term benefits of potential uses, the relative scarcity of the values involved, and the present and potential uses of lands. 43 U.S.C. § 1712(c)(5)-(7); 43 C.F.R. §§ 1610.1-.8. All of these considerations could encompass WSA-level protection. The multiple-use mandate's requirement that BLM account for the "long term needs of future generations for ... non-renewable resources," including, "recreation, ... wildlife and fish, and natural scenic, scientific and historical values," lends further support. 43 U.S.C. § 1702(c).

BLM's ability to create § 202 WSAs was recognized in *Sierra Club v. Watt*, the only case to directly consider the issue. *See supra* at 22-23. In reversing Secretary Watt's decision to open the less-than-5,000-acre areas to potential

development, the court noted that BLM had "correctly" concluded that "nothing in the law precluded the Secretary from recommending that [roadless areas under 5,000 acres] be designated for permanent wilderness status" because "pursuant to sections 202 and 302 of FLPMA, the Secretary of Interior had discretion to determine the management protocol for these lands." *Watt*, 308 F. Supp. at 340; *see also id*. at 341 (stating that the prior Secretary's designation of areas smaller than 5,000 acres as WSAs was "an exercise of the discretion given him by sections 202 and 302, a discretion he clearly had").[14]

There is nothing in FLPMA § 603 that limits BLM's discretion to preserve areas under § 202 for potential wilderness designation. Indeed, § 603 makes no mention whatsoever of § 202 planning. This is hardly surprising since the sections serve different purposes. Section 603 reflects Congress's "urgent need" to ensure that BLM's largest and most wilderness-eligible lands be made part of the wilderness system under the Wilderness Act. *Supra* at 28 n.10. To that end, Congress mandated in § 603 that BLM promptly consider the wilderness-eligibility of its largest areas and, in § 603(c), mandated that BLM protect the areas until Congress determined whether to designate them as wilderness.

[14] Section 302 requires that BLM manage its land under multiple-use principles and that the agency "prevent unnecessary or undue degradation of the lands." 43 U.S.C. § 1732(a),(b).

The fact that Congress carefully prescribed BLM's treatment of the largest of its existing lands does not mean, as the Consent Decree supposes, that Congress, by implication alone, eliminated BLM's discretion for all time to afford similar protections to areas that, for example, were smaller than the 5,000-acre minimum in § 603(a), or that were acquired by BLM through a land exchange after the original 1991 wilderness inventory deadline in § 603(a). Nor is there any hint that Congress in § 603 meant to prevent BLM from extending WSA-level protections to lands that, like many of the 2.6 million acres of wilderness-eligible land uncovered through the Utah re-inventory, were wrongly denied WSA designation in the early 1980's as a result of politically driven wilderness inventories.

b. The Consent Decree's Interpretation Of § 202 Conflicts With That Of Every Prior Administration.

As noted above, the first Interior Secretary to interpret FLPMA, Secretary Andrus, interpreted FLPMA as providing him with the authority to designate § 202 WSAs. *Supra* at 22-23 (discussing *Sierra Club v. Watt* and the recognition in the 1978 Wilderness Inventory Handbook that roadless areas less than 5,000 acres could be inventoried for WSA designation); *see also* App. 532 (same recognition in 2001 Wilderness Inventory Handbook). BLM's first IMP likewise recognized that BLM could create and manage § 202 WSAs. *See* 44 Fed. Reg. 72,014, 72,015 n.1, 72,018 (Dec. 12, 1979).

This interpretation continued throughout the Reagan administration. For example, BLM recognized in a long line of I.B.L.A. decisions that the agency was authorized to designate and protect § 202 WSAs. *See The Wilderness Soc'y*, 81 I.B.L.A. 181, 184 (1984); *N.M. Natural History Inst.*, 78 I.B.L.A. 133, 135 (1983); *Michael Huddleston*, 76 I.B.L.A. at 120; *State of Nevada*, 62 I.B.L.A. 153, 158 (1982); *Tri-County Cattleman's Ass'n*, 60 I.B.L.A. at 314-15 & nn. 11-13; *Save the Glades Comm.*, 54 I.B.L.A. 215, 219 (1981). Nor was this position limited to I.B.L.A. decisions. After Secretary Watt revoked the designation under § 603 of the "Watt-drop" areas, he issued a series of formal Instruction Memoranda to BLM's state directors in 1982 and 1983 that emphasized the agency's ability to protect these areas under § 202. *See* App. 377-412.[15] And when Sierra Club challenged the revocation of § 603 WSA status for these areas in *Sierra Club v. Watt*, BLM's pleadings reiterated the agency's expansive view of § 202. App. 166-175, 194, 207-209, 214-216.

