

# The Environmental Counselor

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## Bounty for Land and Sea: Congress Passes Omnibus Public Land Act\*

By Linda Larson and Jessica Ferrell\*\*

On March 30, 2009, after lengthy and often acrimonious debate in Congress, President Barak Obama signed into law the Omnibus Public Land Management Act of 2009 (the “Act”). The Act sets aside two million acres of wilderness—more than the combined acreage designated by the past three Congresses.<sup>1</sup> It also substantially increases federal funding for research into ocean science, including an ambitious ocean and coastal mapping program, and interdisciplinary research into the causes and management of ocean acidification. The Act affects a broad array of interests, including oil and gas developers in Wyoming, Alaska, and other states; water purveyors nationwide (particularly in California); and livestock producers, wildlife managers in the Rocky Mountain region, and state and regional regulators charged with protecting coastal and estuarine areas and watersheds.

### Wilderness Protection, New National Parks and Monuments

The Act expands wilderness areas located in nine states—California, Oregon, Idaho, Colorado, New Mexico, Utah, Michigan, Virginia, and West Virginia. It will provide new or additional federal protection to, among other areas, the Sierra Nevada, White, Santa Rosa, and San Jacinto Mountains in California; Mt. Hood, high desert wilderness, and the Wild and Scenic John Day River in Oregon; canyon country in northern New Mexico; the Monongahela National Forest in West Virginia; and the Rocky Mountain National Park and Indian Peaks Wilderness in Colorado. The Act

will create some new areas and expand existing national parks, monuments, and historic sites. It also codifies the National Landscape Conservation System, which protects national icons and monuments managed by the Bureau of Land Management.<sup>2</sup>

### Climate Change and Water: Bureau of Reclamation Authorizations and Water Settlements

In the Act, Congress found that:

global climate change poses a significant challenge to the protection and use of the water resources of the United States due to an increased uncertainty with respect to the timing, form, and geographical distribution of precipitation, which may have a substantial effect on the supplies of water for agricultural, hydroelectric power, industrial, domestic supply, and environmental needs.<sup>3</sup>

Recognizing that “[s]tates bear the primary responsibility and authority for managing the water resources of the United States,” the Senate still found that “the Federal Government should support the States, as well as regional, local, and tribal governments, by carrying out,” for example, national research activities and actions to increase the efficient use of water throughout the United States.<sup>4</sup>

Toward this end, Title IX of the Act authorizes funding for local and regional water projects to improve water use efficiencies and update aging infrastructure. It provides for research on the effects of

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climate change on water and authorizes projects to provide sustainable water supplies to rural communities. More specifically, Title IX authorizes the Bureau of Reclamation, along with other agencies, to establish a climate change adaptation program to address water shortages. It provides for the creation of a panel consisting of federal, state, and local officials to address the effects of climate change on water resources and flood management. The Act also requires feasibility studies addressing water supplies in Idaho, Arizona, and California and explore water conservation and water-supply enhancement projects in Oregon, California, New Mexico, and Colorado. Finally, Title IX attempts to address aging dams and associated infrastructure by, among other things, authorizing appropriations to carry out identified maintenance.<sup>5</sup>

In Title X, containing the San Joaquin River Restoration Settlement Act provision, the Act authorizes implementation of the settlement reached in *Natural Resource Defense Council v. Orange Cove Irrigation District*,<sup>6</sup> which created the San Joaquin River Restoration Program (SJRRP). The SJRRP resulted from 18 years of federal litigation addressing competing water needs from in and around the Sacramento-San Joaquin Delta. The Delta is the largest estuary on the West Coast and supplies water to over 20 million people.<sup>7</sup> The case involved 14 conservation and fishing groups, 22 water contractors, and three federal agencies. It addressed various water disputes, including issues over water flows provided to endangered fish. The parties crafted the settlement to achieve two broad goals: (1) a restoration goal to restore and maintain fish populations in certain areas of the San Joaquin river, and (2) a water management goal to reduce or avoid water supply impacts to certain long-term water contractors that may result from flows provided for fish in the settlement.<sup>8</sup> The parties executed a separate memorandum of understanding with the state of California to assist with implementing and funding the settlement. Still, the parties require federal funding. The Act provides for nearly \$1 billion in federal funds and requires an aggregate commitment of at least \$200 million from the state of California.<sup>9</sup>

