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Rule 26.1 Corporate Disclosure Statement

Appellees the State of Utah and the Utah School and Institutional Trust Lands Administration ("SITLA") are state government entities. The Utah Association of Counties ("UAC") is a not-for-profit organization that represents county governments in Utah.

Rule 28.2 Statement of Prior or Related Appeals

The case of *State of Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998) ("*Utah*"), reversed the District Court's order enjoining the Bureau of Land Management ("BLM") from completing the wilderness reinventory on the grounds that the Utah did not have standing to challenge the inventory. *Id.* at 1207. This Court held that Utah had standing to pursue the *de facto* wilderness management claim. *Id.* at 1215.

RESPONSE BRIEF FOR STATE OF UTAH, UTAH SCHOOL AND INSTITUTIONAL TRUST LANDS ADMINISTRATION AND THE UTAH ASSOCIATION OF COUNTIES

The Appellees, the State of Utah, Utah School and Institutional Trust Lands Administration ("SITLA"), and the Utah Association of Counties ("UAC"), on behalf of its members (collectively "Utah") file this response to the opening brief of Appellants, Southern Utah Wilderness Alliance, The Wilderness Society, the New Mexico Wilderness Alliance, the Arizona Wilderness Coalition, Friends of Nevada Wilderness, the Colorado Environmental Coalition, Natural Resources Defense Council, the Biodiversity Conservation Alliance, the California Wilderness Coalition, and the Idaho Conservation League (collectively "SUWA"). The legal argument incorporates the continuing objections to extra-record material submitted by SUWA in the re-filed brief and that of *amici.*

OPINION BELOW

The District Court's order dismissing the case incorporates the findings of fact and conclusions of law set forth in the Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint. [App. 0092-0107].

STATEMENT OF JURISDICTION

This Court does not have jurisdiction over the appeal. Motion to Dismiss filed June 27, 2003 by Utah. This Court, moreover, should not exercise jurisdiction.

SUWA raises issues here for the first time without showing extraordinary circumstances that warrant waiving the rule. *Hill v. Kan. Gas. Serv. Co.,* 323 F.3d 858, 866 (10th Cir. 2003).

QUESTIONS PRESENTED

1. Whether this Court must dismiss the appeal, because SUWA failed to preserve the issues for appeal.

2. Whether SUWA misreads the Settlement Agreement to apply to wilderness study areas ("WSAs") established pursuant to the Federal Land Policy and Management Act ("FLPMA"), Section 603 wilderness review, when it does not,, and further misreads the Settlement Agreement as precluding inventory of wilderness resources, when the agreement does not change BLM's inventory authority.

3. Whether the District Court had subject matter jurisdiction.

4. If this Court reaches the appeal merits, whether the District Court abused its discretion in approving the settlement reached by Utah and the Department of the Interior ("DOI"), Bureau of Land Management ("BLM") ("Federal Appellees" or "DOI" or "BLM").

5. If this Court entertains the legal issues raised by SUWA for the first time in this appeal:

a. Whether the District Court was obligated to hold a hearing before approving the Settlement Agreement, when SUWA failed to file a motion to set aside the Settlement Agreement.

b. Whether the Settlement Agreement is consistent with FLPMA objectives and may afford greater remedies than a court could order.

c. Whether the Settlement Agreement violates FLPMA by adopting an interpretation that concludes that the authority to conduct a wilderness review expired October 1991 and, thus, BLM has no authority to create new WSAs.

d. Whether the Settlement Agreement is unconstitutional, because it binds future administrations to a legal interpretation.

e. Whether the Settlement Agreement violates the National Environmental Policy Act ("NEPA") and FLPMA by limiting the range of future alternatives to be considered by the BLM as it amends or revises its resource management plans ("RMPs").

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, Disposition in the Court Below

Utah filed the original complaint on October 16, 1996 to challenge DOI's Utah wilderness reinventory and the "interim management or *de facto* wilderness policy" for Utah public lands that were not WSAs but were included in congressional

wilderness proposals. [App. 001]. The District Court enjoined the wilderness reinventory and DOI appealed. *Utah,* 137 F.3d at 1199-1201.

From January 1997 until this Court's reversal of the preliminary injunction on March 3, 1998, Utah proceeded with discovery and sought summary judgment on the reinventory Claims 1-5, [App. 0011], while DOI responded with a motion to dismiss for lack of standing, ripeness, and final agency action. [App. 0012].

This Court held that FLPMA §201(a), 43 U.S.C. §1711(a), which authorizes BLM to conduct resource inventories, did not require public involvement and thus, Utah lacked standing to challenge the wilderness inventory. *Utah*, 137 F.3d at 1207-14. Utah did have standing, however, to pursue its claim with respect to *de facto* wilderness management. *Id.* at 1215-16. This Court rejected DOI's argument that it had ongoing authority pursuant to Section 603 to study public lands for new WSAs on the grounds that it had not made that argument in the District Court and DOI Secretary Babbitt had conceded that the FLPMA §603 wilderness review authority had expired. *Id.* at 1206; [Supp. App. 000046].

On remand, Utah filed a second amended complaint [App. 0018], and pursued its remaining claim using discovery and independent investigation of the transactions disclosed in the BLM records. Utah submitted a proposed stipulation of facts to determine whether a trial was necessary. [Supp. Rec. 000018]. A few weeks later,

DOI counsel asked Utah to submit a settlement proposal. [Supp. Rec. 000051-52]. The Utah settlement proposal incorporated recent developments, including the management direction for the wilderness inventory areas ("WIAs"), the Wilderness Inventory and Study Procedures Handbook-2001 ("2001 WIH"), and BLM wilderness study direction dated January 12, 2001. *Id.*

When settlement discussions failed to bear fruit by October 2002, Utah negotiated a new discovery and briefing schedule, which incorporated an agreement on the scope and content of additional discovery to address new facts and new claims. [App. 0020; Supp. Rec. 000019]. On March 14, 2003, Utah submitted the draft amended complaint to Department of Justice ("DOJ") to secure DOJ's consent. [Supp. Rec. 000054]. The proposed case management schedule was filed on March 17, 2003 and approved on March 19, 2003. [App. 0020]. DOI produced its first discovery response on March 28, 2003. [*Id.*] Utah filed the third amended complaint on March 31, 2003. [*Id.* 0021, 0065-0091].

In late March 2003, DOI asked Utah to submit a settlement proposal. Utah and DOI filed the settlement and stipulation ("Settlement Agreement") and joint motion to dismiss on April 11, 2003. [*Id.* 0022] The District Court signed the order of dismissal, which incorporated the Settlement Agreement, and its stipulation of facts and conclusions of law on April 14, 2003. *Id.*

Appellants sought to intervene on April 10, 2003 and April 15, 2003, respectively.[1] SUWA filed a motion for leave to file objections on April 15, 2003. [App. 0022-0023].

On May 2, 2003, SUWA filed a motion for a status conference to set a scheduling order, filed an amended proposed answer to include seven cross-claims, which were identical to those in the proposed answer filed April 14, 2003, and a reply to the Utah intervention response. [*Id.* 0023-0024]. On June 9, 2003, SUWA filed a motion to vacate the Settlement Agreement. Utah opposed the motion, stating the motion or appeal was premature. [*Id.* 0025]. The District Court granted both motions to intervene on June 12, 2003. *Id.* SUWA filed the first notice of appeal on June 13, 2003, and an amended notice of appeal at 4:30 p.m. deleting the denial of intervention as a grounds for appeal. [*Id.*]. SUWA did not pursue the seven cross-claims that were lodged on June 13, 2003 or the pending motions.

B. <u>Statement of Facts</u>

Utah does not repeat the facts pertaining to the wilderness review program and the Utah wilderness controversy. *Utah*, 137 F.3d at 1197-1200. This statement covers pertinent background and the most significant factual disputes.

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[1] Appellants originally filed as two separate groups, although their papers were very similar and they were represented by the same counsel. [App. 0023-0024].

BLM Regulatory Actions 1998 to 2003

BLM issued the wilderness reinventory report in February 1999. [SUWA Add. 0714]. The report identified 146 so-called wilderness inventory areas ("WIAs," involving a total of 3.6 million acres, of which 3.1 million acres were federal land and 529,260 acres were Utah trust lands. *Id.* BLM concluded that all but 16% had wilderness character. *Id.*

As a result, the DOI Solicitor directed BLM to protect wilderness resources in the WIAs. [Utah Add. 000001.] BLM did not approve mineral lease sales for lands that were within WIAs and delayed related development actions. [App. 0078-83, 086-87].

BLM adopted the 2001 WIH in January 2001. [SUWA Add. 0393]. BLM also issued direction requiring all BLM offices to consider new WSAs as part of the plan revision process. [*Id.* 0047.] The 2001 WIH and direction converted the Utah controversy to one of national significance.

In Utah, BLM required BLM to not act on any project that might impair the WIAs' wilderness character. [Supp. Add. 000114-119]. The Utah BLM field offices added new WSAs to the Utah RMP revision list of scoping issues. 66 Fed. Reg. 14415 (Mar. 21, 2001); 66 Fed. Reg. 55202 (Nov. 1, 2001); 66 Fed. Reg. 56343 (Nov. 7, 2001).

Myth: Utah Wilderness Reinventory Necessary to Correct Flaws

This case concerns about 3.6 million acres of public lands in Utah that SUWA seeks to have protected as wilderness, either by Congress or BLM. These lands were not classified as WSAs, because BLM determined, in many cases after two or three evaluations, that they did not met the definition of wilderness in the Wilderness Act, 16 U.S.C. §1131(c).

About half of the 146 WIA units were originally found to lack wilderness character in 1980 and were never the subject of a protest or appeal. 46 Fed. Reg. 15086 (Mar. 3, 1981) (listing final WSAs). The lack of a protest or appeal shows that there was no reasonable doubt that these areas did not meet the definition of wilderness.

Other Utah BLM wilderness inventory decisions were contested through 1985. The BLM reviewed protests, made revisions, and reconsidered WSA decisions after Interior Board of Land Appeals ("IBLA") ruled. *Utah*, 137 F.3d at 1198, n.3 (partial list of citations). BLM changed its WSA decisions in other cases. *See e.g., Sierra Club,* 62 IBLA 263, 272 (1982)(remanding Negro Bill for reconsideration); *Red Rock 4-Wheelers*, 75 IBLA 140 (1983)(affirming BLM decision releasing portion of unit); 47 Fed. Reg. 40489, 40792 (Sept. 9, 1983) (affirming release of land from WSA

status). After remand, BLM decisions were often not appealed. *E.g.*, 48 Fed. Reg. 46858 (1983) (Mt. Pennell).