Secretary Watt's successors in the Reagan administration maintained this position. For example, when he was questioned at a congressional hearing about

[15] Many BLM state directors subsequently created § 202 WSAs. *See, e.g.*, 48 Fed. Reg. 33,056 (July 20, 1983) (California); 48 Fed. Reg. 21,209 (May 11, 1983) (Utah); 48 Fed. Reg. 21,000 (May 10, 1983) (Montana); 48 Fed. Reg. 20,509 (May 6, 1983) (Wyoming); 48 Fed. Reg. 16,975 (Apr. 20, 1983) (Arizona); 48 Fed. Reg. 12,842 (March 28, 1983) (Oregon); 48 Fed. Reg. 11,346 (March 17, 1983) (Colorado); 48 Fed. Reg. 3879 (Jan. 27, 1983) (New Mexico).

the management of the "Watt-drop" areas, Interior Secretary Clark noted that BLM had already re-designated 146,000 acres as WSAs "under authority of Section 202 of FLPMA." Hearings on Public Land Management Policy, Hearings before House Committee on Interior and Insular Affairs, Subcommittee on Public Lands and National Parks, 98th Cong., Serial No. 98-8, Part 8, App. III at 802 (1984). Indeed, the Reagan administration created or expanded § 202 WSAs throughout its tenure. *See* App. 827, 829-851 (GAO report's list of 148 WSAs created in whole or in part under § 202 during Carter, Reagan, and George H.W. Bush administrations).

Succeeding administrations have continued to inventory for wilderness potential and to designate § 202 WSAs. *See*, *e.g.*, 58 Fed. Reg. 45,528 (Aug. 30, 1993); *The Wilderness Soc'y*, 119 I.B.L.A. 168, 170-172 (1991); 56 Fed. Reg. 41,370 (Aug. 20, 1991); App. 315-328. And, at least until the Consent Decree was filed in this case, it was the considered and formal opinion of the Interior Department's solicitor that "BLM may designate new WSAs in accordance with section 202." App. 511. The contrary view in the Consent Decree has no legal basis whatsoever.

B. The Consent Decree Violates FLPMA's Land Use Plan Amendment Requirements.

Each BLM area is governed by a legally binding land use plan. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a). If BLM wants to relieve itself of a

management duty or restriction contained in a land use plan, the agency must follow the plan amendment or revision processes prescribed by regulation, one of which requires the agency to first prepare a NEPA analysis – either an environmental impact statement or a less-detailed environmental assessment – to consider the potential environmental impacts of the proposed change. 43 C.F.R. §§ 1610.5-4 to –6.

Since FLPMA's passage in 1976, BLM has recognized scores of WSAs in its § 202 land use plans. App. 302-328, 826-851. The Consent Decree, however, provides that the agency "will not ... manage or otherwise treat public lands, other than Section 603 WSAs … as WSAs … pursuant to the Section 202 process." App. 105; *see also* App. 106 (providing that BLM will not apply the IMP to "BLM lands other than Section 603 WSAs," by which the Decree is referring to WSAs created through the original inventory process in the early 1980's). Under BLM's existing land use plans, however, BLM is legally obligated to apply the IMP's protections to formally designated § 202 WSAs. *See, e.g.*, App. 273-274, 300-301, 310-311. While BLM can remove these WSA protections by amending its land use plans in accordance with the agency's regulations, it may not circumvent the amendment processes by entering into a secretly negotiated Consent Decree.

