

Federal Parks & Recreation

Editor: James B. Coffin

Subscription Services: Celina Richardson

Volume 29 Number 2, January 28, 2011

In this issue. . .

Lean year ahead; Obama, GOP agree.

President in State of the Union doesn't mention outdoors but does propose transportation aid.. Page 1

House asks big budget reductions.

House resolution would cut \$100 billion in FY 2011 alone ... Page 2

Chambers returns as top NPS cop.

After being fired seven years ago for talking to the press.... Page 3

Big roads bill all the rage now.

Obama wants it. LaHood predicts law by August. Mica preps.. Page 4

Interest groups work on fee bill.

Old foes work together on bill to amend existing FLREA..... Page 5

NPS health conference readied.

Could lead to greater cooperation between rec and health..... Page 6

Enviros attack again over haze.

File two new legal actions to protect parks, wilderness... Page 7

OHVers gain NEPA case access.

Ninth Circuit says they may intervene in enviro suits... Page 8

Court curbs enviros RS 2477 role.

Says only parties with stake in property rights may sue..... Page 9

Mojave monuments bill returns.

Feinstein would protect 1.6 million acres in desert..... Page 10

Notes..... Page 11

Boxscore of Legislation..... Page 13

Obama hits austerity note as Hill is getting organized

Faced with a Republican House determined to reduce federal spending, President Obama laid out a spare agenda for the nation January 25 in an annual State of the Union speech.

Obama didn't single out any particular park and recreation program either for praise or condemnation; but he did swim against the austerity tide by proposing a robust multi-year surface transportation program. He called on Congress to pass quickly such a program, presumably including outdoor programs such as trails. (See related article page 4.)

But Obama's takeaway message to the nation was to prepare for a lean fiscal year 2012 budget when it is introduced February 15. He recommended a five-year freeze on spending.

"This freeze will require painful cuts," he said. "Already, we have frozen the salaries of hardworking federal employees for the next two years. I've proposed cuts to things I care deeply about, like community action programs."

With a Republican House checking a Democratic Senate and Democratic White House, or vice-versa, the real battles this calendar year will be fought in appropriations bills.

Congress still hasn't finished off a fiscal year 2011 omnibus appropriations bill, which will be the major bone of contention between now and March 4, when an extension of the existing law expires (PL 111-322 of December 22.) Conservative House Republicans have already laid down their mark with a demand for a \$100 billion cutback in fiscal 2011 alone.

With fiscal 2011 appropriations still hung up, the Obama administration is nonetheless expected to lay out in mid-February a fiscal 2012 budget request. That request will attempt to carry out the agenda Obama described in his State of the Union address.

Meanwhile, conservation groups are assessing the upcoming year. The Wilderness Society said last week that it is apprehensive about a December order from Secretary of Interior Ken Salazar calling for protection of wild lands managed by the Bureau of Land Management (BLM). The society likes the order, but it worries about BLM's commitment to it.

"Currently, the agency is developing guidance which will determine criteria for deciding which lands to protect, but it's unknown how strong the guidance will be," said the society in a State of the Public Lands briefing. "Also, opponents in Congress indicate they'll fight the new policy. Some are promising to attempt to restrict funding to the BLM if it implements the policy."

The Center for Biological Diversity put out its own report card on the Obama administration January 21 and it too praised the wild lands policy. But the center also complained about Park Service decisions that opened parklands to off-road vehicles (ORVs) in Alaska and Florida and BLM decisions that opened up public lands to ORVs in California.

On the Hill House Republicans and Democrats wrapped up some committee organizational business this week. The House Natural Resources Committee, with Rep. Doc Hastings (R-Wash.) as chairman, held an organizational meeting January 26. Rep. Ed Markey (R-Mass.) is serving as ranking Democrat.

The House Transportation Committee under chairman Rep. John Mica (R-Fla.) held its organizational meeting the same day. Rep. Nick Joe Rahall (D-W.Va.), who chaired the natural resources committee in the last Congress, will serve as ranking Democrat on the transportation panel this year.

The House Appropriations Commit-

tee subcommittee on Interior and related agencies under chairman Mike Simpson (R-Idaho) has yet to hold its inaugural session. However, committee Democrats last week did name Rep. James Moran (D-Va.) as ranking minority member on the subcommittee. Moran chaired the subcommittee last year.

Given the importance of appropriations bills this year Simpson could be the most important single legislator in regards to park and recreation policy in this Congress. GOP appropriators traditionally have supported solid funding for federal land managers, but at the expense of conservation programs, such as the Land and Water Conservation Fund.

GOP lays down appropriations marker; Obama responds

The House January 25 approved a highly-symbolic resolution (H Res 38) that would reduce fiscal year 2011 discretionary domestic spending by \$100 billion.

The resolution, approved 256-165 with all 239 Republicans and 17 Democrats in favor, would return spending in this fiscal year to fiscal 2008 levels. In that the fiscal year is almost one-third over, the resolution, if carried out, would chop as much as 40 percent from appropriations line items.