About half of the WIA units are adjacent to WSAs and were excluded based on the re-evaluation cited above. For example, the Desolation Canyon WIA is really nine separate areas that were removed due to development, including an operating railroad. Newfoundland Mountains was excluded due to military overflights. *Utah Wilderness Assn.,* 86 IBLA 89, 92-93 (1985).

SUWA attempts to contradict this history with a declaration of a former BLM employee alleging that the original Utah wilderness inventory was flawed and politically tainted.[2] SUWA11; SUWA Add. 0793-0796. Utah renews its motion to strike as to both the argument and the declaration affidavit. They are irrelevant, immaterial, and outside the record. The declaration deals with the original inventory decisions announced on November 1980, not the changes cited above. Moreover, this case concerns the approval of the Settlement Agreement, not whether BLM's WSA decisions 20 years ago were correct. Both the argument and declaration lack

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[2] SUWA claims that BLM acted hastily to remove nonimpairment management from the public lands. SUWA11, citing *ASARCO, Inc.*, 64 IBLA 50, 54 (1982). SUWA relies on argument by DOI counsel, not a finding. The more credible discussion in *Cotter Corp. in Utah v. Andrus*, 486 F.Supp. 995, 1003 (D. Ut. 1979), concluded that BLM reasonably decided to do the wilderness resource inventory first, because it had a deadline of October 1991 to complete the wilderness review and there was no statutory deadline to complete the FLPMA RMPs.

credibility given congressional testimony and the administrative record. *See e.g.* [Supp. App. 000002-0000017].

Myth: BLM Always Construed FLPMA Section 202 As Authorizing Wilderness Review

The FLPMA §202 WSAs established before 1991 were pursuant to and an integral part of the FLPMA §603 wilderness review. No one suggested that BLM had independent authority to conduct additional wilderness reviews under FLPMA §202 until SUWA began a lobbying campaign to urge BLM to do so. In 1993, SUWA urged DOI to reconsider the Utah wilderness recommendations made by President Bush in 1992 and to support the proposed wilderness designations set forth in H.R. 1500, which at that time proposed approximately 5.7 million acres of wilderness. *Utah*, 137 F.3d at 1199, n.4. SUWA also met with DOI officials, including the Solicitor's Office, to promote its legal theory that FLPMA §§201 and 202, authorized a wilderness reinventory and new WSAs. [Supp. App. 000042-43; Supp. Rec. 000001]. SUWA also objected to BLM decisions, which might affect alleged wilderness qualities, and urged DOI to protect these lands. [Supp. App. 00018-21]. DOI Secretary Babbitt did just that on November 1, 1993. [Supp. App. 00022]. BLM construed this order to manage the public lands within H.R. 1500 as if they were WSAs. [Supp. App. 000031].

In early 1994, SUWA submitted a legal memorandum advocating the use of Section 202 planning authority to establish new WSAs. [Supp. App. 000024-30]. In discovery, Utah received a faxed duplicate of this memo without the cover letter or author, suggesting that BLM adopted SUWA's legal theory as its own. [Supp. App. 000032-41]. SUWA urged DOI to protect all H.R. 1500 public lands by overriding the RMP decisions and requiring the Utah State Director to approve any decision affecting these public lands. *Id.*

BLM documents show that BLM rejected numerous requests to nominate lease tracts, solely because the tracts were located within H.R. 1500 boundaries or WIAs. [App. 0074,0079-81, 0086-87]. Utah BLM employees strongly objected, because the policy contradicted the RMP management objectives and asked the State Director to provide written direction. [Supp. Rec. 00003-5]. In two cases, BLM offered the leases for sale after modifying the description to exclude the H.R. 1500 land. [App. 0074] Thus, but for the *de facto* wilderness management or "interim management" policy for the WIAs, these public lands would have been offered for sale. This policy did not apply to public lands not identified as WIAs.

Settlement

Settlement negotiations began in early 2001 and continued for two years. [Supp. Rec. 000051]. From the outset, the discussions encompassed the issues resolved in the

Settlement Agreement, including management of the WIAs, the 2001 WIH, related direction, and proposed RMP revisions. *Id.* Utah moved to reopen discovery in the fall of 2002, when it appeared that settlement efforts failed. [Supp. Rec. 000019]. Once Utah and DOI agreed to discovery and a case schedule, Utah sent DOI a draft of the proposed amended complaint. [Supp. Rec. 000054]. DOI resumed settlement discussions shortly thereafter. After intense and sustained negotiations, the parties reached agreement in the early hours of April 11, 2003. [Supp. Rec. 000053].

SUMMARY OF ARGUMENT

1. This appeal must be dismissed, because SUWA failed to preserve the issues raised in this Court. The arguments in SUWA's opening brief were never briefed or addressed by the District Court. Despite its flurry of filings in the District Court, SUWA counsel inexplicably failed to file a motion to reconsider the order approving the settlement under Rule 59(e) or 60 and SUWA abandoned its pending motions when it filed this appeal.

2. SUWA misinterprets the Settlement Agreement. The settlement does not apply to pre-1993 WSAs and does not violate the injunction in *Sierra Club v. Watt*, 608 F.Supp. 305, 344 (E.D. Calif. 1985). The Settlement Agreement repeatedly recognizes BLM's authority to conduct resource inventories, including wilderness.

3. The District Court had subject matter jurisdiction. Utah's complaint alleges facts establishing injury in fact, its causal connection to DOI's actions, and the nexus between the relief sought and the alleged harm. Recent U.S. Supreme Court decisions hold that the uncertainty of the ultimate outcome does not defeat redressability for standing.

4. Even if this Court were to consider SUWA's appeal, it must affirm the District Court's approval of the settlement, because the District Court did not abuse its discretion.

a. The District Court was not required to hold a hearing, since this was not a class action, bankruptcy case, or a pollution case, under which rules or statute require hearings to approve a settlement. SUWA cannot blame the District Court for its failure to file a timely motion and brief to reconsider under Rule 59(e) or 60 and its premature move of this case to the appellate court, which abandoned the pending motions.

b. The Settlement Agreement conforms to the criteria in *Local No. 93, Intl. Assn. of Firefighters of AFL-CIO v. City of Cleveland*, 478 U.S. 501, 525-26 (1986) ("*Local No. 93*"), because it is within the general scope of the complaint and consistent with FLPMA's objectives.

c. The stipulated findings document address the fairness, reasonableness, and adequacy of the Settlement Agreement. SUWA's charges of collusion are contradicted by facts.

5. Alternatively, and only if this Court reaches the legal issues raised by SUWA, approval of the Settlement Agreement must still be affirmed.

a. The Settlement Agreement concludes that BLM authority to conduct a wilderness review is found only in FLPMA §603 and that this authority expired when BLM completed the review and the President submitted his recommendations to Congress in 1992. This interpretation mirrors the language in FLPMA, conforms to BLM's implementation of FLPMA, and is consistent with prior decisions.

b. The Settlement Agreement does not unconstitutionally bind future administrations in the exercise of statutory discretion. SUWA and *amici* rely on a minority view and a now-rescinded Justice Department settlement policy. The Settlement Agreement does not involve a discretionary matter. Neither FLPMA §202 or §603, grants BLM discretion to conduct ongoing wilderness reviews or to establish new WSAs.

c. The Settlement Agreement does not violate NEPA, because identifying new WSAs was a scoping issue not a proposed action or alternative and the Settlement

Agreement is an entirely separate action from that proposed action. Moreover, NEPA does not apply to settlements.

d. The Settlement Agreement does not violate the FLPMA planning rules because it does not change management of pre-1993 WSAs established under either FLPMA §202 or §603, and directs that management be consistent with existing RMPs.

I. ARGUMENTS RAISED FOR THE FIRST TIME ON APPEAL ARE WAIVED

A. Issues On Appeal Must Be Preserved In The District Court

Absent extraordinary circumstances, this Court will not consider issues or arguments raised for the first time on appeal. *Hill v. Kan. Gas. Serv. Co.,* 323 F.3d at 866. This rule applies to an intervenor's appeal of a settlement. *See Anderson v. HHS,* 907 F.2d 936, 946 n.14 (10th Cir. 1990); *New Mexico Citizens for Clean Air v. Espanola Mercantile Co.*, 72 F.3d 830, 832 (10th Cir. 1996).

This Court should dismiss the SUWA appeal, because SUWA did not present its arguments to the District Court and so they were not preserved. *EDF v. Costle*, 636 F.2d 1229, 1255 n.90 (D.C. Cir. 1980) (appellant's failure to object to the lack of notice and comment for original settlement barred appeal). While the issues were listed in the amended answers as cross-claims [App. 0025; Supp. App. 0000102, 0000121], they were not "argued" nor were they "passed upon below" by the District Court. *Jenkins v. Wood*, 81 F.3d 988, 996 (10th Cir. 1996); *In re Walker,* 959 F.2d 894,

896 (10th Cir. 1992). SUWA's appeal divested the District Court of jurisdiction before it could hear SUWA's legal challenges to the Settlement Agreement. *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1148 (10th Cir. 1991). The motions that SUWA did file did not make legal arguments relevant to the issues in this appeal and SUWA abandoned its motions objecting to the Settlement Agreement when it appealed. [App. 0022-0023, 0025].

B. Haste to Appeal Prevented Establishment of Proper Record

The proceedings chronology suggests that SUWA filed the appeal to reach a forum more to its liking rather than, as claimed, "to preserve their ability to challenge [the] approval of the settlement agreement." [App. 0025]. As a proposed intervenor, SUWA had 10 days from the date of the Dismissal Order to file a motion to alter or amend approval of the settlement pursuant to Fed. R. Civ. P. 59(e).[3] *See e.g., U.S. v. South Bend Community School Corp.*, 511 F.Supp. 1352, 1359 (N.D. Ind. 1981); *Neuman v. Blue Cross/Blue Shield of Greater NY*, 55 B.R. 707, 709 (S.D. N.Y. 1985).