Furthermore, even if the Consent Decree had provided that BLM would prepare a NEPA analysis and comply with the plan amendment requirements prior

to eliminating § 202 WSAs – rather than immediately eliminating § 202 WSAs as the Decree purports to do – the agreement would still violate NEPA. NEPA is premised on the assumption that a review of the environmental impacts of an action and its alternatives will lead to more environmentally sound decision-making. *See* 40 C.F.R. § 1500.1(c) (NEPA's purpose "is not to generate paperwork – even excellent paperwork – but to foster excellent action"). If an agency is bound to a particular decision under a Consent Decree, NEPA's environmental analysis, public participation, and especially its range-of-alternatives requirement would be a charade; none of the analysis's results or public comment could affect the foreordained outcome. Consequently, courts have rejected decisions based on NEPA analyses where the agency was committed from the start to a particular decision. *See, e.g.*, *Davis v. Mineta*, 302 F.3d 1104, 1112 (10th Cir. 2002) (rejecting highway project decision where "defendants prejudged the NEPA issues"); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000) (rejecting action that agency had committed beforehand in writing to support because a NEPA analysis "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made").

C. The Consent Decree Violates NEPA.

When a NEPA process is underway, "no action concerning the proposal shall be taken which would ... limit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a)(2). When a proposal concerns the management of wilderness-eligible lands, one legal and reasonable alternative is the designation of some or all of the area as a WSA under § 202, as shown by the creation of numerous § 202 WSAs in the past.

When the Consent Decree was entered, BLM had begun the NEPA process for a number of land use plans in Utah, including plans for the Vernal, Price, and Richfield Districts. BLM had announced in public documents that it would consider an alternative in the NEPA analyses for each of those plans that would include § 202 WSA designation. App. 262-263, 266, 268-269.[16] The Consent Decree, however, explicitly rules out the consideration of any such alternative and commits BLM to deleting any reference to possible WSA designation from the Utah NEPA documents released thus far. App. 105 (Consent Decree), 270 (Federal Register notice deleting WSA references).

By committing BLM to ignoring possible WSA designation in the NEPA analyses for three Utah land use plans, the Consent Decree violated NEPA's requirement that the agency not "limit the choice of reasonable alternatives" when

a NEPA process is underway. 40 C.F.R. § 1506.1(a)(2). Moreover, by prohibiting the agency from ever establishing additional § 202 WSAs, the Consent Decree will necessarily "limit the choice of reasonable alternatives" in the future whenever BLM is considering management proposals for wilderness-eligible lands.

Because the Consent Decree conflicts with NEPA in this respect, the Decree must be vacated.

IV. THE DISTRICT COURT LACKED JURISDICTION TO ENTER THE CONSENT DECREE.

"[A] consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction." *Local 93*, 478 U.S. at 525; *see also Diaz v. Romer*, 961 F.2d 1508, 1510-11 (10th Cir. 1992). Jurisdiction exists only if the plaintiff has Article III standing. *See, e.g.*, *Baca v. King*, 92 F.3d 1031, 1035 (10th Cir. 1996). In addition, in determining whether a consent decree's provisions are within the court's subject-matter jurisdiction, courts examine whether the decree comes "within the general scope of the case made by the pleadings." *Local 93*, 478 U.S. at 525; *see also Diaz*, 961 F.2d at 1511.

Because Utah lacked standing to pursue the issues resolved in the Consent Decree, and because much of the Consent Decree lies beyond the "general scope of the case," the Decree must be vacated.

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[16] Indeed, when BLM agreed to the Consent Decree, the agency was considering § 202 WSA designation in 28 of the 80 land use plans under consideration at the time. App. 339.

A. This Court Has Already Held That The District Court Lacked Jurisdiction To Consider BLM's Inventory Authority.

Perhaps the most striking feature of the Consent Decree is its declaration that the sole authority for BLM wilderness reviews comes from § 603 and that this authority expired in 1993. App. 98, 103-104. With this concession, BLM handed Utah a victory that the State could not possibly have won through litigation because this Court had already held that Utah lacked standing to challenge BLM's inventory power. *Supra* at 13-14. Given this Court's earlier standing decision, the district court plainly lacked jurisdiction to resolve a dispute over BLM's § 201 inventory power.