An influential coalition of conservative House Republicans January 20 put together the spending agenda that, by definition, would force major reductions in park and recreation programs.

The House Republican Study Committee developed the spending recommendation. The committee is not only asking for general cuts of \$100 billion in domestic discretionary spending, but also the elimination of a half-dozen programs with direct impacts on outdoor activities. Those programs includes Save America's Treasures and heritage area grants.

Although no one expects Congress to slash \$100 billion from domestic spending this year, Rep. Jim Jordan (R-Ohio), chairman of the Republican Study

Committee, tried to build momentum at a January 20 press conference. "Unless Washington acts soon to cut spending, massive tax hikes, economic stagnation, and national bankruptcy will rob our children of the opportunity to reach for the American Dream," he said.

But the obstacles before the House conservatives begin with their leadership. House Budget Committee Chairman Paul Ryan (R-Wis.) has recommended just a \$60 billion cut this year. And other senior House members are not likely to sympathize with a budget-balancing program that includes no tax hikes, no reductions in entitlement programs and no reductions in defense and security spending, despite the January 25 House vote.

Finally, Democrats still control the White House and the Senate, although Sen. Jim DeMint (R-S.C.) did endorse the House Republican Study Committee proposal.

President Obama made the case January 25 for decreased spending, albeit at a slower rate than the House Republicans. "I am proposing that starting this year, we freeze annual domestic spending for the next five years," he said.

He added, "I recognize that some in this Chamber have already proposed deeper cuts, and I'm willing to eliminate whatever we can honestly afford to do without. . . Cutting the deficit by gutting our investments in innovation and education is like lightening an overloaded airplane by removing its engine."

At the bottom line the Republican proposal would reduce spending in fiscal 2011 to fiscal 2008 levels. Fiscal 2011 began October 1 and programs are currently being financed by a temporary continuing resolution at fiscal 2010 levels until March 4.

In fiscal 2012 the proposal would reduce federal spending to fiscal 2006 levels and freeze spending for the subsequent eight years at that level. The Spending Reduction Act of 2011 would reduce federal spending by \$2.5 trillion over ten years. Again, none of the cuts

would come from entitlements or security and no taxes would be imposed. The Obama administration is expected to introduce its fiscal 2012 budget recommendation in mid-February.

Here are a half-dozen programs with direct park and rec implications that the Republicans would eliminate, and the impact:

- * Save America's Treasures, a \$25 million annual saving,
- * Heritage area grants, a \$24 million annual saving,
- * Beach replenishment, a \$95 million annual saving,
- * Community Development Fund, a \$4.5 billion annual saving,
- * Encourage outsourcing of government programs, no estimate,

Interior returns Chambers to NPS police chief position

On a Friday afternoon – the optimum time for politically problematic news – the Interior Department January 21 announced that it would return Teresa Chambers to her old job as chief of the National Park Service policy force. She will take over Monday, January 31.

The Bush administration fired Chambers in 2003 because it said she violated agency policy by talking to the press about budget needs.

After a seven-year legal campaign by Chambers and sympathetic interest groups, the Merit System Protection Board on January 11 ordered the Park Service to reinstall Chambers by January 31. The Obama administration could have appealed the board's order but did not.

An attorney for Chambers, Paula Dinerstein, had good and bad things to say about the merit board system. On the positive side, "I think the decision says the board is willing to enforce the whistleblower law and look at charges brought against employers. If you speak out, you have the opportunity to be vindicated and the board will look carefully at your claims."

On the other hand, said Dinerstein, senior counsel for the environ-

mental group Public Employees for Environmental Responsibility (PEER) that represented Chambers, "It is sort of an example of how bad the system is to obtain redress. Here's an employee with a clear-cut case and she needed six years and free representation from public interest groups."

The Interior Department announced the rehiring of Chambers in a press release that emphasized the good work that the incumbent Park Service chief, Sal Lauro, has done over the last two years. Lauro will be moved up to deputy assistant secretary of the Interior for Law Enforcement to make room for Chambers.

Said Secretary of Interior Ken Salazar, "Sal Lauro is a tremendous asset to the department and I appreciate his willingness to continue to play a leadership role in our law enforcement programs. He exemplifies the professionalism and dedication of our strong and proud park police force."

Salazar did say, minimally, that he "looks forward" to Chambers "continuing to advance" Lauro's agenda. The Park Service police force employs about 800 officers.

The federal government is expected to have to pay Chambers and her lawyers \$2 million. "Her salary has been about \$160,000 per year for the last six years," said Dinerstein. "In addition she is to be compensated for leave, retirement and other benefits. We and the government are in the process of calculating all this. Attorney fees will also be included."

Chambers was fired after she told the *Washington Post* in late 2003 that the park police force was stretched too thin in the wake of the 9/11 bombings and that the force needed more personnel and money. She has worked since 2008 as chief of the Riverdale, Md., park police department.