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[3] Motions to alter or amend the judgment under Rule 59(e) question the correctness of a judgment on some material point of fact or law, and may properly be cast as a motion to reconsider, to vacate, to set aside, for re-argument, or for rehearing. *See St. Paul Fire and Marine Insurance Co. v. Continental Casualty Co.*, 684 F.2d 691 (10th Cir. 1982), *overruled on other grds.,* 97 F.3d 434 (10th Cir. 1996).

A Rule 59(e) motion would have also tolled SUWA's time to appeal. F.R.A.P. 4(a)(4)(iv).[4]

SUWA erroneously blames the District Court for not giving SUWA the chance to present objections to the Settlement Agreement, when SUWA never laid out its objections. SUWA 55-56. While SUWA filed a motion for leave to file objections and later a motion to vacate the Settlement Agreement, it never stated the grounds for relief or provided supporting authority as required by Local Rule 7(b)(1). [App. 0022-23]. SUWA later filed a motion to vacate the order approving the Settlement Agreement but abandoned that motion when it appealed. Even assuming SUWA missed the deadline for a motion to alter or amend the judgment inadvertently, SUWA could have filed a motion to set aside the settlement pursuant to Rule 60 and sought an extension of the appeal deadline. Inexplicably SUWA failed to file either motion and blames the District Court for its mistakes by claiming that the District Court never gave it a chance. On these facts, this Court should consider SUWA's arguments waived. Each of the arguments raised by the *amici* on appeal are also waived. *Wyoming Farm Bureau Federation v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000).

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[4] An applicant-intervenor may request additional time to appeal. *Thurman v. FDIC*, 889 F.2d 1441, 1448 (5th Cir. 1989); *Wolpe v. Poretsky*, 144 F.2d 505, 508 (D.C.Cir. 1944).

C. No Extraordinary Circumstances Exist To Warrant Overlooking Waiver

Exceptions to the waiver rule are rare and generally limited to cases when the jurisdiction of a court to hear a case is questioned, sovereign immunity is raised, or when the appellate court feels it must resolve a question of law to prevent a miscarriage of justice. *Hicks v. Gates Rubber Co.,* 928 F.2d 966, 970 (10th Cir. 1991); *Gundy v. U.S.*, 728 F.2d 484, 488 (10th Cir. 1984). This Court rarely grants an exception, because:

> The facilitation accorded appellate review by having the District Court first consider an issue is important. . . It is also unfair to the opponent if one party is allowed to argue an issue not raised in the trial forum. We think such a practice leads to unfair surprise in the appellate court and would, if allowed, require us to frequently remand for additional evidence gathering and findings. The need for finality in litigation and conservation of judicial resources counsels against exceptions.

Hicks, 928 F.2d at 970-71.

D. Vacating Settlement Pending Appeal Unsupported

Nor does the decision of *Sanguine, Ltd. v. U.S.DOI,* 798 F.2d 389, 391 (10th Cir. 1986), support SUWA's argument that this Court must first "vacate the approval of the Consent Decree pending the resolution of the District Court proceedings." SUWA 59. Unlike the facts in *Sanguine*, SUWA is not appealing the denial of intervention. The District Court granted intervention and, thus, SUWA was not denied the right to challenge the Settlement Agreement. *See U.S. v. Allegheny-Ludlum Industries, Inc.*,

63 F.R.D. 1, 5 (N.D. Ala. 1974). The demand that the settlement be vacated pending the challenge gives SUWA the relief that it seeks without any basis for doing so.

II. SETTLEMENT AGREEMENT MISCONSTRUED

A. Settlement Does Not Affect Pre-1993 §202 WSAS

SUWA and *amici*[5] collectively argue that the Settlement Agreement requires Defendants to "refrain from applying the IMP. . . to BLM lands other than Section 603 WSAs" and this will cut off IMP protection for pre-1993 WSAs.[6] SUWA 22-24. SUWA and *amici* appear to deliberately misread the agreement by taking one sentence out of context to create a false sense of urgency. Their conclusions are flatly wrong and their arguments that the settlement is unlawful for various reasons fail. *See* SUWA22-24 (mandatory injunction); 39-40 (judicial standards); 44-46 (planning rules); and 54-58 (NEPA). The Settlement Agreement clearly preserves IMP protection for pre-1993 WSAs.

In response to the decision in *Watt*, 608 F.Supp. at 344, BLM (pursuant to FLPMA §202) restored IMP management for the 13 pre-1993 WSAs that were originally classified as Section 603 WSAs and then dropped. [Supp. Rec. 000029-30];

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[5] *See* Hicks 14n.3.

[6] Pursuant to FLPMA §603(c), 43 U.S.C. §1782(c), "Interim Management Policy" or IMP defines WSA management so as to not impair the area's suitability for wilderness.

50 Fed. Reg. 23526 (June 4, 1985).[7] Utah contends in the present case that FLPMA §202, is not valid authority to create WSAs after the Section 603 mandate expired, so Utah does not challenge the 13 pre-1993 WSAs in the present action. Utah and DOI agreed that the Settlement Agreement would recognize continued IMP protection for pre-1993 WSAs. Utah intended that the term "Section 603 WSAs" as used in paragraph 8 of the Settlement Agreement, would include these 13 pre-1993 WSAs, because the inventory, review and designation of those areas occurred during the 15-year 603 Wilderness Review, and they were, otherwise, so closely bound up in the Section 603 process that as far as Utah is concerned they are Section 603 WSAs in every material respect.

The Settlement Agreement reasonably construed in its entirety preserves IMP management and does not affect the 13 202 WSAs in Utah or elsewhere. The short answer to SUWA's sole focus on Paragraph 8 is that the term "Section 603 WSAs," as used in the Settlement Agreement includes all pre-1993 WSAs including the 13 in Utah. SUWA violates the basic principles of contract construction by using a selective quote and ignoring the other terms in the agreement, which also establish that the Settlement Agreement does not apply to the pre-1993 §202 WSAs. The Settlement Agreement is a contract to be construed using ordinary principles of contract

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[7] The Utah Section 202 WSAs total 21,594 acres or less than one percent of the 3,230,434 WSA acres in the state. [Supp. App. 000096-97]

interpretation, *Anthony v. U.S.*, 987 F.2d 670, 673 (10th Cir. 1993), and must be read in its entirety to give effect to all provisions. *Colorado Milling and Elevator Co. v. Chicago, R.I.&P. R. Co.*, 382 F.2d 834, 836 (10th Cir. 1967).

Starting on the first page, the Settlement Agreement limits the settlement to the Utah re-inventoried public lands that "were not identified as having the necessary wilderness character and were not classified as [WSAs] during the wilderness review conducted between 1977 and 1993 by authority of Section 603 of [FLPMA] ('Section 603 WSAs')." [App. 93]. Because the 13 pre-1993 WSAs in question were initially identified and designated between 1976 and 1993 pursuant to Section 603, the term "Section 603 WSAs," therefore, includes the 202 WSAs which were identified as having wilderness character during the 15-year wilderness review and initially designated 603 WSAs and later as 202 WSAs. *Supra* 20. This interpretation is confirmed where the Settlement Agreement states that the "3.2 million acres" in Utah WSAs "**appropriately** continue to be managed so as not to impair their suitability for preservation as wilderness." [App. 100 (emphasis added)]. These 3.2 million acres include the 13 pre-1993 WSAs. *Supra* 20.

The Settlement Agreement repeatedly references the term "Post 603 Lands" [App. 0094, 0097-98, 0100-0102], which refers to public lands "identified in the 1999 Utah Wilderness Inventory Report. . . and other BLM public lands identified by the

public or BLM ***after October 21, 1993*** for wilderness study, classification or management." [App. 094 (emphasis added)]. The agreement concludes that "[t]he parties agree it is in the public interest. . . to enter into a stipulation with respect to all Post-603 Lands[.]" [App. 0101]. Significantly, SUWA omits the fact that BLM has implemented the Settlement Agreement without changing management of the pre-1993 202 WSAs. [Supp. Add. 000108].

The Settlement Agreement must be interpreted so that its terms are given plain meaning, and the intent of the parties is determined from the document alone. *Anthony*, 987 F.2d at 673.[8] The above explanation construes the Settlement Agreement in a way that is logical, legal and enforceable. *Walsh v. Schlect*, 429 U.S. 401, 408 (1977); *Superior Oil Co. v. Western Slope Gas Co.*, 604 F.2d 1281, 1297 (10th Cir. 1979). SUWA advances an interpretation that would make the agreement arguably unlawful, which contradicts rules of construction for contracts. *Conservation Law Foundation v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979).

The rest of the Settlement Agreement must be upheld, even if Paragraph 8 of the Settlement Agreement were found unlawful. SUWA takes a phrase entirely out of

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[8] The issue of whether a contract term is ambiguous is a question of law which this Court may decide, but the interpretation of an ambiguous contract is a question of fact which an appellate court must remand to the district court for explicit findings on the issue. *Republic Resources Corp. v. ISI Petroleum West Caddo Drilling Program 1981*, 836 F.2d 462, 465-66 (10th Cir. 1987).

context from *U.S. v. Colorado*, 937 F.2d 505, 509-10 (10th Cir. 1991), to say that a "settlement must stand or fall as a whole." SUWA 24 n.7. There, this Court only held that a district court cannot unilaterally rewrite the terms of a settlement over the objections of the parties. *Id.* Whenever possible courts will enforce the valid parts of partially unlawful contracts, even without a severability provision and the same principles would apply to a settlement. *Sealy Mattress Co. of Southern California v. Sealy, Inc.*, 346 F.Supp. 353, 358 (N.D. Ill. 1972). *See also U.S. v. Witco Corp.*, 76 F.Supp.2d 519, 531 (D. Del. 1999); *Burnside Ott Aviation Training Center v. Dalton*, 107 F.3d 854, 858-59 (Fed. Cir.1997).

B. Settlement Agreement Preserves Broad Inventory Authority

SUWA and *amici*[9] also misread the Settlement Agreement to prohibit BLM from inventorying wilderness resources, when it does not. The Settlement Agreement expressly states, "[N]othing herein is intended to diminish BLM's authority under FLPMA to prepare and maintain on a continuing basis an inventory of all public lands and their resources and other values, as described in FLPMA Section 201." [App. 101]. This concept is restated. [App. 097; 105]. The Settlement Agreement also states that BLM inventory of "resources and other values may include, but are not limited to characteristics that are associated with the concept of wilderness." [App. 101;105]. *See*

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[9] *See also* Hicks 13, 18-19; Babbitt 15-18.

also [Utah Add. 000108]("Section 201 FLPMA authority to inventory resources or other values, including areas with wilderness characteristics such as naturalness, or those that offer solitude and are conducive to primitive, unconfined recreation."].