Similarly beyond dispute is the fact that the Consent Decree's wilderness inventory provisions resolve a dispute that lies outside the "general scope of the case made by the pleadings." None of the claims in Utah's amended complaint challenge BLM's inventory power. App. 65-91. And to the extent any of the claims could be read to do so, their inclusion was plainly improper under this Court's standing decision and dismissal order.

B. The Consent Decree Provisions Concerning The Management Of Existing WSAs Are Beyond The Scope Of The Amended Complaint.

The sole claim that survived this Court's 1998 decision was that BLM was managing non-WSAs in Utah as "de facto wilderness." *Utah*, 137 F.3d at 1215-1216. Although Utah expanded this claim in its amended complaint, none of

Utah's claims concern the management of existing WSAs. Rather, all of Utah's challenges concern the management of the "re-inventory" lands; *i.e.*, the 2.6 million wilderness-eligible acres identified in BLM's re-inventory. As Utah itself recognized when it was negotiating the settlement with BLM, "our case is not really about the scope of 603(c) for existing WSAs." App. 340. "Do we risk seeing the agreement set aside by taking on this issue[?]" Utah's attorney worried. *Id*.

Utah's concern was entirely warranted. A court may only approve a consent decree that is within the general scope of the pleadings, which in this case, by Utah's own admission, does not reach as far as the management of existing WSAs. The Consent Decree, however, does affect existing WSAs – indeed, it affects the management of every single § 202 WSA nationwide – by prohibiting BLM from "establish[ing], manag[ing] or otherwise treat[ing] public lands … as WSAs ... pursuant to … Section 202." App. 105. Because this sweeping provision reaches far beyond the scope of the amended complaint, the Consent Decree must be vacated.

Furthermore, Utah has never presented the slightest evidence that it has standing to challenge the management of any existing WSA in the State. Nor has it presented evidence – and it is difficult to imagine how any such evidence could exist – to show its standing to challenge existing § 202 WSA management <u>in other</u>

states. Because Utah has never proven its standing, the Consent Decree must be vacated.

C. Utah Lacks Standing To Challenge BLM's Management Of Re-Inventory Areas.

Utah's amended complaint alleges that the State is harmed by: (1) reduced revenues from mineral leasing on federal and state lands in Utah; and (2) the inability of counties to maintain roads on public lands because of BLM actions, App. 74, 79-83, 85-87. These allegations cannot support Utah's standing.

Utah's claim that it is suffering decreased revenues from mineral leasing stems from its belief that, but for BLM's protective management of the re-inventory areas under the 2001 Wilderness Inventory Handbook, the agency would be issuing additional mineral leases. App. 74, 79-81, 84-87. However, this Court has held repeatedly that a complaint challenging a federal agency's failure to offer a competitive lease is non-justiciable because, even assuming harm to the plaintiff, the courts may not redress the harm by ordering a federal agency to lease particular parcels of public lands. *See Baca*, 92 F.3d at 1036-37; *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 882 (10th Cir. 1992); *Ash Creek Mining Co. v. Lujan*, 969 F.2d 868, 874 (10th Cir. 1992). This precedent dictates that, even if Utah were correct in its interpretation of FLPMA, the harms it has alleged would not be redressable for standing purposes because there is only a speculative possibility that the federal government might lease the lands in question for mineral

development, and this Court may not order the federal agencies to enter into such leases.[17]

Any harm from alleged interference with counties' maintenance of roads within the re-inventoried federal lands is similarly unredressable. The reason why counties cannot, in some instances, maintain what they claim as county roads across re-inventoried lands has nothing to do with the re-inventory or with BLM's authority to create § 202 WSAs. The counties' inability to do the roadwork they desire is based instead on BLM's view that county roadwork on BLM land outside of formally recognized county rights-of-way requires prior BLM authorization. As BLM explained to Utah in a pending lawsuit concerning road management on BLM lands, "any disturbance of the surface of federal land requires authorization from the BLM." App. 238; *see also* App. 249.