President backs increased emphasis on transportation

President Obama bucked the budget-cutting trend January 25 in his State of the Union address and called on Congress

to pass a big new surface transportation bill.

"Over the last two years, we have begun rebuilding for the 21st century, a project that has meant thousands of good jobs for the hard-hit construction industry," he said. "Tonight, I'm proposing that we redouble these efforts."

Obama didn't say how the country could pay for legislation, other than to promise to pay for it. "We will make sure this is fully paid for, attract private investment, and pick projects based on what's best for the economy, not politicians," he said.

The President's call came just a week after Secretary of Transportation Ray LaHood said he believes Congress would complete a multi-year bill by early August.

"I've met with Speaker Boehner and Transportation Chairman Mica – and I'm optimistic that we will work together in the months ahead and get legislation to President Obama's desk by the August recess," LaHood told a CMC3 2011 Jump Start Conference in Atlanta January 18. Boehner is Speaker of the House John Boehner (R-Ohio) and Mica is House Transportation Committee Chairman John Mica (R-Fla.)

Where the money will come from to pay the bill remains a mystery. Both LaHood and Mica have ruled out an increase in the gasoline tax. But as one lobbyist said, "You're looking at a huge gap with needs of \$45 billion per year and gas tax revenues of \$33 billion per year."

LaHood appears to be relying on investment banks to parlay an initial federal investment of \$50 billion into even greater outside transportation investments. The administration last September proposed a \$50 billion down payment on a new, multi-year law. The \$50 billion would be divided among highways, railways and runways by an Infrastructure Bank.

At least some of the money would come from increased taxes on the oil and gas industry. That would be mixed with

private money, the theory goes, and be spent by the Infrastructure Bank.

Said LaHood last week, "This legislation will include a \$50 billion up-front investment to help employ the nearly one in five construction workers that are still out of a job at a time when so many of the roads and bridges you use every day have fallen into disrepair."

The administration is reportedly working on the details of a surface transportation bill and will submit its recommendations to the Hill soon. The administration intends to introduce its fiscal year 2012 budget in mid-February, so that may be an appropriate time to propose the legislation.

Meanwhile, Mica said one of his top priorities this year is to move a bill through the House so that the measure does not get caught up in election-year politics in 2012. He said he will hold hearings around the country before marking up a bill.

Mica too has rejected an increase in the gasoline tax. To stretch existing revenues he is talking about eliminating unspecified programs. In that some Republicans have long had the daggers out for programs such as transportation enhancements and trails they are at particular risk.

Mica told *Transportation Nation* in a recent interview, "We'll look at how to do more, as I said, with less. Maybe cutting some of the fluff programs. And giving states more discretion." His office did not respond to our request for a description of fluff programs.

The Highway Trust Fund currently supports the surface transportation law called the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU.) SAFETEA-LU now "guarantees" \$42.6 billion per year for highways, but the Highway Trust Fund produces just \$35 billion for gasoline taxes. So the fund and SAFETEA-LU are already running a deficit.

SAFETEA-LU expired on Sept. 30,

2009, but Congress has kept it alive until March 4 with a temporary extension to buy time to write a new law.

The House subcommittee on Highways and Transit did approve June 24, 2009, a version of a new, six-year highway bill. That measure would spend \$500 billion on highways and mass transit with a marked emphasis on outdoor programs. However, neither the House nor the Senate identified the money to pay for it.

Interest groups begin to forge replacement for FLREA

A broad coalition of warring interests is cooperating at the moment to draw up recommendations for a new federal lands recreation fee bill.

The participants – from rec industry fee advocates to citizen groups that oppose most fees – may be close to the outline of a proposal. Perhaps their most noteworthy point of agreement is the elimination of entrance fees in undeveloped areas.

"It's going surprisingly well," said Kitty Benzar, president of the Western Slope No-Fee Coalition. She is coordinating a working group with American Recreation Coalition president Derrick Crandall. "I never thought we could reach common ground but Derrick says he opposes fees in undeveloped back country areas. He says the law never intended for the Forest Service to charge back-country fees."

Benzar and Crandall have held one conference call with more than 34 leaders of recreation interests around the country and have put together a working paper. If all goes well in two more conference calls, the participants hope to submit recommendations to the Hill as soon as late February.

In 2004 Congress passed the disputed recreation fee law called the Federal Lands Recreation Enhancement Act (FLREA), which was signed Dec. 8, 2004, as PL 108-447. The law established a new system of entrance fees and user fees for federal land management agencies, with the agencies retaining 80

percent of revenues. The legislation was backed by the agencies, federal appropriators, the recreation industry and other interests.

The fiscal 2011 administration budget request projects that the law, authorized through December 2014, would produce in fiscal 2011 \$264.5 million, again with 80 percent retained by the agencies. The lion's share, \$173 million, would be collected by NPS, followed by the Forest Service with \$67.5 million, the Bureau of Land Management with \$18.7 million, the Fish and Wildlife Service with \$4.8 million and the Bureau of Reclamation with just under \$500,000.