SUWA relies on the statement that FLPMA Section 603 provided the sole authority to conduct "wilderness reviews for the purpose of identifying and preserving public lands... recommended to Congress for wilderness," to conclude that the Settlement Agreement violates FLPMA §201(a), and contradicts the historic interpretation of FLPMA and this Court's ruling in *Utah*. SUWA26-34 (quoting App. 100-101, ¶17). SUWA equates "inventory" in Section 201(a) with Section 603 "wilderness review" and actually misquotes the Settlement Agreement, which uses the term "wilderness review" not "wilderness inventory." This Court recognized that an inventory differs from a "wilderness review." *Utah*, 137 F.3d at 1206, n.17.

SUWA and *amici* confuse BLM's expired wilderness *review* authority with its continuing wilderness *inventory* authority. The Settlement Agreement only states that Section 603 authorized "a distinct, one time only, wilderness ***review*** that expired fifteen years after FLPMA's creation," not "wilderness inventory" as SUWA claims. *Id*.27 (emphasis added). The Settlement Agreement stipulates that the "wilderness review" authority, "including the establishment of new WSAs" and the application of IMP management expired no later than October 21, 1993, with the "submission of the

wilderness suitability recommendations to Congress pursuant to Section 603." [App. 103].[10] The Settlement Agreement concludes that BLM lacks the authority to undertake another three-stage "wilderness review" under Section 603, which culminated in a wilderness study report submitted to the President, who in turn made recommendations to the Congress. [App. 94]; *Utah*, 137 F.2d at 1198 (describing inventory, study and reporting phases).

III. DISTRICT COURT HAD JURISDICTION TO APPROVE SETTLEMENT

SUWA's contention that Utah lacks standing, SUWA 44-48, relies on this Court's earlier holding that Utah lacked standing to challenge the Utah wilderness reinventory, and upon the claim that Utah cannot meet the redressability requirement. SUWA44; 46-48.[11] SUWA's arguments fail because (1) settlements may address issues outside the complaint so long as they are within the general scope of the case and statutory objectives; (2) Utah's third amended complaint presents a new claim and

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[10] FLPMA §603, gave the Secretary 15 years or until October 21, 1991 to report to the President his wilderness recommendations, and required the President to advise Congress within two years. 43 U.S.C. §1782(a),(b). President Bush forwarded the DOI Utah wilderness recommendations without change to Congress on June 22, 1992. Fried, J. *The Grand Staircase-Escalante National Monument*, 17 VA. ENVTL. L. J.477, 484 n.37 (1998) (citing Letter to Congressional Leaders Transmitting Proposed Legislation on Utah Public Lands Wilderness Designation, Pub. Papers, 1023 (June 26, 1992)).

[11] SUWA also argues that there is no jurisdiction because the pre-1993 WSAs are outside the scope of the complaint. SUWA44-46. The Settlement Agreement does not apply to pre-1993 WSAs. *Supra* 19-23.

conforms to this Court's holding in *Utah*, 137 F.3d at 1215-16; (3) recent decisions by the U.S. Supreme Court support a determination of redressability notwithstanding an uncertain outcome.

A. Scope of Settlement Agreement Lawful

The decision in *Local No. 93,* 478 U.S. at 528-29, does not support SUWA's argument that the Settlement Agreement is invalid because it addresses matters outside the complaint and affords remedies that a court could not grant. SUWA19, 43, 45.[12] While the district court must have subject matter jurisdiction, a settlement need only fall within the general scope of the case and further the objectives upon which the complaint is based. *Local No. 93,* 478 U.S. at 525. The issues addressed in the Settlement Agreement mirror those stated in the complaint and the remedies afforded are not different from what a court could grant. *Id.* Rescission of the 2001 WIH and the related BLM direction is similar to an injunction barring BLM from implementing the 2001 WIH. Amending the RMP scoping notices is a necessary step to implementing an injunction and is not unlawful. The Settlement Agreement is also

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[12] In *Local No. 93*, the Court established the rule that an intervening party could not overrule a settlement unless it strips that party of a legal right or claim or imposes a duty or obligation on that party. *Local No. 93*, 478 U.S. at 528-29. When challenging a settlement, the public policy favoring settlement requires an objecting party to show much greater harm than that for standing. *In re Integra Realty Resources, Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001). SUWA cannot prove that the Settlement Agreement strips it of a claim, or imposes a legal duty or obligation and should not be allowed to overturn this voluntary settlement.

consistent with FLPMA policies, including cooperation and consultation with state and local governments in planning and land management matters, 43 U.S.C. §§1701(a)(2), 1712(c)(9).

B. Standard of Review

When the parties settled, this case was again at the complaint stage. Thus, Utah's factual allegations are presumed to be true and that the general allegations are presumed to include specific facts. *Bennett v. Spear*, 520 U.S. 154, 168 (1997); *Roe No. 2 v. Ogden*, 253 F.3d 1225, 1229 (10th Cir. 2001).

C. Complaint Alleges Sufficient Jurisdictional Facts

Subject matter jurisdiction is limited to an actual case or controversy, in which the party must show injury in fact that is caused by the conduct challenged and the remedy sought will address or alleviate the harm. *Utah v. Evans*, 536 U.S. 452, 459-460 (2002) citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1993) (*"DOW"*), and *Allen v. Wright*, 468 U.S. 737, 751 (1984).

1. Injury in Fact and Causation

Utah alleged that the 2001 WIH and related direction, which authorized a new wilderness review and required that the Utah WIAs be managed to protect their wilderness character, violated FLPMA, because BLM has no authority to establish new WSAs under FLPMA [App. 0076-83]; that the WIA management violates FLPMA

procedures requiring that public lands be managed in accordance with RMPs; and that when a major multiple use is prohibited, BLM must follow withdrawal and management decision procedures. [*Id.*0083-88]. As a result of these unlawful actions, Utah alleged that it suffered reduced revenues from public lands that were nominated but rejected for mineral lease sales solely on the basis that they were in H.R. 1500 or WIAs, [*Id.*0067, 0069, 0071, 0073-0074, 0079-0081, 0087-0088]. Utah also lost revenues because BLM management of H.R. 1500/WIA lands precluded development of adjacent trust lands. [*Id.* 0079-0081, 0087-0088]. The policy also burdened and interfered with county government functions, such as road maintenance and land use. [*Id.* 0081-0082]. Utah sought a declaratory judgment that BLM lacked the authority to conduct a new wilderness review or establish new WSAs, that BLM must manage public lands in accordance with RMPs, and that BLM's interim WIA management violates FLPMA for failure to follow management decision and withdrawal procedures, [*Id.*0087-90], to enjoin BLM from implementing the 2001 WIH and direction, and to order BLM to either manage public lands in accordance with RMPs or follow withdrawal procedures. [*Id.*0089-0090].

The Settlement Agreement summarizes Utah's claims and concludes that there was subject matter jurisdiction. [App. 0093-0094]. The Settlement Agreement also concludes: "The above-described actions have affected the interests of Plaintiffs by (a)

interfering with UAC member counties' ability to perform governmental functions, (b) reducing or precluding generation of revenue from state school trust lands due to the lack of access to state and private lands based on land use restrictions on adjacent federal lands, and (c) reducing or preventing the generation of revenues." [*Id.* 0101¶18].

2. Additional Standing Criteria Met

Utah is not required to allege specific examples with respect to delays or denial of drilling approvals at this stage of a proceeding. SUWA 47,n.17 citing *DOW*, 504 U.S. at 560-562. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Bennett v. Spear*, 520 U.S. at 168 citing, *DOW*, 504 U.S. at 561.[13] The allegations cover the combined effect of BLM WIA management, including reduced revenues to the state and obstructed development of trust lands. [App. 0087-88]. These summary allegations are sufficient, because specific facts as to parcels and dates are presumed.

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[13] *DOW* is also distinguished because it concerned the adequacy of affidavits at summary judgment. 504 U.S. at 560.

3. Uncertain Outcome Does Not Defeat Redressability

Contrary to SUWA's argument that because BLM has discretion to not issue a mineral lease and uncertainty that BLM would lease the public lands in WIAs, the uncertain outcome does not preclude redressability for standing. SUWA 47. Recent Supreme Court decisions holding that an agency's discretion to make a decision and the uncertainty of the ultimate outcome do not preclude a finding of redressability erode the validity of SUWA's redressability argument. In *FEC v. Akins*, 524 U.S. 11 (1998), the Court found that the plaintiff had standing to file a complaint with the FEC, even though FEC had complete discretion to decide whether to pursue an enforcement action sought by the plaintiff. *Id*. at 25. *See also Utah v. Evans*, 536 U.S. at 464.

The Wyoming District Court confirmed the effect of *Akins* in *Wyoming Timber Assn. v. U.S.F.S.*, 80 F.Supp.2d 1245 (D.Wyo. 2000). The court wrote: "To regain our bearings, under *Rio Hondo* and *Utah v. Babbitt* and certainly after *Akins*, the fact that this Court cannot fashion a remedy creating a substantial likelihood that the Forest Service will offer additional timber for sale does not, by itself, deprive Petitioners of standing." *Id.* 1257. The association could show a right to redress when asserting a procedural right, which was designed to protect the interests of the party suing. *Id.,* citing *DOW,* 504 U.S. at 573 n.8; *Utah,* 137 F.3d at 1215-16. Other courts recognize that certainty of remedy is not required. *W.Va. Highlands Conservancy v. Norton*, 137

F.Supp.2d 687, 698 (S.D.W.Va. 2001); *see also Animal Legal Defense Fund v. Glickman*, 154 F.3d 426, 443 (D.C. Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999).

Utah asserts procedural rights under FLPMA to enjoin BLM from conducting a new and unauthorized wilderness review; to require BLM to either follow the RMPs rather than adopt with *ad hoc* interim protection for the WIAs or to require BLM to comply with management decision and withdrawal procedures. [App. 0083-0088]. FLPMA protects and recognizes Utah's interests: 43 U.S.C. §1701(a)(2) (coordination of inventory and planning with state); §1701(a)(12) (public lands be managed as source of domestic minerals and implement Mining and Minerals Policy Act); §1701(a)(13) (compensate state for loss of tax revenues); §1712(c)(9) state and county roles in land use planning); §1714(c) (rights and interests regarding withdrawals); and §1714(h) (public hearing on withdrawal).