The counties' inability to do unpermitted roadwork in the re-inventoried areas has nothing whatsoever to do with BLM's interpretation of any FLPMA provisions at issue in this case. Because the resolution of the issues raised in

[17] Utah also alleges that BLM has delayed or refused drill permits and mining plans on existing leases. App. 79, 87. The State, though, has failed to provide any examples of such delays sufficient to show a concrete and particularized harm. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992).

Utah's amended complaint will not alleviate the alleged road-related harm, Utah cannot satisfy the redressability prong of the standing test.[18]

V. THE CONSENT DECREE IS UNCONSTITUTIONAL

As this Court recently emphasized, the "Constitution neither compels nor permits" the creation of "an agreement forged by a private group with a former administration" that would "strip both Congress and the Executive of their discretionary powers." *Biodiversity Assocs.*, 357 F.3d at 1172. Accordingly, "[t]he executive branch does not have authority to contract away the enumerated constitutional powers of Congress or its own successors." *Id*. The Consent Decree contradicts this fundamental principle by committing future administrations to a particular interpretation of FLPMA, any deviation from which would expose them to potential contempt proceedings. BLM's Consent Decree, therefore, "violate[s] the democratic structure of government" and "should be repudiated" as unconstitutional. Michael W. McConnell, *Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change*, 1987 U. CHI. LEGAL F. 295, 297.

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[18] Utah also alleges that BLM's actions have harmed counties by interfering with their land-use planning. App. 69, 81, 83. Counties, though, have no right to impose their land use plans on federal land where those plans would conflict with federal law. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 580-81 (1987) (citing *Kleppe v. New Mexico*, 426 U.S. 529, 543 (1976)); *Wyoming v. United States*, 279 F.3d 1214, 1226-27 (10th Cir. 2002).

Article II of the Constitution "vests significant discretionary authority in the President, and through him in subordinate executive officers." *Id*. at 300. The President is limited to four-year terms of office, for a maximum of two. U.S. Const. Art. II, § 1; *id*. amend. XXII, § 1. Thus, "[a]t the end of his term, the authority of a President and his Administration comes to an end. Any attempt by a President to exert legal control over the powers of his successors, unless specifically authorized, is a violation of these constitutional provisions." McConnell, *supra*, at 300; *see also* Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 35-37. To hold otherwise would undermine democratic accountability because a new administration, whose policy positions may differ and may reflect the wishes of the majority of voters, must be able to reconsider earlier policies and legal interpretations without the consent of plaintiffs and without the threat of contempt citation. This concern led the Seventh Circuit to vacate a consent decree that required Chicago to allocate funds to pay interest on adverse tort judgments. *Evans v. City of Chicago*, 10 F.3d 474, 475-76 (7th Cir. 1993) (en banc). Judge Easterbrook, joined by four other judges, noted that:

> Although the decree purports to last for all time ... democracy does not permit public officials to bind the polity forever. What one City Council enacts, another may repeal; what one mayor decrees during his four-year term, another may revoke. Today's lawmakers have just as much power to set public policy as did their predecessors. 'Chicago' speaks through its elected representatives, and the people are free to upset even the most enlightened

> policies of earlier times. The current mayor wants to be free of his predecessor's commitment, concluding that more flexibility over budgets will promote the public welfare. People of good will could be on either side of this disagreement; each mayor may have correctly perceived the needs of the moment.

Id. at 478.[19]

No law "specifically authorizes" BLM to bind future administrations to the novel interpretation of FLPMA in the Consent Decree. BLM, therefore, may not restrict the discretion of future administrations to re-interpret the statute. *See Wilbur v. Kadrie*, 281 U.S. 206, 216-17 (1930) (rejecting argument that, absent statutory authority, actions of prior administrations can restrict the power of future administrations); *Evans*, 10 F.3d at 478 ("Consent alone is insufficient to support a commitment by a public official that ties the hands of his successor."); McConnell, *supra*, at 303 (noting that the Constitution rarely "permits executive decisions that bind future legal discretion").[20]

Consent decrees are animated not only by the consent of the parties that enter into them but also by the judicial power of the courts. *Local 93*, 478 U.S. at

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[19] *See also Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1134 (D.C. Cir. 1983) (Wilkey, J., dissenting) (in order to preserve the "democratic nature of our Republic, American courts have never allowed an agency chief to bind his successor in the exercise of his discretion."); *Nat'l Audubon Soc'y v. Watt*, 678 F.2d 299, 305 n.12 (D.C. Cir. 1982) (noting same concern).