Critics of the law such as the Western Slope No-Fee Coalition charge that federal agencies have become too eager to make money from FLREA fees at the public's expense. They maintain that federal land management agencies - the Forest Service in particular - have gone overboard in collecting entrance fees to broad areas that include developed sites. The law authorizes entrance fees at developed sites but not in the larger areas, say the critics.

In the last Congress four western senators - two from each party - introduced legislation (S 868) that would repeal FLREA. The four are Montana Sens. Max Baucus (D) and Jon Tester (D) and Idaho Sens. Mike Crapo (R) and James E. Risch (R).

Repeal would not affect entrance fees to developed sites federal land managers charge under the Land and Water Conservation Act. It would, however, make these changes:

- * eliminate collection of "standard amenity fees" at developed sites that the 2004 law authorized for the Forest Service, BLM, and the Bureau of Reclamation,

- * eliminate retention of recreation fees by the agencies and return use fees to the U.S. Treasury,

- * cap entrance fees charged by NPS at \$25 for a single visit by car, \$12 by foot or bicycle, and \$40 for an annual pass (instead of \$15), although NPS

would still retain old entrance fee authority,

- * eliminate a multi-agency American Passport and reinstate the old Golden Eagle and Golden Age Passports charged by the Park Service, and

- * increase the Golden Eagle passport fee from \$25 to \$65.

Instead of outright repeal of FLREA the recommendations being developed by the fee working group would probably revise the law, said Benzar. "I think very likely something other than the Baucus bill would start to move," she said.

The Baucus bill, shorthand for the repeal bill, was handicapped from the onset because it would have eliminated revenue for federal land management agencies. "One reason the Baucus bill didn't move was because it would have eliminated agency retention of fee revenues," said Benzar. "I thought retention was a bad idea from the beginning and I still think it is a bad idea." But she said she has to compromise.

Other areas the working group is addressing:

1. Private sector operations on federal lands, such as national forest concessioners. Critics complain about quality and prices but concessioners rejoin that they are saving the government money and providing better service than federal managers.

2. Federal consultation on fees. Critics charge that land managers don't consult with all interests before assessing new fees.

3. Redirection of fee revenues. Critics suspect that land management agencies are diverting fee revenues to base operations.

NPS health conference may lead to much bigger things

The Park Service will host a major conference April 5 and 6 in San Francisco on strengthening the tie between outdoor recreation and the nation's health, particularly the health of youths.

The attendees from government, nonprofits and business will attempt to figure out how health and park groups can work together. Although no one is saying so explicitly, implicitly federal, state and local land managers hope to obtain a piece of the hundreds of billions of dollars the government spends each year on health programs.

For the record a Park Service flyer says of the Healthy Parks Healthy People conference at Golden Gate National Park, "This April event will open the discussion of how our parks and open spaces can become purposefully connected to the health of our people and our planet." The Institute of the Golden Gate will cohost the institute.

"About 150 people have been invited at the CEO caliber level," said Derrick Crandall, president of the American Recreation Coalition. "Everybody from recreation providers to health providers." It's possible that former Secretary of Interior Dirk Kempthorne will be among the attendees. Kempthorne represents the insurance business, which has a significant stake in keeping people healthy, and alive.

Crandall said the takeaway from the conference would focus on three areas: "First, it would make the Park Service initiative on health sustainable. Second, it would lead to an international conference on healthy parks and healthy people. And third and most important, it would define an agenda for the health community and the park community to work together on."

"This could be a catalytic event to identify new initiatives and to take a big step forward," said Crandall.

Although the Park Service is the host, the institute will look at all levels of government that provide outdoor recreation opportunities, including state and local governments.

The Park Service established a Health Promotion Initiative in September 2010 that is being coordinated by Captain Charles Higgins, director of the Park Service Office of Public Health.

The Healthy Lands Healthy People movement at NPS may get a boost in early February when an America's Great Outdoors initiative is expected to submit recommendations to President Obama. The report was due in mid-November but, for the record, was delayed because of the thousands of comments feds had to analyze. However, it is widely believed the report was delayed because of the political problem of proposing new programs at a time of government retrenchment.

As a first order of business a Park Service Health and Wellness Steering Committee is attempting to develop a baseline inventory of Park Service health promotion programs. That inventory will begin with a total of 295 programs that have been uncovered thus far. The Park Service says 40 percent of the programs collaborate with state and local or other health organizations.

Enviros attack EPA, DoI and USDA over Class I area haze

Environmentalists relaunched an old legal campaign January 19 to protect national parks and wilderness areas from haze.

They (1) notified EPA they intend to sue because they say EPA has failed to crack down on states that are supposed to limit haze-causing pollutants and (2) filed a lawsuit against the Interior Department and the Department of Agriculture for not addressing pollution from large power plants.