For similar reasons, Utah allegations that WIA management interferes with the counties' interests in roads, transportation plans, and land use plans also satisfy redressability. SUWA claims that restrictions on road maintenance are due to R.S. 2477 policy. SUWA 48. WIA management, however, directly affects county road maintenance, because BLM claims authority to approve any work that may affect public lands. Thus, WIA management increases the regulatory burdens and an end to such management would reduce the burden.

UAC does not argue that the county plans supersede federal plans, only that WIA management contradicts the county plans, when FLPMA requires BLM to make every effort to ensure compatibility. 43 U.S.C. §1712(c)(9). An end to WIA management would reduce this incompatibility and conflict.

IV. STANDARDS OF REVIEW FOR SETTLEMENTS

A. Abuse Of Discretion And Deference Apply to Review of Settlement

SUWA argues for *de novo* review of the District Court's approval of the Settlement Agreement, because: (1) the District Court could not have possibly researched the "legitimacy of the new interpretation of FLPMA" given the "extreme rapidity" of the Settlement Agreement approval, and (2) BLM's interpretation conflicts with FLPMA's plain terms and is contrary to the agency's historic interpretation. SUWA 20-22,24-25.[14]

It is well established, however, that an appellate court reviews a district judge's approval of a settlement agreement for an abuse of discretion. *Heuser v. Kephart*, 215 F.3d 1186, 1190 (10th Cir. 2000); *U.S. v. Hardage*, 982 F.2d 1491, 1495 (10th Cir. 1993).

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[14] *U.S. v. Alexandria*, 614 F.2d 1358 (5th Cir. 1980) is readily distinguished, because the lower court *refused* to approve a government consent decree. The appellate court applied the *de novo* standard of review because the district court had "imposed [its] views of reasonableness" over those of the agencies responsible for the enforcement of Title VII rights. *Id*. at 1362.

> Great weight is accorded [the district judge's] views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Ace Heating & Plumbing Co. v. Crane, 453 F.2d 30, 34 (3rd Cir. 1971).

SUWA's baseless allegation that the District Court did not make an informed judgment cannot convert this Court's standard of review from abuse of discretion to *de novo* review. SUWA cites the District Court's prompt approval of the settlement, while omitting the fact that the District Court was familiar with the record after 6½ years of litigation and extensive briefing on the facts and the law. *Supra* 3-4. The District Court's *approval* of the Settlement Agreement, therefore, must not be disturbed "absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of judgment." *Rutter and Wilbanks Corp. v. Shell Oil. Co.*, 314 F.3d 1180, 1187 (10th Cir. 2002).

B. Neither Hearing Nor Independent Findings Required

SUWA contends that the District Court was required to provide a reasoned judgment, analysis, and findings supporting approval of the Settlement Agreement. SUWA 19-20. SUWA also complains that the District Court failed to allow a hearing before approving the Settlement Agreement. *Id.* 54-58.

No rule requires either a hearing or an opinion in this case. While findings of fact or conclusions of law may respond to **specific** settlement objections, they are **not**

required if the record contains adequate facts to support the decision of the district court to approve the proposed compromise.[15] *In re Integra Realty Resources*, 354 F.3d 1246, 1268 (10th Cir. 2004); *Anderson*, 390 U.S. at 437. In this case, the Order of Dismissal incorporates detailed findings that were part of the Settlement Agreement and these are sufficient. [App. 93-103, 109].

SUWA does not cite a single case where a settlement hearing was not pursuant to a specific rule or statute that required a hearing. *E.g*, *U.S. v. Comunidades Unidas Contra La Contaminacion*, 204 F.3d 275, 279-81 (1st Cir. 2000) (28 C.F.R. §50.7 comment on pollution settlements); *Reiss v. Hagmann*, 881 F.2d 890 (10th Cir. 1989); *Rutter*, 314 F.3d at 1187(Bankruptcy Rule 9019(a) hearing on settlements); *Anderson*, 390 U.S. at 437(Fed.R.Civ.P. 23(e) hearing for class action settlements); *Local No. 93*, 478 U.S. at 529; *U.S. v. Miami*, 664 F.2d 435, 447 (11th Cir. 1981); *U.S. v. Hileah*, 140

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[15] Unlike class action or bankruptcy settlements, which are approved by the court, the District Court was not actively involved in the settlement negotiations. The distinction is significant, as the lower court in *Biodiversity* explained:

> This is a case where the parties sat down among themselves and settled the case. The more proper analogy here is to an executory settlement contract. It is true that the Court approved the settlement agreement, but that is different from a consent decree... In contrast to cases where the Court does approve agreements such as class actions, there are no standards by which the Court is governed in approving these settlement agreements.

[Supp. Add. 00016], *Biodiversity et al. v. Laverty*, Civ. No. 99-2173, p.12 (D. Colo. 2000).

F.3d 968, 972 (11th Cir. 1998); *U.S. v. Colorado*, 937 F.2d at 509 (42 U.S.C. §2000e-2(n)(1) hearing for civil rights consent decrees).

An objecting party may file a motion to reconsider the settlement approval, thereby triggering a hearing. *See e.g. U.S. v. Colorado*, at 507 (government moved to modify the decree). SUWA failed to file such a motion. *Supra* 15-17.

C. Settlement Is Fair and Reasonable, and Not Illegal Or Collusive

Even had SUWA filed a timely motion, the Settlement Agreement still meets the fairness standard. *U.S. v. Colorado*, 937 F.2d at 509. The strong public policy favoring voluntary settlements guides review of settlements. *Alexandria*, 614 F.2d at 1362; *Tulsa City Lines v. Mains*, 107 F.2d 377, 380 (10th Cir. 1939) (the "inveterate policy of the law is to encourage, promote, and sustain the compromise and settlement of disputed claims"). While a district court should not "blindly accept" a proposed settlement, it need only satisfy itself that the agreement is fair, adequate, and reasonable. *Bragg v. Robertson*, 83 F.Supp.2d 713, 717 (S.D.W.Va. 2000). The court must also ensure that the decree is not illegal, a product of collusion, or contrary to the public interest. *U.S. v. Colorado*, 937 F.2d at 509.

1. Fair and Reasonable and in the Public Interest

In determining whether the "adversarial process has produced a consent decree that is fair and reasonable," a court may consider the extent of discovery, the stage of

the proceedings, the experience of counsel, and whether the case had seen "full adversarial vigor" involving parties with "sharply conflicting interests." *Bragg*, 83 F.Supp.2d at 719. There is more respect for the agency's role when the settling parties, "themselves knowledgeable and represented by experienced lawyers, have hammered out an agreement at arm's length and advocate its embodiment in a judicial decree." *U.S. v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); *Bragg*, 83 F.Supp.2d at 717.[16]

The case proceedings document the extensive case development and the adversarial positions and conflicting interests of the parties. *Supra* 4-5,11-2; [App. 101]. DOI and Utah both advocate approval and any review of the lower court's approval is enjoys even greater deference. *Cannons*, 899 F.2d at 84.

The Settlement Agreement memorializes the reasons and related public interest in settling. [App. 0101-103]. First, the agreement acknowledges that BLM actions adversely affected Utah's interests and the public interest favors settlement. [App. 0101]. The Settlement Agreement states that the case had been litigated for six years, the parties had briefed and vigorously represented their positions, that despite BLM's

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[16] BLM's reasonable interpretation of its statutory authority further insulates the Settlement Agreement. *U.S. v. Mead Corp.*, 533 U.S. 218, 235 (2001) (citing *Skidmore v. Swift & Co.*, 323 U.S. 139 (1944). *See also Rocky Mountain Oil & Gas,* 696 F.2d 734, 745 (10th Cir. 1982) (*"RMOGA"*).

expenditure of resources, it was uncertain that BLM could pursue new WSA classification, [*Id.*]; Utah counties believe that BLM management policies have inflicted harm on their rights and interests, [*Id.*]; information from the wilderness reinventory will still be used in land use plans, [*Id.*]; and settlement will provide certainty and clarity, improve federal relations with Utah and Utah counties, and allow BLM planning to proceed with less controversy and uncertainty and in accordance with statutory requirements. [*Id.* 0102]. The public interest is further supported by the conclusion that BLM resources can be protected using existing authority. [*Id.* 103-104,106].

2. Conforms to Federal Law

The agreement leaves the Utah wilderness decision with Congress, which can determine whether additional lands should be subject to additional wilderness review, designated as WSAs, or wilderness. [*Id.* 0101-102]. The legal conclusions in the Settlement Agreement conform to FLPMA and earlier agency interpretations. *Infra* 40-52.

SUWA asks this Court to rule on the legal issues raised in the Utah complaint, when settlements and judicial review of settlements try to avoid a protracted examination of the parties' legal rights. *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984). Thus, while

a court may evaluate the "strength of the plaintiff's case" in a fairness assessment, *U.S. v. North Carolina*, 180 F.3d 574, 581 (4th Cir. 1999), it does not "inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy." *Gorsuch*, 718 F.2d at 1126. *See also Armstrong v. Board of School Directors*, 616 F.2d 305, 320 (7th Cir. 1980).

SUWA cannot show that the alleged statutory conflict appears on the face of the Settlement Agreement with "legal certainty," and instead produces reams of extra record material to support its "view" of FLPMA. A ruling on SUWA's statutory arguments would inappropriately adjudicate the merits of the Utah's legal claims. *Compare* SUWA App. 0075-83, *with* SUWA 25-39 (arguing the Settlement Agreement violates FLPMA §§201, 202 and 603). Accordingly, this Court need only satisfy itself that the statutory interpretation agreed upon in the "decree represents a reasoned factual and legal determination," *U.S. v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990), and furthers "statutory objectives." *Biodiversity Associates v. Cables*, 357 F.3d 1152, 1169 (10th Cir. 2004).

3. Settlement Reflects Arms-Length Negotiations

Utah continues its objections to emails marked privileged and confidential on the grounds that they are immaterial and irrelevant. The conclusions that SUWA attempts to draw from the email are contradicted by other evidence, some of which is

also extra-record given the posture of this case. The argument and email documents should be stricken.

SUWA finds collusion in an email acquired in a separate Freedom of Information Act lawsuit. SUWA 14-15. SUWA received only a few of the documents requested and, like the blind man holding the tail of an elephant, reaches entirely wrong conclusions.