[20] That BLM attempts to impose that restriction in a Consent Decree is irrelevant. *See* Easterbrook, at 37 (limits on the executive's power to bind future administrations "exist independent of the form in which the government's action is to be pledged"); *id*. at 31 n.18 (agreeing with McConnell that "a party should not be able to do by consent decree what he may not do by contract").

519. Therefore, even if the executive branch cannot consent to a decree that restricts the discretion of future administrations to interpret federal law, such a consent decree may be adopted if the court could have arrived at the same interpretation of the law in a final judgment.[21] Federal courts have regularly applied this principle to consent decrees that would require state or local officials to violate state or local law. Since the officials cannot consent to legal violations, courts have concluded that such decrees are permissible only if the court could have mandated the violations in a final judgment. *See, e.g., People Who Care v. Rockford Bd. of Educ. School Dist. No. 205*, 961 F.2d 1335, 1337 (7th Cir. 1992) (stating that litigants may not "agree to disregard valid state laws," and proceeding to evaluate whether the consent decree would have been possible as a remedial measure); *Overton v. City of Austin*, 748 F.2d 941, 957 (5th Cir. 1984) ("Absent a properly grounded judicial determination that the present charter provisions are illegal, the consent of the parties provides an insufficient basis on which to judicially ordain a different system of council election and composition.").

Because the Consent Decree in the instant case would bind future administrations to a particular legal interpretation – which the current

[21] However, when, as here, "litigants seek to grant themselves powers they do not hold outside of court," the court must be "especially cautious." *See League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 846 (5th Cir. 1993) (*en banc*); *see also* Easterbrook, *supra*, at 33-34 ("The concern about the use of consent decrees should be greatest" where consent decrees purport to bind future officials because of the risk that current officials are seeking to expand their powers to bind third parties.).

administration lacks the authority to do – the Decree must be rejected unless all of its terms could have been properly ordered by the district court. McConnell, *supra*, at 301-02. In contrast, "to the extent that a consent decree contains elements that differ from or go beyond what a court could order in a litigated judgment, it has no more force than any other agreement between a government official and a private party," which in this case would be no force at all. *Id*. at 302.

There are two fundamental reasons why the district court in this case could not have imposed the terms of the Consent Decree in a final litigated judgment. First, plaintiffs lacked standing to raise the legal claims resolved by the Consent Decree, particularly the wilderness-inventory claims that this Court has already deemed beyond the court's reach. *See supra* at 12-13.

Second, even assuming *arguendo* that Utah had standing to pursue the claims resolved in the Consent Decree, the entry of the Decree would be unconstitutional because Utah did not raise a "substantial federal claim" sufficient to trigger the court's jurisdiction. As the Seventh Circuit has noted, "a settlement of a dispute about the meaning of [federal] law may be enforced if the agreement compromises genuine uncertainties, for then the public official actually may be enhancing or preserving the powers of the democratic branch (by avoiding a worse outcome after trial)." *Evans*, 10 F.3d at 478-49 (emphasis added). However, because there is a risk that parties might rely on non-substantial federal claims to

obtain court approval of a consent decree in order to increase improperly their own powers or achieve some other policy end, courts have carefully examined whether there is a "substantial federal claim" raised by the plaintiffs that would justify the exercise by the courts of their remedial powers. *Id.* at 479; *see also id*. at 480 ("entry and continued enforcement of a consent decree regulating the operation of a governmental body depend on the existence of a substantial claim under federal law"); *David B. v. McDonald*, 116 F.3d 1146, 1149-50 (7th Cir. 1997) (reiterating *Evans*); *People Who Care*, 961 F.2d at 1337-39 (examining whether there was a violation of federal law that would justify a consent decree that would allow defendants to disregard prior contracts and state law); *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341-42 (7th Cir. 1987) (requiring "at least a probable violation of [federal] law" to justify entry of decree).