In the twin actions the environmentalists are trying to nudge the Obama administration into cracking down on coal-fired power plants in the West, such as the Navajo Generating Station in Arizona. The complainants maintain that for 30 years various administrations have failed to implement a regional haze program of the Clean Air Act to protect national parks.

Among the conservation groups filing the petition and lawsuit are the National Parks Conservation Association (NPCA) and the Sierra Club. Said NPCA Clean Air Counsel Stephanie Kodish, "The

regional haze program was designed to reduce pollution and restore pristine visibility to national parks and wilderness areas. The Federal government must swiftly act to enforce this program."

The 1977 amendments to the Clean Air Act established an elaborate procedure for the states and EPA to follow to reduce haze over 156 Class I national parks and wilderness areas of more than 5,000 acres. And to prevent increases in haze.

Although the 1977 amendments directed EPA and the states to write plans to clean up haze, little has been done, according to the plaintiffs. After decades of lawsuits from environmentalists, including NPCA, EPA on January 15, 2009, told the states they must submit proposed State Implementation Plans (SIPs) by January 2010 in order to promulgate final plans by a deadline of January 15, 2011. If states didn't prepare plans, then EPA would issue federal plans.

But, said the environmentalists last week, 37 states, the Virgin Islands and the District of Columbia have not completed the SIPs in whole or in part and EPA had not written substitute federal implementations plans (FIPs.) So in a January 19 notice of intent to sue, the environmentalists wrote EPA Administrator Lisa Jackson:

"Unfortunately, EPA has failed to meet the January 15, 2011 deadline through the final promulgation of regional haze FIPs or full approval of regional haze SIPs for any of the states and territories listed above. Accordingly, the Administrator is in violation of her nondiscretionary duty to promulgate regional haze FIPs for each of the above-named states and territories by January 15, 2011."

In the second legal action a slightly different set of environmental groups, but still including NPCA and the Sierra Club, on January 19 asked the U.S. District Court for the District of Columbia to direct the Interior Department and the Department of Agriculture to certify that specific coal fired power plants are causing haze over national

parks and wilderness areas.

The groups are targeting a Navajo Generating Station in Page, Ariz.; a TransAlta/Centralia power plant in Centralia, Wash.; and the Four Corners Power plant in Fruitland, N.M. Said the environmentalists in their lawsuit:

"As set forth in Petitioners' May 5, 2009 petition, the Navajo Generating Station in Arizona annually impairs visibility more than 0.5 deciviews at each of the eleven mandatory Class I areas within 300 kilometers of the facility, including an average of 2.5 deciviews of impairment on at least eight days every year to Grand Canyon National Park alone. The Navajo Generating Station causes more than 19 deciviews of maximum cumulative impact across the eleven mandatory Class I areas within 300 kilometers of the facility."

The Park Service has also been working with EPA on reducing haze from the Navajo Generating Station and Four Corners Power Plant. In a Nov. 20, 2009, letter to EPA's Region 9, NPS Intermountain Regional Director Michael Snyder offered NPS's scientific analysis of an EPA proposed rulemaking on the power plants.

In so doing Snyder noted, "Our analyses indicate that (the Four Corners plant) causes visibility impairment in all 16 Class I areas within 300 km, and that (the plant) causes the greatest cumulative impact upon Class I area visibility of any single source we have evaluated to date."

Ninth Circuit: ORVers may take part in NEPA suits

The Ninth U.S. Circuit Court of Appeals ruled January 14 that when environmentalists bring NEPA lawsuits, parties other than the federal government may intervene in the lawsuits.

Heretofore, the Ninth Circuit had barred interests such as off-road vehicle (ORV) advocates from intervening. It was the only circuit court that imposed such a limitation.

The interest groups want to in-

tervene because they fear that the federal government, left to its own devices, would not aggressively stand up for their rights.

In its decision the Ninth Circuit *en banc* said that the old rule forbidding intervention "fails to recognize the very real possibility that private parties seeking to intervene in NEPA cases may, in certain circumstances, demonstrate an interest protectable under some law, and a relationship between that interest and the claims at issue."

The Ninth Circuit gave these instructions to district court judges within its jurisdiction: "To determine whether putative intervenors demonstrate the 'significantly protectable' interest necessary for intervention of right in a NEPA case, the operative inquiry should be whether the 'interest is protectable under some law' and whether 'there is a relationship between the legally protected interest and the claims at issue.'"

The Ninth Circuit, often the most liberal of the federal appeals courts, has in the past imposed a rigorous "None But a Federal Defendant" rule. It only allowed the federal government to participate in National Environmental Policy Act (NEPA) lawsuits. So when environmentalists filed NEPA lawsuits commodity groups, state and local governments, and other interests could not intervene on the side of the federal government.

In the lawsuit at hand The Wilderness Society and Prairie Falcon Audubon, Inc. had sued the Forest Service over a travel management plan for the Minidoka Ranger District in the Sawtooth National Forest. Motorized recreation advocates including the BlueRibbon Coalition sought to intervene but were denied because of the Ninth Circuit's old "federal defendant" rule.