SUWA claims that the negotiations were a collusive back-room deal based on the speed of the settlement. SUWA 16-17, 58.[17] SUWA relies on the April 1, 2003 email to assume that negotiations began on April 1 and ended April 11. This too is wrong. Negotiations began in spring of 2001. [Supp. Rec. 000019]. Similarly, counsel's statement in the motion to amend that settlement efforts had failed was also true. *Supra* 5,12. The past delay and failure to settle gave counsel no reason to believe that they would succeed this time.

SUWA also relies on another April 1, 2003 email by Utah counsel forwarding the first draft to BLM counsel and referring to a single issue not yet resolved. SUWA 15. The email, which was sent before the first draft was submitted, refers to an unresolved issue **among Utah counsel**, who had to ensure that a settlement met the

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[17] Despite SUWA's pejorative comments, settlement discussions are necessarily secret and confidential. Documents and statements arising out of a settlement enjoy a privilege to facilitate the open exchange of information and ideas. *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003).

needs of all of the Utah parties. The email and cannot be construed as reflecting a final resolution of any issue between opposing parties. Indeed, the countless drafts reviewed over the next 10 days show that the parties had many issues to address and resolve.

SUWA relies on Utah counsel's comments on April 1, 2003 about possibly extending the settlement to include pre-1993 WSAs as an admission of illegality. SUWA 58-59. This issue was discussed and then discarded early on in the negotiations.

4. DOI Had Sound Reasons to Settle

SUWA charges that the settlement is one-sided and BLM had no reason to settle. SUWA 56-58. The Settlement Agreement sets out the concrete reasons to settle, including improving federal state relations and resolving an ongoing and thorny controversy that would mire RMP revisions for several years. [App. 0101-0103]. The fact that BLM also decided to repudiate policy that SUWA persuaded the previous administration to adopt does not make the settlement collusive.

BLM also faced some embarrassment, because government counsel argued to this Court that BLM would not affect the Utah public lands in any way, and had not changed management. 1997 Opening Brief for Federal Appellants10-11; 24-28; [Supp App 00063,0059]. The BLM arguments to this Court were disingenuous, if not inaccurate. BLM had in fact changed the management of the WIAs, [Supp. App. 83],

and while the inventory report itself did not make a recommendation *per se*, BLM immediately adopted "interim" management criteria that applied to WIAs. [Supp. Add. 0001].

V. SETTLEMENT IS A LAWFUL, REASONABLE INTERPRETATION OF FLPMA

SUWA never raised its legal issues to the District Court and they are not properly before this Court. Utah, nevertheless, discusses SUWA's arguments to show their lack of legal merit.

A. The Settlement Agreement Correctly Interprets FLPMA §202

_____At the heart of SUWA's challenge is the faulty contention that BLM may create WSAs pursuant to FLPMA §202. If BLM ever had that authority, it was only by virtue of the Section 603 wilderness review authority, which expired by its own terms. To defy this simple fact, SUWA must ignore the plain language of the statute, misrepresent the Settlement Agreement, and misconstrue relevant precedent. Instead, the Settlement Agreement correctly states that BLM's Section 202 authority to designate WSAs was contingent upon and part of the Section 603 wilderness review mandate, which has expired. [App. 100].

1. Wilderness Review Authority Limited to Section 603

National direction contemporaneous with the wilderness review shows the Settlement Agreement correctly stipulates that BLM has no authority to designate new

WSAs. Section 202 authority was only invoked within the context of the time-limited Section 603 wilderness review:

> Wilderness consideration under section 202 will take place ***as part of the same wilderness study effort for which the affected areas were previously scheduled***. These areas must be kept on schedule, so the wilderness question can be resolved expeditiously.

[SUWA Add. 279 (emphasis added)].

Acting pursuant to the Section 603 authority, BLM, from 1977 to 1991, pursued an aggressive schedule to inventory all of the public lands in Utah and identify those areas that were roadless and had wilderness character, to study the identified wilderness study areas, and to forward all of the wilderness recommendations to the President by October 1991. [Supp. Rec.000027a]. As a result of BLM's efforts, the final Utah Statewide Wilderness Study Report included conclusive Secretarial recommendations on WSAs [Supp. App. 000095-97]. In discussing the Section 603 and 202 WSA designation phase, BLM stated, "[T]he WSAs were determined based on a systematic process, including public input and appeals. The inventory reflects evaluation and the collective professional judgments by numerous BLM personnel, **and this phase of the process has been concluded**." [*Id.*000027a] (emphasis added).

BLM also completed its wilderness review of the WSAs in every other western state by October 1991. [SUWA App. 669-694]. The GAO report identifies the Section 202 wilderness studies as really being part of the overall Section 603 wilderness

review: "**As required by FLPMA**, BLM's studies and recommendations for Section 603 and 202 study areas have been sent to the President and he has sent those recommendations to Congress." [Supp. Rec. 000033-34](emphasis added). BLM stated that the WSA and wilderness recommendations would not be revisited. [Utah. Add. 0094] (thanking the BLM employees for their "sacrifice over the last 15 years"). The BLM wilderness review completed 100 environmental impact statements ("EIS") and 9 statewide wilderness reports. *Id.* The Secretary's October 18, 1991 letters transmitting the wilderness recommendations to the President "completed" the Section 603 reporting process. *Id.*

BLM consistently rejected citizen proposals for new WSAs, because the Section 603 wilderness review was completed. With regard to proposed WSAs less than 5,000 acres, the BLM wrote, "These areas were retained for review under authority of Section 202 of FLPMA. Wilderness inventories for existing public lands have therefore been completed and no additional wilderness inventories are to be undertaken." [Utah Add. 000095].

The foregoing shows that BLM's Section 202 WSAs were defined by and a part of Section 603 wilderness review. FLPMA legislative history concurs. [Utah Add. 000076, 000082], H. Rep. No. 94-1163, 94th Cong., 2nd Sess., pp. 1, 17 (May 15, 1976) ("the Committee expects the Secretary to establish priorities in a manner which will

expedite the review process and which will cause minimum interference with existing multiple use management of the public lands"). This reasonable, long-standing interpretation should be affirmed, even if there is "another equally reasonable interpretation." *RMOGA,* 696 F.2d at 745.

2. BLM Consistently Limited 202 WSAs to Section 603 Review

The decision in *Watt* and pre-1993 IBLA precedent do not support the argument that BLM is currently authorized to establish new Section 202 WSAs, as SUWA argues. These decisions involved the creation of WSAs during the now-expired wilderness review. *Watt*, 608 F.Supp. at 340; *Tri-County Cattleman's Association*, 60 IBLA 305, 314 (1981); *State of Nevada,* 62 IBLA 153, 157 (1982); *Michael Huddleston,* 76 IBLA 116, 121 (1983). As part of a stipulation in *Watt*, BLM agreed to "re-inventory" certain areas for potential WSA designation under Section 202 or 603 but required that "**[b]oth groups of WSA's be studied by 1991"**. [*Id.* 309] (emphasis added).

The pre-Babbitt era DOI and IBLA rejected SUWA appeals to compel new WSAs on the grounds that BLM WSA decisions were final in 1981 could not be reconsidered. *SUWA,* 123 IBLA 13, 18 (1992); *SUWA,* 122 IBLA 17, 21 (1992). Utah BLM employees cited these IBLA decisions when they objected to Secretary Babbitt's 1993 *de facto* wilderness directive: "It has been stated that WSA designation for Utah

was concluded with the issuance of the Board's decision in *Utah Wilderness Association*, 86 IBLA 89 (1985), and that the BLM may administer the remaining land for other purposes. We have recently been told verbally through management that we are to treat HR 1500 lands in a manner contrary to these IBLA decisions." [Supp. Rec. 000003]. IBLA recently affirmed its view that the WSA decisions are final and there is no authority to reconsider or revisit them to create new WSAs. *Colorado Environmental Coalition*, 161 IBLA 386, 393 (2004).

SUWA urges a legal position that formed the basis of SUWA's lobbying to convince DOI to use Sections 202 and 302 to establish new WSAs and to manage them under the IMP. *Supra* 10-11. This occurred shortly after SUWA lost the IBLA appeals.[18]

3. No Law or Rule Authorizes Ongoing Wilderness Review Or Nonimpairment Management

Contrary to SUWA's argument, BLM's "near-unbounded" multiple-use mandate in the development of land use plans does not grant BLM the discretion to establish Post-603 WSAs. SUWA34-36. The fact that FLPMA §§201(a)(1) and 202, provide for resource inventories and land use planning to ensure that the proper multiple use mix of public lands is irrelevant to whether Section 202 authorizes new WSAs.

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[18] If DOI had always construed FLPMA §§202 and 302, as authorizing new WSAs as SUWA argues, such a campaign by SUWA would not have been necessary.

Neither 202 or 302 contains the word "wilderness." The FLPMA definition of "multiple use" does not include wilderness as one of the uses. 43 U.S.C. §1702(c). "Multiple use" and "wilderness" are mutually exclusive notions in most cases. Multiple use assumes the ongoing and obvious presence of mankind and his many extractive uses and wilderness prohibits many, if not most, of the multiple uses, *i.e.* developed recreation, motorized vehicles, mountain bikes, and mineral development. *See* 43 U.S.C. §1702(c) (definition of multiple use) and 43 U.S.C. §1702(l) (principle multiple uses) versus 16 U.S.C. §1131(c) (definition of wilderness). Thus, SUWA's argument that "near-unbounded" multiple use can authorize wilderness turns the FLPMA's "multiple use" concept with its emphasis on "principle multiple uses" on its head.

Only Section 603 authorizes BLM to conduct a wilderness review and to protect wilderness characteristics of public lands. 43 U.S.C. §1782. Section 202, by comparison, merely provides for the planning process and does not refer to wilderness resources or protection thereof. 43 U.S.C. §1712. Moreover, Section 202 itself mandates that in the development of land use plans, the Secretary shall "use and observe the principles of multiple use and sustained yield," *Id.*, but again the statutory definition of that term does not include, and is antithetical to, wilderness. *Id.* §1702(c). Similarly, Section 302(a) merely authorizes the BLM "by regulation or otherwise" to

prevent the undue and unnecessary degradation of the lands. 43 U.S.C. §1732(a). Thus, FLPMA §§202 and 302 cannot be construed to provide independent wilderness review authority, without rewriting several key provisions of FLPMA and emasculating Section 603, in particular, all in violation of the traditional canons of statutory construction. *Bennett v. Spear*, 520 U.S. at 173.[19]

Furthermore, the 2001 WIH and related policies and directives[20] premise that BLM may conduct a new wilderness study as part of planning contradicts Congress' exclusive authority to establish wilderness. 16 U.S.C. §1131(a); 43 U.S.C. §1782(b). Agencies may not "establish their own system of wilderness priorities" and only Congress makes wilderness decisions. *Norton v. SUWA,* 124 S.Ct. 2373, 2376 (2004); *Mountain States Legal Foundation v. Andrus*, 499 F.Supp. 383, 394 (D.Wyo. 1980).