Furthermore, even if there is a "substantial federal claim," the courts will carefully examine the consent decree because "any federal decree must be a tailored remedial response to illegality." *League of United Latin Am. Citizens*, 999 F.2d at 847. Absent such examination, a consent decree could be used to increase the powers of the parties in a way that the court could not have provided in a final judgment on the merits.

SUWA has demonstrated that Utah failed to raise any substantial federal claim in its amended complaint. *Supra* at 24-43. The Consent Decree's

interpretation of FLPMA contradicts the statute's plain terms, its prior interpretation, caselaw, the overall purposes of the Act, and a number of other statutes. Because it is highly improbable that plaintiffs would have been successful on the merits of all of their claims, the Consent Decree must be rejected as unconstitutional.

VI. THE DISTRICT COURT FAILED TO MAKE THE REQUIRED FINDINGS OR UNDERTAKE THE REQUIRED ANALYSIS TO APPROVE THE CONSENT DECREE.

District courts are required to provide a reasoned judgment, analysis, and findings to support the approval of a consent decree. As the Supreme Court has noted, "[i]t is essential ... that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler-plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law." *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 434 (1968); *see also United States v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 279-81 (1st Cir. 2000) (applying this requirement); *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989) (remanding a district court's approval of a consent decree where "[t]here is no indication in the record that the trustee or the courts did any legal research or made any attempt to properly separate the issues and evaluate the facts").

The requirement that a district court carefully review proposed consent decrees in order to determine whether there is a legal violation and an appropriate remedy is heightened when, as here, the decree would impact third party interests. *See City of Miami*, 664 F.2d at 447 (reviewing consent decree that would alter a collective bargaining agreement, and stating that it was "not prepared to hold that the consent decree is valid insofar as it deprive[d]" the union of promotion procedures guaranteed under the agreement without a "show[ing] that the City's practices have discriminated against individuals in or members of the affected class in such a way as adversely to affect their promotions").[22]

The district court's failure to provide SUWA the chance to challenge the consent decree also contravenes the Supreme Court's conclusion that "an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree." *Local 93*, 478 U.S. at 529. Although SUWA moved to intervene before the proposed Consent Decree was

[22] *See also United States v. City of Hialeah*, 140 F.3d 968, 975-84 (11th Cir. 1998) (applying *City of Miami* to a consent decree that would affect seniority rights of third parties); *TBG Inc. v. Bendis*, 36 F.3d 916, 925 (10th Cir. 1994) (rejecting consent decree that would harm non-settling defendants and noting that "the interest in settlement does not justify depriving third parties of their statutory rights"); *Evans*, 10 F.3d at 480 (courts "insist[] that the litigants establish a probable violation of federal law before the court may enter a consent decree that affects the rights of third parties").

filed, and specifically sought a formal opportunity to voice its objections (Dkt. 181, 192), the district court never provided it the "fair opportunity to present relevant facts and arguments to the court, and to counter the opponent's submissions," to which SUWA was entitled. *Comunidades*, 204 F.3d at 278 (quotation omitted). This omission is particularly glaring given the significant legal and constitutional issues implicated by the Consent Decree.

The need for careful district court review and consideration of intervenors' objections is especially appropriate in this case because there are serious doubts concerning whether the decree meets this Circuit's requirement that it be "fair, adequate, and reasonable." *Colorado*, 937 F.2d at 509; *see also Gottlieb v. Wiles*, 11 F.3d 1004, 1015 (10th Cir. 1993) ("It is the responsibility of the proponents of the settlement to provide sufficient evidence to support a conclusion that the settlement is fair."), *overruled in part on other grounds, Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Gottlieb*, 11 F.3d at 1015 ("district court must independently analyze the evidence before it in making a determination; it may not rely solely upon assertions of the proponents of the settlement as to what the evidence shows").