## Oceans: Coastal Protection Grants, New Science Initiatives Led by NOAA

Title XII is comprised of many separate acts creating major new programs aimed at increasing scientific knowl-

edge related to ocean, coastal, and Great Lakes resources and preserving significant coastal and estuarine habitat:

- The NOAA Undersea Research Program Act and associated authority for ocean exploration establish new research programs for the National Oceanic and Atmospheric Administration (NOAA) and authorize appropriations of over \$500 million for the next seven years to implement those programs. Research is to be aimed at increasing scientific knowledge “essential for the informed management, use, and preservation of oceanic, marine, and coastal areas and the Great Lakes” and is to be conducted by the NOAA in coordination with other federal agencies, educational entities, nongovernmental organizations, the private sector, and a network of regional research centers.
- The Ocean and Coastal Mapping Integration Act calls for the creation of an innovative nation mapping plan for the nation’s coasts, oceans, and Great Lakes to be coordinated at the federal level by the NOAA.<sup>10</sup> The NOAA may establish up to three ocean and coastal mapping centers, co-located at an institution of higher education, that will serve as “hydrographic centers of excellence.”
- The Integrated Coastal and Ocean Observation System Act establishes a national system of coastal and ocean observations for the nation’s coasts, oceans, and Great Lakes to be coordinated at the federal level and conducted at the regional level by a network of regional public-private “information coordination entities” gathering specific data on key variables, in part to improve the nation’s capacity to “measure, track, explain, and predict events related directly and indirectly to weather and climate change, natural climate variability, and interactions between the ocean and atmospheric environments.”<sup>12</sup> The Act requires the development of a policy within six months “that defines processes for making decisions about the roles of the Federal Government, the States, regional information coordination entities, the academic community, and the private sector in providing to end-user communities environmental information, products, technologies and services” related to the new system.<sup>13</sup>
- The Federal Ocean Acidification Research and Monitoring Act creates an interagency research program

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spearheaded by the NOAA “to monitor and conduct research on the processes and consequences of ocean acidification on marine organisms and ecosystems,” including “assessment and consideration of regional and national ecosystem and socioeconomic impacts of increased ocean acidification.”<sup>14</sup> The acidity of surface seawater has increased by 30% since the beginning of the Industrial Revolution—the most dramatic change in ocean chemistry in at least 650,000 years.<sup>15</sup>

- The Coastal and Estuarine Land Conservation Program Act amends the Coastal Zone Management Act to fund a program to protect coastal and estuarine areas that have significant conservation, recreation, ecological, historical, aesthetic, or watershed protection values and that are threatened by conversion to other uses. The program appropriates \$60 million per year for fiscal years 2009 through 2013 for grants to state, regional, and other government entities that can come up with a 100% matching nonfederal share for acquisition of property or conservation easements.<sup>16</sup>

### Forest Service Authorizations, Oil Leasing

Title III of the Act provides for various U.S. Forest Service authorizations, including watershed restoration and enhancement achieved by cooperative agreements. Title III also attempts to improve wildland firefighter safety and reduce wildfire management costs. Title IV of the Act provides for forest restoration, and Title V adds rivers in Arizona, Wyoming, and Massachusetts to the National Wild and Scenic Rivers System and various trails nationwide to the National Trails System.

A controversial provision in Title III provides for the withdrawal of over 1.2 million acres of land in the Wyoming Range of western Wyoming’s Bridger-Teton National Forest from oil and gas leasing.<sup>17</sup> Opponents of the Act, including Senator Tom Coburn (R-Okla.), targeted this provision for criticism during congressional debates. While the potential consequences of the withdrawal on domestic oil supplies are uncertain, Senator Coburn argued that it will cost the United States 300 million barrels of oil. Senator John Barrasso (R-Wyo.), citing an estimate from the U.S. Geological Survey, put the cost at five million barrels.<sup>18</sup>