The land use planning regulations also contradict SUWA's expansive interpretation of Section 202. Unlike the Forest Service regulations, which require the

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[19] *Amici* Professors erroneously cite FLPMA's policy to preserve and protect public land resources in their natural condition, 43 U.S.C. §1701(a)(8), as supporting continuing Section 202 wilderness authority. Professors 15. *Amici* omit other FLPMA policies, which relate to mining, minerals and production of range for domestic livestock, §1701(a)(12), and overlook the fact that FLPMA requires specific statutory authority to implement any FLPMA policy statement. 43 U.S.C. §1701(b). FLPMA §603, was the only statutory authority to protect public lands as wilderness and that authority expired.

[20] BLM's purported land use planning authority to create Post 603 WSAs first appeared in the 1995 IMP which explained that additional WSAs would be identified periodically through BLM's land-use planning process. *Amici* NWF Add. 18-19, 23. *Cf.* SUWA Add. 320, 1987 IMP (no mention of the continued identification and evaluation of WSAs through Section 202).

evaluation of wilderness areas in each planning cycle, 36 C.F.R. §§219.9(b)(5), 219.27(b), BLM planning regulations do not. 43 C.F.R. Part 1600. In fact, BLM removed wilderness study from BLM planning. The draft rule would have defined "RMP" to include WSA wilderness suitability decisions, *draft* 43 C.F.R. §1601.0-5(p)(2). 43 Fed. Reg. 58764, 58766, 58769 (Dec. 15, 1978). In response to public comments, BLM deleted the reference to WSAs and wilderness from the final rule and rulemaking discussion. 44 Fed. Reg. 46386, 46387, 46393 (Aug. 7, 1979). Instead, wilderness suitability decisions were to be made under the wilderness review process. Consequently, the Settlement Agreement's rescission of BLM's 201 WIH, [App. 104], conforms to FLPMA and the implementing regulations.

4. Isolated Post-1993 WSAs For Acquired Land Distinguished

SUWA cites a few, scattered Section 202 WSAs that were established after October 1993 as contradicting the Settlement Agreement.[21] SUWA39; *see also* Babbitt21 n. 8, NWF8. These areas involved lands that BLM did not even acquire until **after** the final wilderness recommendations were made to the President. [SUWA App. 153, 179; Supp. Rec. 00022]; 58 Fed. Reg. at 45529; 56 Fed. Reg. at 40342; 59 Fed. Reg. at 15451.

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[21] Two of the WSAs cited by SUWA predate the Section 603 expiration. 58 Fed. Reg. 45528 (Aug. 30, 1993); SUWA App. 181, 189 (Little Snake RMP WSAs 1989).

These isolated transactions do not validate the 2001 WIH or the direction to convert WSA status over 3.6 million acres of public lands in Utah and millions of acres nationwide **previously** found unsuitable for wilderness; nor does it support DOI's subsequent Section 202 WSA direction requiring BLM to re-inventory public lands for management as WSAs. 64 Fed. Reg. 13439 (Mar. 18, 1999), as modified, 64 Fed. Reg. 59787 (Nov. 3, 1999); [Add. 404-407, 424-426].

These 202 WSAs for land acquired Post-603 did not reflect nor come into being pursuant to bureau-wide policy. DOI issued the 2001 WIH and related direction after the fact. For example, the Wyoming BLM State Office had decided not to "consider any additions or changes to the existing WSAs" in the planning area because the wilderness inventory and study was already completed and the recommendations forwarded to Congress. [Supp. Rec. 000021].

In any event, the only material issue is whether DOI acted consistent with the law when it entered into the Settlement Agreement and clarified its overall direction against the use of Section 202 to create WSAs. As in this case, DOI can correct agency policy "that was grounded upon a mistaken legal interpretation." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993). Indeed, the legal theory underlying the 2001 WIH and related direction that FLPMA Sections 202 and 302 grants BLM continuing authority to designate new WSAs originated with SUWA not DOI. *Supra*

10-11. The Settlement Agreement, therefore, is consistent with the law, does not reverse longstanding agency policy but merely restores the status quo that existed before SUWA persuaded DOI Secretary Babbitt to change.

B. Deadline in 1964 Wilderness Act Irrelevant

According to SUWA, the Settlement Agreement conflicts with the Forest Service, Fish and Wildlife Service and National Park Service's interpretation of the Wilderness Act's "precisely analogous" 10-year wilderness review deadline, 16 U.S.C. §1132(b),(c), as providing continuing authority to undertake wilderness review. SUWA31-34. *See also* Professors11-13. *Amici* argue that FLPMA's legislative history provides "no reason to read the deadline in Section 603 any differently from the Wilderness Act's ten-year deadline." Professors'20. This is inaccurate.

Even assuming that another agency's implementation of the Wilderness Act applies to the statutory deadline in Section 603,[22] SUWA fails to grasp the fact that throughout the wilderness reinventory controversy, *Amicus* Babbitt admitted that DOI's authority to conduct a wilderness review of public lands under Section 603 of FLPMA had expired. [Supp. App. 000046] ("I also agree with you that FLPMA's Section 603 no longer provides authority to inventory BLM land in Utah for wilderness values"); [*Id.* 000101] (FLPMA Section 603's "wilderness review mandate has been

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[22] The Wilderness Act does not apply to public lands, only national parks, wildlife refuges, and portions of national forests. 16 U.S.C. §1132(b),(c),

completed") [Supp. rec. 000027a]. This Court recognized the "Secretary's express rejection of Section 603" in limiting Defendants' wilderness inventory authority to FLPMA Section 201(a). *Utah*, 137 F.3d at 1206n.17.

Because DOI acknowledged that Section 603 wilderness review authority expired, DOI only cited Section 202 and 302 as authorizing the 2001 WIH. [Add. 401]; 64 Fed. Reg. at 13439. FLPMA §§202 and 302, have no **analogous** provision to the Wilderness Act and no deadline and the efforts to draw analogies to the Wilderness Act must fail.

C. Section 603 Deadline Distinguished

The Section 603 deadline differs from other situations where the agency's failure to act deprives individuals or the public of an intended benefit. *See e.g. Brock v. Pierce County*, 476 U.S. 253 (1986), *Gallagher v. NTSB*, 953 F.2d 1214 (10th Cir. 1992), *Twin Pines Coal Co. v. U.S. Dept. Of Labor*, 854 F.2d 1212 (10th Cir. 1988). In those cases, the failure to meet the deadline conflicted with the statutory objectives.

In the case of FLPMA § 603, Congress imposed the deadline to ensure that the wilderness review caused the minimum interference with multiple use. *Colorado Environmental Coalition*, 161 IBLA at 392 citing H.R. Rep. No. 1163, 94th Cong. 2d Sess. 17 (1976), reprinted in 1976 U.S.C.C.A.N. at 6191.[23] There is no need to enforce

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[23] This statement from the FLPMA committee report also contradicts SUWA's argument (continued...)

the deadline, because BLM BLM labored for fifteen years and timely completed the wilderness review mandated by Section 603.

D. Settlement Does Not Preclude Resource Protection

Contrary to the emotional rhetoric of SUWA and *amici*,[24] the Settlement Agreement recognizes DOI authority to: (1) manage a tract of land that has been dedicated to a specific use according to any other provision of law (Section 302(a)), (2) utilize the criteria in Section 202(c) to develop and revise land use plans, including giving priority to the designation and protection of Areas of Critical Environmental Concern (Section 202(c)(3)), and (3) take any action necessary, by regulation or otherwise, **to prevent unnecessary or undue degradation** of public lands (Section 302(b)). [App. 104]. BLM may also use data from its inventories in the RMP development and revision, [*Id*. 104, 106].

Finally, *amici* Professors contend that BLM need not act under a statutory directive to make wilderness recommendations to Congress, and the Settlement Agreement unlawfully terminates this authority. Professors20, 28. The Settlement Agreement does not infringe on the Executive Branch's constitutional power to make recommendations to Congress. Article II, §3. BLM may communicate with Congress

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[23](...continued)
that the FLPMA deadline was intended to protect these roadless areas. SUWA 28 n.10.

[24] SUWA 36 n.14; NWF 4-33; Babbitt 19.

any time regarding lands it deems suitable for designation as wilderness. BLM, however, may not designate Section 202 WSAs and impose IMP management in the absence of congressional action. SUWA and *amici*, therefore, misstate the Settlement Agreement impacts.

VI. THE SETTLEMENT AGREEMENT IS CONSTITUTIONAL

A. The Settlement Agreement Does Not Restrict BLM's Discretionary Power To Make Policy Choices; Wilderness Review Deadline Expired

Much is made by SUWA and *amicus* Hicks about the Settlement Agreement's binding effect on the future exercise of executive branch discretion. They argue that the "executive branch does not have authority to contract away the enumerated constitutional powers of Congress or its own successors," and thus, the Settlement Agreement unlawfully commits successor administrations to a particular interpretation of FLPMA. SUWA Brief48-52, Hicks Brief4-10.[25]

This largely academic argument lies in the dissent in *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984), wherein the majority upheld a controversial Environmental Protection Agency ("EPA") consent decree that required the agency to undertake programs not required

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[25] SUWA wrongly contends that BLM risks contempt proceedings for any interpretative "deviation." The agreement sets a nine month deadline, which is long past. App. 103, ¶2.

by the statute.[26] The dissent argued that the decree unlawfully limited the discretion of future EPA Administrators. *Id*. at 1137.

Even assuming this premise is correct, which it is not, the Settlement Agreement does not constrain future administrations in exercising discretion under FLPMA. Instead, the parties stipulated that BLM's authority to conduct wilderness reviews expired on October 21, 1993, after the President submitted the wilderness suitability recommendations to Congress pursuant to Section 603 and DOI has no authority to establish Post-603 WSAs. [App. 103]. The restriction on the creation of new WSAs, therefore, is **non-discretionary** and not within BLM's lawful discretion.