In determining whether a decree is "fair, reasonable, and adequate," courts review the likelihood of plaintiff's success on the merits and the benefits the plaintiff achieved in the consent decree. *See, e.g.*, *Rutter*, 314 F.3d at 1188; *United*

States v. North Carolina, 180 F.3d 574, 581 (4th Cir. 1999); *United States v. Akzo Coatings*, 949 F.2d 1409, 1435 (6th Cir. 1991). That review counsels the rejection of the Consent Decree here. As discussed above, Utah's chances of prevailing in its challenge to BLM's long-held interpretation of FLPMA were vanishing small, particularly as to claims for which Utah lacked standing and for which the State therefore, had no chance of success. By acceding to each of Utah's demands in the Consent Decree, BLM surrendered all in exchange for nothing. This Court may not approve such a decree. *Cf. Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 283-84 (7th Cir. 2002) (rejecting a proposed consent decree because it required members of the plaintiff class to surrender "potentially substantial claims" for "no consideration").[23]

There are also questions concerning whether the negotiations leading up to the settlement were the product of arm's-length negotiations. *See Rutter*, 314 F.3d at 1188 (district courts must examine whether a class-action settlement is "fairly and honestly negotiated"); *Comunidades*, 204 F.3d at 280 (considering whether

[23] When the outcome of litigation is certain, a rational defendant may choose to settle to avoid the cost of litigation. Courts, therefore, have considered the possible time and expense of litigation when approving consent decrees. *See Rutter*, 314 F.3d at 1188. In this case, though, the outcome of at least some claims was certain given this Court's 1998 standing decision. The remaining legal claims would have been resolved via relatively inexpensive summary judgment proceedings – the cost of which would be particularly low because BLM had already briefed many of the legal issues in the earlier appeal.

parties had "an arm's length, good faith bargaining record"); *Colorado*, 937 F.2d at 509 ("district court must ensure that the agreement is not ... a product of collusion"); *Cannons Eng'g*, 899 F.2d at 86 (court should consider the "candor, openness, and bargaining balance" of the negotiation). The extraordinary rapidity with which the far-reaching agreement was reached in this case, in tandem with evidence that the administration had long been considering re-interpreting FLPMA's wilderness-related provisions along these same lines, suggests that the Consent Decree was not the product of hard-fought negotiation, but rather an agreement between two like-minded parties to a shift in statutory interpretation and land management that each desired. *Supra* at 14-17.

The Wilderness Society filed freedom of information requests with the Interior Department to determine whether the agreement was a product of collusion or negotiation. Those requests have been met with persistent refusals and delays, and The Wilderness Society has had to resort to litigation – which is still pending – to obtain information. Given these concerns, SUWA should be allowed to conduct discovery before the Consent Decree is approved. *See In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1123-29 (7th Cir. 1979) (remanding to district court for discovery concerning the propriety of negotiations leading to settlement of a class-action lawsuit).

SUWA believes that this Court ought to reject the Consent Decree outright on the grounds that it conflicts with FLPMA, NEPA, the Constitution, and the injunction in *Sierra Club v. Watt*. However, if this court does not reject the Consent Decree outright on legal grounds, it should, for the reasons above, remand with instructions that the district court allow SUWA to conduct discovery and present its objections to the Decree. If it chooses this course, this Court must vacate the approval of the Consent Decree pending the resolution of the district court proceedings. *See Sanguine, Ltd. v. United States Dep't of Interior*, 798 F.2d 389, 391-92 (10th Cir. 1986).

CONCLUSION

For the reasons stated above, SUWA respectfully requests that this Court vacate the district court's approval of the Consent Decree.

STATEMENT REGARDING ORAL ARGUMENT

This case presents fundamental issues concerning the interpretation of FLPMA, the scope of a federal agency's power to settle litigation, and the role of the courts in assessing proposed consent decrees. Because this Court's resolution of these issues will have far-reaching consequences for the management of millions of acres of federal land and for the courts' consideration of consent decrees more generally, SUWA believes that it is absolutely essential that this Court hold oral argument in this appeal.

Respectfully submitted April 5, 2003.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that the Opening Brief of Southern Utah Wilderness Alliance *et al.* is proportionately spaced and contains 13,929 words.

Respectfully submitted April 5, 2003.

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