### Department of Interior Authorizations: Cooperative Management and Alaska Road Construction

In Title VI, the Act establishes a cooperative watershed-management program that will fund water quality and availability studies. The program is intended to enhance water conservation, improve water quality, and reduce water conflicts.<sup>19</sup> More controversial provisions of the Act provide for preservation of paleontological resources and the construction of a road between King Cove and Cold Bay through the Izembek National Wildlife Refuge in Alaska.<sup>20</sup> Although the Act has generally been lauded by environ-

mental groups and Democratic supporters,<sup>21</sup> supporters of the Act object to the Izembek National Wildlife Refuge Land Exchange provision, which would remove some 200 acres of Alaskan wilderness to facilitate construction of the road.<sup>22</sup> Some expect the road to adversely affect migratory birds and other wildlife; still, the plan for construction must, among other things, minimize the loss of wetlands.<sup>23</sup> The paleontology provision, which restricts the recovery of arrowheads, fossils, and other archeological materials from public lands, also ignited controversy and allegedly left the House Natural Resources Committee “deeply divided.”<sup>24</sup>

The Act also provides for a five-year Wolf Compensation and Prevention Program that could significantly assist farmers, ranchers, tribes, and wildlife agencies in the Rocky Mountain West that contend with livestock kills by protected predators.<sup>25</sup> Earlier this year, the Obama Administration suspended the prior administration’s attempt to de-list wolves from the Endangered Species Act list.<sup>26</sup> In March 2009, however, Secretary of Interior Ken Salazar affirmed the U.S. Fish and Wildlife’s decision to remove gray wolves from the Endangered Species Act list in Idaho, Montana, and parts of Oregon, Washington, and Utah. The gray wolf will remain listed in Wyoming due to inadequate state protection.<sup>27</sup> The new wolf compensation program could provide ranchers and farmers with some relief from burdens imposed by federal regulation in Wyoming and from a rise in livestock depredations due to larger wolf populations there and in other states.<sup>28</sup> Toward that end, Title VI provides states and American Indian tribes with 50% matching federal grants “to assist livestock producers in undertaking proactive, non-lethal activities to reduce the risk of livestock loss due to predation by wolves” and to compensate those producers for livestock lost by wolf predations.<sup>29</sup>

### Conclusion

Proponents of the Act in the Senate and the Department of Interior, including sponsor and Senate Energy and Natural Resources Committee Chairman Jeff Bingaman (D-N.M.) and Interior Secretary Ken Salazar, describe it as a sweeping conservation law that will ensure access to and preservation of wilderness areas.<sup>30</sup> Ocean advocates praised the Act’s emphasis on gathering information related to the impacts of climate change. “This wise decision could not have come a moment sooner. The ocean faces unprecedented threats from climate change and industrial demands. These challenges can only be solved if scientists and ocean experts have the information they need to intelligently inform their decisions,” stated Laura Burton Capps of the Ocean Conservancy.<sup>31</sup>

Opponents, including U.S. Senator Tom Coburn (R-Okla.), contended that the Act blocks exploitation of certain domestic energy supplies, includes wasteful earmarks, and, with respect to the San Joaquin River Restoration Settlement Act, dedicates an excessive amount of

federal money to protect what they view as an insignificant number of endangered fish.<sup>32</sup>

Although the Act will not end debate over the best use or lack of use of America's public lands, it resolves some long-running controversies through preservation or targeted funding. The new data-gathering and research programs in the Act may result in better information for policy makers and the public in future debates. One thing that no one disagrees about is that nearly all regions of the country will be impacted in a substantial way by this landmark legislation.

For additional information on the Omnibus Public Land Management Act of 2009 or natural resources law, contact Linda Larson or Jessica Ferrell.

#### ENDNOTES

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1. HR 146 EAS (Pub. L. No. 111-11). *See also* Democratic Policy Committee, *The Bipartisan Environmental Accomplishments of S. 22, the Omnibus Public Land Management Act of 2009* (Jan. 15, 2009) (discussing earlier version of the public lands bill and citing Congressional Research Service, *Wilderness Overview and Statistics* (Jan. 8, 2009)).
2. *See* HR 146 EAS at Titles I to III, V, VII to VIII (Pub. L. No. 111-11). For a summary of legislation in the Act setting aside wilderness, see The Wilderness Society, *Key Legislation in Omnibus Public Land Management Act of 2009*.
3. HR 146 EAS at Title IX, Subtitle F, § 9501(3).
4. *Id.* at Title IX, Subtitle F, § 9501(4).
5. *Id.* at Title IX.
6. No. 2:88-cv-01658-LKK-GGH (E.D. Cal.).
7. For additional information on similar litigation addressing limited water supplies in and around the San Joaquin Delta, see *Marten Law Group on Pacific Coast Fed'n of Fishermen's Ass'ns v. Gutierrez*, LexisNexis Env't Law & Climate Change Center (May 27, 2008).
8. Restoration Administrator 2007 Annual Report: San Joaquin River Restoration Program (Dec. 2008), filed as document 1393 in *Natural Resource Defense Council v. Orange Cove Irrigation District*, No. 2:88-cv-01658-LKK-GGH (E.D. Cal.), on December 15, 2008. (Available on PACER.)
9. HR 146 EAS at Title X, Subtitle A, Part I, § 10004(i)(1).
10. *Id.* at Title XII, Subtitle A.
11. *Id.* at Subtitle B.
12. *Id.* at § 12302.
13. *Id.* at § 12308.