Furthermore, unlike the settlement in *Biodiversity*, which limited the Forest Service's discretion to manage the public lands under its multiple use mandate delegated by Congress, 16 U.S.C. §§528-531, the Settlement Agreement expressly states that Defendants "are not precluded from managing public lands consistent with the law, nor are they precluded from managing public lands in the lawful exercise of discretion." [App. 106]. The decision in *Evans* is also inapposite because the vacated consent decree had contracted away the sovereign power of a city to determine its

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[26] Both SUWA and *amicus* Hicks rely extensively on law review articles which were published as part of a University of Chicago legal forum addressing *Gorsuch*. SUWA48-53, Hicks6-17. The forum also presented opposing viewpoints. Robert V. Percival, *The Bound of Consent: Consent Decrees, Settlements and Federal Environmental Policy Making*, 1987 U. Chi. L. F. 327.

annual budget. 10 F.3d at 478. The Settlement Agreement does not affect vital executive functions such as the budgetary process.

The Settlement Agreement, therefore, does not encroach on "either the constitutionally vested authority of Congress or on the statutorily vested authority of the [BLM's] successor's in office," nor does it "strip both Congress and the [BLM] of their discretionary powers." *Biodiversity*, 357 F.3d at 1172. Instead, like other valid consent decrees, the Settlement Agreement fulfills BLM's statutory duties and obligations. *Cf. Bragg v. Robertson*, 54 F.Supp.2d at 657.

B. Attorney General Can Bind Future Administrations

SUWA and *amicus* Hicks confuse concerns over a consent decree's limitations on discretionary policy decisions of future administrations with the authority of the executive to commit to a legal interpretation to settle litigation. SUWA49, Hicks5. A government consent decree may certainly be premised on an interpretation of law. *See U.S. v. Krilich*, 303 F.3d 784, 791 (7th Cir. 2002) (EPA and private party incorporated interpretation of law into consent decree). As shown, *supra* 40-52, the Settlement Agreement lawfully adopts the prior and contemporaneous interpretation of FLPMA §§202 and 603.

Assuming *arguendo* that this interpretation limits BLM in the exercise of its discretion to interpret FLPMA, it was not barred by independent statutory or

constitutional limitations. The authority of executive agencies to make binding settlement commitments derives from Article II of the Constitution, and the broad powers of the Attorney General conferred by Congress to conduct litigation in pursuit of the national interest. Percival, 1987 U. Chi. Legal F. at 345. *See also* 5 U.S.C. §§516, 519; *U.S. v. California*, 332 U.S. 19, 27 (1947).

The Attorney General's settlement power has long been understood to exist as an incident to this statutory authority to supervise litigation for the United States. *U.S. v. Hercules, Inc.*, 961 F.2d 796, 798 (8th Cir. 1992) (settlement power incident to litigation supervision); *Swift v. U.S.*, 276 U.S. 311, 331-32 (1928) (Attorney General's authority to enter into consent decree includes "the power to make erroneous decisions as well as correct ones."). Indeed, in 1999, the Attorney General's Office determined that its settlement power is "sweeping" and allows "her to exercise broad discretion in determining when, and on what terms, settlement would best serve the interests of the United States." Utah Add. 22, 25 (citing *inter alia Hughes Aircraft Co. v. U.S.*, 534 F.2d 889, 901 (Cl. Ct. 1976)), Exec. Order No. 6166, §5 (1933), reprinted at 5 U.S.C. §901 (1982)).[27]

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[27] The legal opinion repudiates a 1986 policy issued by Attorney General Meese which basically adopted the dissent's position in *Gorsuch*. [Utah Add. 000021]. At one time the Meese Policy was reprinted in the Department of Justice Manual, but it has since been removed. *Cf.* §4-3.100B (1990) (cited in Webster, *Protecting Environmental Consent Decrees From Third Party Challenges*, 10 Va. Envtl. L. J. 187n.73 (Fall 1990). [Utah

(continued...)

Few, if any, courts have embraced the narrow scope of settlement power now advocated by SUWA in this matter. Even the cases relied on by the *Gorsuch* dissent are distinguished. The Supreme Court decisions concerned the continuing authority of a successor administration to revise or revoke administrative orders, or a judgment pronounced under judicial proceedings, and not the Attorney General's settlement power. *Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206, 217 (1930); *West v. Standard Oil Co.*, 278 U.S. 200, 210 (1929). *National Audubon Society v. Watt*, 678 F.2d 299 (D.C. Cir. 1981), involved a stipulation that did not settle the underlying litigation and was not incorporated into a judgment. *Id.* at 302. The court did not decide the issue but only drew general principles from "*dictum*" in other cases, including those holding that particular contracts made by one administration are in fact binding on its successors. *Id*. at 305 n.12.

Consequently, the Settlement Agreement, as signed by the Assistant Attorney General, [App. 107], lawfully commits BLM to an interpretation of FLPMA. Defendants have not violated independent statutory limitations, such as the APA or NEPA, *infra* 62-64, nor have they limited constitutionally conferred executive branch discretion, such as the Pardon Power, Article II, §2, cl. 2, or the discretionary power

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[27](...continued)
Add. 65, §4-3.000 (1997)].

of the President to make recommendations to Congress. Article II, §3. *Cf.* Utah Add. 24, 33, 43. Under these circumstances, the Attorney General is free to enter into settlements that would limit the future exercise of executive branch discretion that has been conferred pursuant to statute. *Id*. at 46.

C. Constitutional Limitations Do Not Bar Approval of the Settlement Agreement

SUWA and *amicus* Hicks contend that (1) the entry of consent decree that binds future administrations exceeds the relief that could have been ordered by the District Court had the case proceeded to judgment and violates the separation of powers, and (2) the Utah Appellees did not raise a "substantial federal claim" sufficient to trigger the District Court's jurisdiction. SUWA50-54, Hicks11-18.

This same separation of powers argument has been rejected by the majority in *Gorsuch*, 718 F.2d at 1126-27, and by the Supreme Court in *Local Number 93,* 478 U.S. at 529. To the extent that a "consent decree is not otherwise shown to be unlawful, the court is not barred from entering a consent decree merely because it might lack authority. . . to do so after trial." 478 U.S. at 526. This is true because it is the parties' agreement rather "than the force of law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Id*. at 522. Consent decrees, therefore, are distinguishable from ordinary injunctions, and a court

may use them to provide "broader relief than [courts] could have awarded after trial." *Id*.

Their "substantial federal claim" argument is equally frail given that it is based on a jurisdictional premise that has no application to this case. Its origin lies in *Evans*, wherein the court explained that under Article III, a substantial federal claim is essential to both entry and enforcement of a consent decree. 10 F.3d at 479. The principle, however is specifically limited to consent decrees which limit state or local governments from exercising their normal legislative powers. *David B. v. McDonald*, 116 F.3d 1146, 1147 (7th Cir. 1997).

In contrast, the Settlement Agreement only governs the actions of Defendants who are not a unit of state or local government. Thus, the jurisdictional concerns with entangling an arm of the federal government in the administration of a separate sovereign do not apply. Only in those situations, must a consent decree embody substantial federal claims, and not merely state law claims, such that a federal court may exercise jurisdiction.

VII. SETTLEMENT DOES NOT IMPLICATE NEPA OR FLPMA

The argument that the Settlement Agreement's prohibition on new Section 202 WSAs violates NEPA, because the BLM had already began the RMP revision process, [SUWA42-43], must also fail.

The Price, Richfield and Vernal field offices only identified the new Section 202 WSAs as a preliminary scoping issue, not part of the proposed alternative nor as a proposed action. SUWA Add. 141, 144, 147. *Cf. Federal Highway Administration,* 46 Fed. Reg. 5702, 5718 (January 19, 1981). Consequently, the Settlement Agreement never constrained the reasonable choice of alternatives actually under consideration in the planning process.

Assuming *arguendo* that the designation of new WSAs is a reasonable alternative, which it is not, the Council on Environmental Quality ("CEQ") regulation cited by SUWA, 40 C.F.R. §1506.1(a)(2), does not apply, because the settlement is a separate and distinction action.[28] This regulation only applies to specific actions taken on a project undergoing NEPA review, not "separate and distinct" actions. *Wilderness Watch Oregon Natural Resources Council*, 142 IBLA 302, 305 (1998); *SUWA*, 141 IBLA 85, 89 (1997)(BLM may approve an application for permit to drill without violating the national directive). A separate action, therefore, may proceed if supported by an existing environmental impact statement. 43 C.F.R. §1506.1(c). Otherwise, all activity under an existing RMP would cease whenever BLM begins RMP revision. *In re Bryant Eagle Timber Sale*, 133 IBLA 25, 27-28 (1995). The

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[28] The rule states that "no action concerning [a] proposal shall be taken which would. . . limit the choice of reasonable alternatives" until an agency completes its environmental analysis and issues a record of decision. 40 C.F.R. §1506.1(a)(2).

Settlement Agreement directs the WIAs be managed under the existing RMPs and EIS. App. 98, ¶13b. Thus, the Settlement Agreement was a separate and distinct action independent of the RMP revisions, and thus, did not violate §1506.1(a)(2).

Finally, while NEPA may apply to specific proposed actions that implement a settlement agreement, the agreement itself is not a "major federal action" under NEPA. 28 C.F.R. §61.4. Unlike "administrative processes, there are no statutory guidelines or specific judicially articulated standards that an agency must follow in negotiating settlement agreements." *Wilderness Society v. Bosworth*, 118 F.Supp.2d 1082, 1110 (D.Mont. 2000). Defendants, therefore, could lawfully amend the scope of the RMPs to conform to the settlement.

The Settlement Agreement direction is consistent with existing RMPs which also do not violate FLPMA. SUWA's arguments to the contrary are simply wrong. SUWA 40-42.

VIII. CONCLUSION

For the above reasons, Utah urges this Court to dismiss the appeal.

IX. ORAL ARGUMENT REQUESTED

Oral argument is requested due to the number of complex issues, and the importance of the case. Utah and DOI have pending motions to dismiss that have been referred to the merits panel. This case has a long history and Utah believes that

argument would present an opportunity for clarification, especially since there are jurisdictional issues before the Court as well.

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Respectfully submitted,

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