The recreation groups then presented their case to a three-judge panel of the Ninth Circuit in March of 2010. The three-judge panel consulted with the full appeals court and the full court agreed to consider the situation.

Paul Turcke, who argued the case

on behalf of the BlueRibbon Coalition's Legal Program, said, "Today's decision will positively affect all nonfederal interests who rightfully seek a meaningful role in public lands litigation affecting them. These positive effects extend, ironically, to the preservation groups who opposed our intervention here and provided the foundation and fuel for this appeal."

Coincidentally, a separate appeals court dealt environmentalists a significant defeat January 11 on a separate access-to-the-courts issue. The Tenth U.S. Circuit Court of Appeals held that environmentalists couldn't file lawsuits involving RS 2477 rights-of-way because the environmentalists don't have property rights at stake. (*See following article.*)

In a completely different Ninth Circuit issue Rep. Michael Simpson (R-Idaho) introduced legislation (HR 162) January 5 that would divide the panel into two circuits: The Ninth Circuit would include only California, Guam, Hawaii, and Northern Mariana Islands. A new Twelfth Circuit would include Alaska, Arizona, Idaho, Montana, Nevada, Oregon, and Washington. Similar bills have been introduced for decades by westerners who object to a perceived liberal tilt by the court.

Appeals court limits enviros' role in RS 2477 ROW cases

The Tenth U.S. Circuit Court of Appeals ruled January 11 that environmental groups may not file lawsuits involving disputes over the ownership of RS 2477 rights-of-way (ROWS.) The court held that only claimants to property rights – in this case counties or the federal government – may file such lawsuits.

While the majority in the case viewed the decision as procedural, dissenters on the appeals court said the decision would have "long-term deleterious effects on the use and management of federal public lands."

The minority predicted, "A citizen's right to protest and be heard on the supremacy of federal rules and regu-

lations is ignored, and notwithstanding the resulting chaos in the management of federal public lands, the majority declares: prudence dictates that the federal courts should remain silently in their chambers."

The environmentalists who brought the lawsuit said the majority decision leaves citizens no recourse when local governments claim roads across federal lands because only federal land managers now have the authority to take the local governments to court.

Heidi McIntosh, associate director for plaintiff Southern Utah Wilderness Alliance (SUWA), said, "Now BLM (the Bureau of Land Management) has to step up to the plate and do its job to make sure the Monument and its remarkable resources are fully protected."

The dispute before the court began in 2003 when Kane County, Utah, asked BLM to remove signs that had closed routes to off-highway vehicles (OHVs) in Grand Staircase-Escalante National Monument in southern Utah. It is managed by BLM. The county claimed ownership of the roads as RS 2477 ROWs, under an old law that gave local governments rights to roads those governments had maintained.

The dispute escalated when Kane County removed BLM's signs that barred OHVs. On Oct. 13, 2005, SUWA and The Wilderness Society sued and said only the federal government through BLM had jurisdiction over federal lands under the Supremacy Clause of the U.S. Constitution.

U.S. District Court Judge Tena Campbell in the Central Utah District then held for the environmentalists in August 2006. The judge said that before Kane County can take any action on the subject roads it must establish the validity of its RS 2477 claims in federal court. Until then, the court said, federal law rules.

But on January 11 the circuit court said the lower court erred because it should have thrown out the environmentalist lawsuit on grounds the plaintiffs didn't have standing to sue.

Referring to plaintiff The Wilderness Society as TWS, the majority held, "No apparent obstacles prevent the federal government from asserting its own rights against Kane County, as this court has already recognized. Thus, without any circumstances in favor of allowing TWS to assert the federal government's legal rights, TWS lacks prudential standing."

The minority argued unsuccessfully, "This is a pivotal case which, unless reversed or modified, will have long-term deleterious effects on the use and management of federal public lands. It also expands the doctrine of prudential standing by arrogating to appellate courts unbounded and unprecedented authority to reverse trial court decisions without addressing the merits."

To which the majority rejoined, "The dissent contends that TWS has prudential standing simply because its members have suffered alleged aesthetic or recreational injury and have a right to be heard on the supremacy of federal rules and regulations, but of course, prudential standing moves beyond injury in fact and addresses whether a plaintiff is asserting its own legal rights rather than resting on the rights or interests of third parties."

Feinstein introduces modified Mojave Monument legislation

California Sen. Dianne Feinstein (D) reintroduced legislation (S 138) January 25 that would designate a 941,00-acre Mojave Trails National Monument in the California Desert.

The Feinstein bill would put the lands off limits to solar development. Said Feinstein, "Conservation and renewable energy development can exist hand in hand, and that's what my legislation will do. With this bill, I believe we've found the right balance between interests that were previously set against each other."

The bill would also designate a 134,000-acre Sand to Snow National Monument and protect other public lands in the desert. All told it would protect 1.6 million acres.