14. *Id.* at § 12402. Ocean acidification is defined as “the decrease in pH of the Earth's oceans and changes in ocean chemistry caused by chemical inputs from the atmosphere, including carbon dioxide.” *Id.* at § 12403(1).
15. Discover Magazine, *Ocean Acidification: A Global Case of Osteoporosis*, July 16, 2008.
16. HR 146 at Title XII, Subtitle E. The 100% match requirement may be waived for “underserved communities” and “communities that have an inability to draw on other sources of funding because of the small population or low income of the community.” *Id.* at § 307A(f)(2)(B).
17. *Id.* at Title III, Subtitle C, §§ 3201 to 3203.
18. Straub *et al.*, *PUBLIC LANDS: Senate passes controversial omnibus measure*, Land Letter (Jan. 15, 2009) (subscription required).
19. HR 146 at Title VI, Subtitle A, §§ 6001 to 6003; *see also* Straub, *supra*.
20. HR 146 at Title VI, Subtitle E, §§ 6401 to 6406.
21. *See, e.g.*, press release by Senator Jeff Bingaman (D-N.M.), Chairman of the Senate Energy and Natural Resources Committee, *Bingaman and Udall's Sabinoso Wilderness Bill Passes Senate* (Jan. 16, 2009); *see also* The Wilderness Society, *Tremendous Day for Wilderness* (March 25, 2009).
22. HR 146 at §§ 6401 to 6406; *see also* The Wilderness Society, *Wilderness Vote Down to the Wire: House Passage of Long-Awaited Legislation Looks Uncertain* (Jan. 29, 2009) (objecting to the Izembek provision).
23. HR 146 at Title VI, Subtitle E, § 6403(e).
24. Saccone, “Paleontology provisions threaten bill that includes Dominguez conservation area,” *GJ Sentinel* (Feb. 2, 2009) (quoting Representative John Salazar (D-Colo.)).
25. HR 146 at Title VI, Subtitle C, §§ 6201 to 6203.
26. *See* Tankersley, “Obama blocks some of Bush's last-minute environmental decisions”, *LA Times* (Jan. 22, 2009).
27. *See generally* “Gray Wolves No Longer To Be Listed As Threatened And Endangered Species In Western Great Lakes, Portion Of Northern Rockies,” *Science Daily* (March 10, 2009).
28. According to U.S. Senator John Tester (D-Mont.), in Montana, “confirmed wolf kills of cattle rose from 32 in 2006 to 77 in 2008. Kills of sheep rose from four to 111.” Jon Tester, “Passage of ‘Wolf Kill Bill’ Was Common Sense,” *New West* (March 31, 2009).
29. HR 146 at Title VI, Subtitle C, § 6202.
30. *Bingaman on Passage of Omnibus Public Lands Management Act* (Jan. 15, 2009) (quoting Senator Bingaman); *see also* Department of Interior, *Secretary of the Interior Ken Salazar's Remarks at Today's Presidential Signing of the Omnibus Public Lands Management Act of 2009* (March 30, 2009) (announcing that the Act will protect a massive amount of public land and represents “one of the most significant” of such protections “in a generation”); The Wilderness Society, *Tremendous Day for Wilderness* (March 25, 2009) (hailing the Act's passage as “a monumental day for wilderness and for all Americans who enjoy the great outdoors”).
31. U.S. Senate Breaks Blockade of Public Lands Bills by Dr. No, ENS (Jan. 12, 2009).
32. *See id.*; *Senator T. Coburn, Highlights of the Omnibus Lands Grab and Energy Restrictions Act* (undated).