The bill does not include provisions that were included in a predecessor bill last year that would have accelerated the processing of solar energy rights-of-way in the desert. Feinstein said the Senate Energy Committee does not address conservation and energy issues in the same legislation

"The Senate Energy and Natural Resources Committee prefers to move energy-related legislation separately from land conservation legislation," she said. "Therefore, I plan to work with senators from Western states on a bill to improve the renewable energy permitting process to allow quicker development of renewable energy projects on private and disturbed public land."

Feinstein is trying to walk a tightrope between protection of the desert on one side and encouragement of solar power development on the other.

Conservationists praised Feinstein. Said Paul Spitler, National Wilderness Campaigns Associate Director for The Wilderness Society, "Her legislation will help ensure that the desert's unique and spectacular scenery will continue to attract visitors from around the world."

At a Senate Energy Committee hearing May 20, 2010, the Obama administration said it could work with Feinstein on the legislation. The administration praised, with qualifications, the predecessor bill (S 2921) from Feinstein.

At the hearing ranking committee Republican Lisa Murkowski (R-Alaska) worried that the bill would withdraw conservation lands from renewable energy development before the lands had been studied thoroughly. "It is frustrating to see one of the better areas for solar production in the West encumbered by national monuments and wilderness areas, (before areas are studied,)" she said.

Notes

Wal-Mart leaves Wilderness. The Wal-Mart, Inc. superstore chain said January 26 it will not build a Supercenter retail store on land that was

part of the Wilderness Battle of the Civil War. Preservation groups have fought the proposal in court since Wal-Mart first proposed it in August 2009. Wal-Mart initially argued that other commercial enterprises were located within the battlefield on private land and they should also be allowed to locate there. But in the second day of a trial in Orange County Circuit Court, Wal-Mart announced that it would not carry through with the proposal. The Friends of Wilderness Battlefield led the campaign against the store. NPS Director Jon Jarvis welcomed Wal-Mart's decision. Jarvis said, "Those involved in the suit and their partners have done a service for which we should all be grateful." The Wilderness Battlefield is part of the Fredericksburg & Spotsylvania County Battlefields Memorial National Military Park. The Battle of the Wilderness was fought on May 5-7 of 1864 and was the initial conflict between Generals Robert E. Lee and Ulysses S. Grant. Some 28,000 soldiers died, were wounded or were captured during the battle.

Dems defend 'wild lands.' Forty-six House Democrats January 21 gave Secretary of Interior Ken Salazar a boost by endorsing his strategy to have the Bureau of Land Management (BLM) protect a new system of "wild lands." In a letter to Salazar the sympathetic Democrats addressed head-on an allegation that Salazar in December exceeded Congressional authority by calling for the designation of de facto wilderness areas. "Such criticism is based on a misunderstanding of the Order and a misunderstanding of wilderness. No law requires the federal government to transform unsuitable land into wilderness and that is not what the Order contemplates," says the letter. "Rather, the Order acknowledges Congressional intent that the Department conduct periodic assessments to determine where wilderness already exists and work to protect wilderness characteristics where appropriate." The letter was prepared by Rep. Edward Markey (D-Mass.), ranking minority member on the House Natural Resources Committee. In a Secretarial Order Salazar directed BLM to identify and manage as wilderness lands with wilderness characteristics. He acknowledged that only

Congress has authority to designate wilderness. Even so, he said BLM has authority to protect lands as wilderness on its own authority, raising deep legal questions. Republicans and commodity groups are questioning the legality of the order.

More 'Open Fields' grants out.

The Department of Agriculture announced January 21 the award of \$8 million in fiscal year 2011 "Open Fields" grants to encourage private landowners to open their lands to hunting and fishing. The fiscal 2011 round of grants is the second under the 2008 Farm Bill that allocated \$50 million to the start-up program. The department awarded \$11.75 million in fiscal 2010. States and tribes can use the money for programs that provide landowners with financial incentives to open their lands, such as rental payments. The money can also be used for informational programs and other activities related to providing access to private land. The program is formally titled the Voluntary Public Access and Habitat Incentive Program, but recreationists and conservationists call it Open Fields. Secretary of Agriculture Tom Vilsack has taken a personal interest in the program, going so far as to call a press conference last June to announce the first round of grants. States and tribes may apply for future grants at the federal grant portal at www.grants.gov.

Non-green jacket leads Grand Canyon. The Park Service (or perhaps the Interior Department) last week named a non-Park Service federal employee as acting superintendent of Grand Canyon National Park. The new acting superintendent, Jane Lyder, currently serves as deputy assistant secretary of Interior for Fish and Wildlife and Parks. She also served a long tour as a legislative counsel for the Interior Department. Lyder replaces Steve Martin, who retired January 1. The Park Service has begun a search for a permanent superintendent.

NPS visitation data reviewed.

Some 70 professionals inside and outside the Park Service learned earlier this month what had long been speculated: Visitation in the national parks is not keeping pace with the nation's

population. The professionals viewed the latest visitation data at a Park Visitor Research Summit held in Yosemite National Park. The attendees heard Dr. Jim Gramann, former chief social scientist at NPS, report that most park visitors are white, educated and upper income Americans. Minorities and lower income citizens continue to avoid the national parks. Time and lack of interest are the prime disincentives. Attendees included Park Service officials, concessioners, scholars, state tourism agency officials and nonprofit representatives. The National Parks Promotion Council under interim executive director John Poimiroo hosted the summit. The Park Service has seen a modest up-tick in visitation in the last two years, but the increase hasn't kept pace with the nation's population growth.

FS roadless opinion imminent?

The Tenth U.S. Circuit Court of Appeals is expected to issue a landmark ruling shortly with national implications on the legality of a Clinton administration roadless national forest regulation. The rule essentially bars road construction in 40 million acres of national forest. Depending on how the Tenth circuit rules, it could provide either a final legal blessing to the 2001 Clinton rule or it could confuse Forest Service roadless policy. If the Tenth Circuit sides with a lower court, it will throw out the Clinton rule on the grounds that the regulation establishes wilderness areas, and only Congress can do that. Such a ruling would directly conflict with a Ninth U.S. Circuit Court of Appeals decision upholding the Clinton rule. Conflicting decisions would leave the Forest Service in the middle. If the Tenth Circuit reverses the lower court, it will come close to giving final validation to the Clinton rule. And the Obama administration has said it supports the Clinton rule. Before the Tenth Circuit is an August 2008 decision of U.S. District Court Judge Clarence Brimmer in Wyoming who held the Clinton 2001 regulation was illegal. He said it established wilderness without Congressional approval. He also said the rule violated the National Environmental Policy Act by abbreviating a public comment period. The lawsuit was brought by the State of Wyoming. The

Obama administration has already taken one major step to reconcile the difference between the Brimmer decision and an Aug. 5, 2009, decision of the Ninth Circuit upholding the Clinton rule: Secretary of Agriculture Tom Vilsack on May 28, 2009, assumed authority to decide on proposed activities in roadless areas. And he said that if federal courts don't resolve their differences about national forest roadless areas, the Forest Service would write a new rule.

State veto of monuments bill in. Rep. Virginia Foxx (R-Va.) introduced legislation (HR 302) January 18 that would require state approval of each new national monument. Eight House Republicans cosponsored the bill. Individual House Republicans introduced bills in the last Congress that would have re-

quired Congressional approval of national monuments under the Antiquities Act of 1906. The flurry of bills was touched off last February when House Natural Resources Committee Republicans obtained an Interior Department memo that suggests the President should designate 14 national monuments on land managed by the Bureau of Land Management (BLM). The memo, obtained by Rep. Rob Bishop (R-Utah), discusses three strategies for strengthening protections for BLM back-country lands: (1) legislation from Congress, (2) unilateral monument designation under the Antiquities Act and (3) land use planning. The Interior Department document says 1,618,140 acres would be involved, including 397,210 acres of state and private land. Acquisition of the land would cost more than \$2 billion.

Boxscore of Legislation

<u>LEGISLATION</u>	<u>STATUS</u>	<u>COMMENT</u>
Appropriations 2011 CR Omnibus HR 3082 (Edwards)	President signed Dec. 22, 2010, as PL 111-322.	Extends FY 2010 spending levels through March 4 for all departments.
Appropriations 2011 (Interior) No bill number yet	House subcommittee approved July 22, 2010.	Would roughly maintain FY 2010 spending with some increase for LWCF.
Appropriations fiscal 2011 (Energy and water) No House bill yet S 3635 (Dorgan)	House subcommittee approved July 15, 2010. Senate committee approved July 22, 2010.	Would roughly maintain FY 2010 spending.
Appropriations fiscal 2011 (Agriculture) No bill number yet S 3606 (Kohl)	House subcommittee approved June 30, 2010. Senate committee approved July 15, 2010.	Would reduce spending somewhat compared to FY 2010.
Appropriations fiscal 2011 (Transportation) HR 5850 (Olver) S 3644 (Murray)	House approved July 29. Senate committee approved July 22, 2010.	House would increase spending somewhat, Senate would maintain status quo.
Appropriations fiscal 2012 No bill yet	Administration expected to introduce budget February 15.	President predicts austere budget request.
Appropriations Stimulus HR 1 (Obey)	President Obama signed into law Feb. 17, 2009, as PL 111-5.	Allocates some \$4 billion to federal land management agencies to help revive the economy.
Omnibus Lands Bill S 22 (Bingaman) HR 146 (Holt)	President signed into law March 30, 2009, as PL 111-11.	Includes 160+ individual bills, including NLCS, new national parks.
National monuments HR 302 (Foxx)	Foxx introduced January 18.	Would require state approval of any national monument under Antiquities Act.
California Desert monument S 138 (Feinstein)	Feinstein introduced January 25.	Would designate a Mojave National Monument and protect 1.6 million acres of desert.